



# THE CODE OF CIVIL PROCEDURE

BEING

ACT V of 1908

WITH A CRITICAL COMMENTARY, COPIOUS EXPLANATORY NOTES,  
AND A COMPLETE COLLECTION OF RULINGS OF ALL THE  
INDIAN HIGH COURTS AND OTHER SUPERIOR COURTS  
AND THE PRIVY COUNCIL, ETC., ETC.

BY

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BY HIS SON

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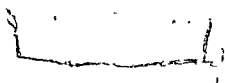
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## REPORT OF THE SPECIAL COMMITTEE APPOINTED TO CONSIDER THE AMENDMENT OF THE CIVIL PROCEDURE CODE

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We have the honour to present this report on the proposals to amend the Code of Civil Procedure which have been submitted for our consideration by the Government of India and, annexed to it a draft Bill amended by us. A detailed account of the alterations introduced in the Bill will be found in the Notes on Clauses which form the second part of this Report, but we desire by way of preface to make some observations of a general character on the defects in the existing law which appear to us to call for reform and on the more important of those alterations.

1 The Code of Civil Procedure of 1882 has been in force for 25 years and the experience of those years has shown that the general lines on which it proceeds are sound. The matters in which it has proved defective are for the most part matters of detail, and they arise, as it seems to us, mainly from the fact that it is impossible to frame a fixed and rigid Code in such a manner as to sufficiently meet the varying needs of an area so diversified as that to which the Code applies. In our opinion it is essential that there should be some machinery to enable variations to be introduced in procedure to meet the different requirements of different localities as well as to enable defects to be remedied as they are discovered without resort to the tardy process of legislation. We propose to make provision for these purposes by a re-arrangement of the Code. We recommend that matters of mere machinery should be relegated to rules capable of alteration by each High Court, subject to certain checks, and that those provisions only should be retained in the body of the Code in which some degree of permanence and uniformity is desirable. This re-arrangement is in accordance with precedent and possesses advantages so obvious that it is needless to enlarge upon them.

2. The objection—and as it appears to us the only objection of substance—that can be urged against this proposal is that until the scheme of distribution has become familiar to those who have to administer the Act, the change may cause some confusion and the familiar numerical references to the present sections will no longer apply. We are sensible that some inconvenience must arise from this cause in the first instance, but this is but a small disadvantage in comparison with the advantages

to be obtained by the change, and we cannot think that any one will seriously contend that such a slight and temporary drawback should stand in the way of a reform which appears to us in other respects to be wholly beneficial.

3. The adoption of this principle has necessarily involved a departure from the arrangement of the present Code but in other respects we have advisedly adhered as closely as possible to the existing language, the meaning of which is now well understood by Courts and by practitioners. Speaking generally, it may be said that we have only departed from the phraseology of the Code where experience has suggested improvements or competent authority has called for some change. We have refrained from altering the wording merely because it might be capable of improvement; for in any change even of a verbal character there is a risk of opening a door to fresh litigation. In the amendments that we have introduced we have endeavoured to state general rules of procedure rather than to provide in detail for every possible contingency for we hold it to be a sound view that excessive elaboration of details of procedure tends to cramp the actions of the Court and in consequence to encourage technicalities. For this reason we have made no attempt to embody in the Code a digest of very numerous decisions on the existing sections we have made amendments to meet case law only on points on which there is a conflict of authority. And in this connection we desire to point out that at the present time there is even less justification for the enactment of elaborate provisions in regard to procedure than at the time when the Code of 1882 was passed. Since then the standard of legal efficiency in the mofussil has been materially raised, and the principles of procedure are now so well understood that the Courts may be trusted to apply them intelligently in cases for which no provision may be made in terms.

But although we have made the present Code the basis of our draft, we have carefully examined the Bill settled by the Select Committee in 1903, and we desire to express our acknowledgments to that Committee for the store of information it contains, and for the materials collected in their Report.

Apart from the re-arrangement to which reference has been made, we have not introduced many changes of a radical character into the Code.

4 The general nature of some of the amendments we recommend may be conveniently illustrated by a brief examination of the extent to which the various stages of a suit will be affected by them.

A To begin with, it is hoped that the multiplicity of suits will be further curtailed by the new provisions we have inserted to remove limitations which we regard as needless on the comprehensiveness of a suit, and by the wider powers of amendment vested in the Courts under the Bill. An adequate check is provided by the power of a Court to interfere where embarrassment is likely to result.

B. Increased facilities have been given for the service of process to which further reference is made in the Notes on Clauses. It is hoped that in the gradual introduction of service by post may be found a solution of one of the principal defects in our legal system.

C. In our opinion it is most necessary that litigants in this country should come to trial with all issues clearly defined, and that cases should not be expanded or grounds shifted without reference to the true facts. For this purpose we think that the present system of pleadings in the mofussil, which is notoriously lax, should be improved, and we have incorporated in the rules an Order on pleadings, which it is hoped will lead to sounder and surer methods of arriving at the real points in dispute. The forms have been revised and we hope that they will be brought into more general use in the mofussil.

We have not been able within the time at our disposal to make these forms, or the other forms in the Appendix to Schedule I, complete; but this is a matter of detail which can be further considered before the Bill is passed into law.

D. It is not possible to secure expedition in the disposal of suits, unless the questions of fact on which there is a real contest are narrowed down as far as possible. As a step towards this, we have incorporated in the rules an Order in which provision is made for the admission not only of documents, but also of facts. It must be left to litigants and their advisers to make adequate use of this order; but it is hoped that the Courts will encourage the use of it, since it certainly affords a means whereby the two principal evils of litigation, delay and expense, can be materially diminished.

E. We attach much importance to a proper use being made by Courts in the mofussil of the procedure prescribed for the first hearing. The Code as it stands makes provision for the examination of parties by the Court, and we have altered the language so as to compel the production of documents at the first hearing. In our opinion this will act as a substantial check on the fabrication of documentary evidence.

F. The provisions relating to the hearing of suits do not call for material alteration, but we have thought it well to provide expressly for the cases where a party dies between conclusion of the hearing and delivery of judgment. It would obviously be wrong that such an accident should in any way interfere with the disposal of the case and we have therefore inserted a provision to enable judgment to be pronounced notwithstanding the death.

G. A change of importance has been made in regard to decrees. In the first place, we have inserted an express provision recognizing the distinction between preliminary and final decrees. We hope in this way to afford facilities for checking the delay that now results from the objectionable practice of leaving for determination in execution questions which should be decided by the decree. This change should ensure the more expeditious disposal of a class of suits which at present are conspicuous for the delay to which they give rise. Another amendment of importance which we have introduced is in regard to mortgage-suits. These are very numerous and involve complicated questions of law. Hitherto some confusion has been occasioned by the co-existence of the provisions of the Transfer of Property Act and of the Code in regard to execution in mortgage-suits. We think that the provisions regulating this matter should be dealt with in their entirety in the Code, and we have therefore introduced rules in Order XXXIV to give effect to our view. We propose that the sections of the Transfer of Property Act affected by this change should be



repealed We desire to call the attention of those Provinces to which that Act does not apply to the effect of these changes

In our opinion it is expedient to give greater assistance to the Courts in the framing of decrees. The importance of this branch of procedure cannot be over-rated; it is surrounded by difficulties which are a fruitful source of error and consequently of litigation. We have amplified the provisions of the Code to meet this defect, and have introduced some forms which can be adapted to meet the requirements of individual cases. We think that further forms might be added with advantage before the Bill becomes law.

H Amongst other matters, we have removed limitations which at present exist on the power of appointing Receivers, and have conferred a power to appoint Receivers on Subordinate Courts

J **Execution.**—The subject of execution is, perhaps, one of the most difficult with which we have had to deal. The present system, in the mofussil, at any rate, tends to excessive delay and affords facilities for defeating the claims of creditors. At the same time the creditor often has only himself to blame, owing to his own laches in prosecuting his right. In the Presidency Towns the same objections cannot be fairly raised; the system works well, whilst, in the mofussil, the difficulties arise not so much from the machinery itself, as from the defective manner in which it is worked. One of the most fruitful sources of litigation is the setting aside of execution sales, on the ground of irregularity in the publication of the sale proclamation. It is notorious that in many of these cases the Court's officer, either through negligence or dishonesty, has not duly published the proclamation, but it is impossible to deal with such cases by any provision in a Code. After a most careful consideration of the subject, we have not seen our way to any very drastic changes in the present system. We have found ourselves unable to accept the somewhat far-reaching proposal of the Committee of 1902 in relation to the execution of decrees by precept but we are so far in accord with the view expressed by that Committee as to have been able to insert in the Bill a clause which enables the Court which passed the decree to issue a precept to any other Court to attach property of the judgment-debtor, pending execution in the ordinary course. Beyond this we have felt we could not safely go.

We anticipate that there will be a substantial saving of time, and consequent expense, from the provision requiring that mesne profits shall be ascertained by the Court under the decree itself, and not as now in execution proceedings.

Clause 53 has been introduced to settle a long mooted point upon which there is much diversity of judicial opinion, as to whether or not questions as to the liability of ancestral property in the hands of a son or other descendant to whom it has come otherwise than by descent for the payment of the debt for which the decree was passed, can be determined under clause 47 of the present Bill, corresponding with s. 244 of the existing Code. We think they should be.

Other amendments deserving notice relate to (1) the power to break open the outer door of the judgment-debtor's dwelling house; (2) the date from which the purchaser's title accrues; (3) oral application for immediate execution; (4) the discretion of the Court in the execution of the

decrees for the restitution of conjugal rights; (5) execution against partnership property; (6) extended facilities for attaching salaries; and (7) powers to decree-holders to carry decrees into effect at the expense of the judgment-debtor.

We regard the changes made in relation to execution as calculated to materially assist the judgment-creditor in recovering the fruits of his judgment.

**6 Arbitration.**—Two questions of importance have arisen in connection with this subject. (1) should any of the sections of the Arbitration Act of 1899 be incorporated into the Code; (2) should the right of appeal, as now existing, be altered, and if so, in what direction? We are of opinion that the best course would undoubtedly be to eliminate from the Code all the clauses as to arbitration, and insert them in a new and comprehensive Arbitration Act. There are perhaps difficulties as to this at present. We have determined therefore to leave the arbitration clauses much as they are in the present Code; but we have placed them in a Schedule in the hope that at no distant date they may be transferred into a comprehensive Arbitration Act.

In regard to appeals some change has been made upon this question, adopting the view of the Judicial Committee as expressed in Ghulam's case (1 L. R. 29 C. 167) we are strongly in favour of finality in cases of arbitration. If rights of appeal be given, the disappointed party will take advantage of every such right. To meet the difficulty expressed in the case reported in 1 L. R. 25 C. 141 (which followed many other cases of the Calcutta High Court), we have inserted the words "or being otherwise invalid" in sub-section (c) of s. 521 of the present Code. If, therefore, either party considers the award invalid on any ground he can apply to have it set aside. We have thought it right to give one appeal from the opinion expressed by the Court on a special case under s. 517, and to allow one appeal as from order under ss. 521, 523 and 526. And having regard to the rather wide language of the Judicial Committee in Ghulam's case, we have further thought it advisable to make it clear that an order granting an application either under s. 523 or 526 is not to be deemed a decree within the meaning of the Code; otherwise there would be a wider right of appeal from orders under these sections than from a decree under s. 522. The other alterations deal with the text, rather than with any question of policy or principle.

**7. Suits Relating to Public Matters.**—We have inserted a clause to enable actions for public nuisances to be brought, with the consent of the Advocate-General, irrespective of special damage. It has been represented to us that such a power is needed and we concur in that view.

**8. Public charities.**—The suggestion has been made on high authority that some express reference should be made in the Code to the power of the Court to apply the *Cy-près* doctrine in the settling of schemes. But this power would appear to exist already within its proper limits (*Mayor of Lyons* case, 1 L. R. 3 I. A. 32) and we do not think it necessary to make express reference to it.

It has been represented to us by more than one gentleman whose opinion is entitled to weight, that the power to enquire into the affairs of public charities should be made more extensive. The clause, as it stands

gives sufficient powers to the Courts to direct accounts and to frame schemes when once a suit has been instituted, but it is said that members of the public interested in any public charity ought to have the means of calling for and inspecting accounts without undertaking the burden of a suit, at least in the first instance. We are told that revenue derived from charitable trusts are in some cases very large in amount: that no accounts of their expenditure are ordinarily rendered, and that there is good ground for believing that a considerable portion is misspent or squandered on useless objects.

The Hon'ble Dr. Rashbehary Ghose supports these views and has submitted a clause to give effect to them. It is in the following terms:—

“ 93-A. (1) The Court may also, upon an application by any two or more persons having the like interest and having obtained the like consent, direct any trustee of such charity to cause to be prepared and filed in the Court, within such time as may be specified in the order, a detailed account of the receipt and disbursement in connection with the trust property for a period not exceeding three years next preceding the date of the application

(2) Such accounts, when filed in Court shall be open to inspection by the public

(3) A trustee who fails to comply with any such direction shall be removed if a suit for that purpose be instituted, unless he can show good cause for such failure.”

We have given to the subject our best consideration and desire to record our sympathy with the motives of the proposers. But we have not inserted the clause in the Bill because we think that the question is one of policy on which the public opinion of the communities interested should first be obtained. It affects primarily, as we understand, the Hindu and, to a less extent, the Muhammadan community. And we should not feel justified in recommending an amendment of the law on such a subject as this, unless the leaders of those communities were to express their support of the proposal in unequivocal terms. If it is eventually decided to adopt the amendment, then we think that the clause proposed by Dr. Ghose may be accepted.

9) **Suits by or against Firms.**—Attention is directed to the new provision in regard to suits by or against firms (Order XXX), which will, we hope, prove acceptable to the commercial community.

10. **New Procedure.**—We have given power to provide by Rules for Counter-claims, Third Party Procedure, Summary Procedure in suits for debt or liquidated demands, as for instance, rent, or any other definite sum payable under a contract and originating summons. We are of opinion that these forms of proceeding may usefully be adopted in some areas but that this is a matter which would be left for each High Court to decide.

11. **Appeals.**—As regards appeals from original decrees we have departed but slightly from the existing Code. We have thought it advisable to give legislative sanction to the view that no appeal shall lie from a consent decree or as to costs, except by leave of the Court; but the

most important change is that incorporated in clause 97, which renders it obligatory upon a party, who considers himself aggrieved by a preliminary decree, to appeal from that decree at the risk of being precluded from disputing its correctness on an appeal from the final decree. We feel strongly that this is a most useful provision, as tending to that which is so desirable *viz.* finality in litigation.

As regards appeals from appellate decrees the only substantial departure from the existing Code is the insertion of clause 103. Experience has shown the desirability of these clauses, the effect of which will be to avoid remands with their consequent delay and expense.

As regards appeals from orders, a comparison of clause 104 of the Bill with s. 588 of the existing Code would support a *prima facie* inference that the right of appeal from Orders had been materially curtailed. But this inference is dispelled on looking at sub-clause (h) of clause 104 which allows an appeal from any order made under Rules from which an appeal is expressly allowed by Rules. We have gone carefully into the question of the cases in which an appeal should be allowed from these Orders and our conclusion is expressed in the Rules themselves.

**12. Rules.**—The distribution of the provisions of the Code between the body of the Bill and the Rules is a matter on which opinions may well differ. The general principle on which we have proceeded has been to keep in the body of the Bill those provisions which appear to us to be fundamental and those provisions which confer powers operating outside the Province in which the Court is situated. In some cases we have adopted the plan of inserting leading provisions in the Bill, stating in general terms the powers of the Court, and of leaving the details to Rules; in matters of less importance the provisions have been relegated altogether to Rules. The result of this re-arrangement is to reduce the Act, as distinct from Schedules, to 155 clauses. The existing order of sequence has, speaking generally, been maintained, but the reduced bulk of the Bill has rendered it no longer necessary to reproduce the division into Chapters.

It is proposed to vest the power of making Rules in High Courts, subject to the control of Local Governments (or, in the case of the Calcutta High Court, of the Government of India), but we think it most desirable that in exercising this power the Courts should have the advice of representatives of the various branches of the legal profession, and we have accordingly provided that, in the case of Chartered High Courts and of Chief Courts, Rules shall only be made after those Courts have taken the opinion of a Rule Committee on which there will be representatives of the Bar, of Vakeels or Pleaders and, in Presidency-towns, of Attorneys. In the case of other High Courts power has been given to establish such Rule Committees as the Governor-General in Council may determine. It is believed that Standing Committees of this kind will be of great value. We have thought it better to require the same sanction as is required by the Indian High Courts Act of 1861, in order that the rule-making power should correspond with the power conferred under that Act; but we are of opinion that, in the interest of uniformity, it is expedient that all amendments of Rules should be communicated to the Government of India and to other High Courts before sanction is given to them. This, we understand can be effected by executive order.

provision some manual corresponding to the English "Annual  
containing:—

the act;

l rules of procedure made under it or under other Acts in the  
Province;

notes of decisions on the Act and Rules.

We are sensible that there may be defects and flaws in the Bill  
append to this report. The subject is complicated and technical  
time at our disposal has been limited. We do not doubt therefore  
h improvement may be made in the Bill before it is finally passed

But in our opinion it is framed on the right lines. We believe  
reasons we have stated that in any reform of Civil Procedure it is  
to introduce some elasticity to give wider powers of control to  
Courts and to invest them with a larger discretion in regard to  
t of cases which come before them. Mr. Dikshit, Subordinate  
om Bombay, has been present throughout our deliberations, and  
this opportunity of acknowledging the help we have derived from  
ience of the working of the Code in the mofussil. We desire also  
l our acknowledgments of the services of Mr. Law, of the Legisla-  
partment, who has attended to the clerical and press work to our  
atisfaction.

H. ERLE RICHARDS.  
FRANCIS MACLEAN.  
LAWRENCE JENKINS.  
S. ISMAY.  
RASHBEHARY GHOSE.

August 31st, 1907.

# NOTES ON CLAUSES

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## A.—CLAUSES OF BILL.

### PRELIMINARY.

*Clause 2*—The definitions have been re-arranged in alphabetical order.

*Decree*.—The importance of the definition of the word “decree” rests on the fact that by reference to it the right of appeal is determined. The Committee have in the main adhered to the existing definition; but they have modified it in two respects, and this has involved a slight recasting of the language. The principal modification aims at permitting an appeal from an adjudication which purports to settle the rights of the parties, though it does not completely dispose of the suit. Such an adjudication the Committee describe as a preliminary decree.

The *Explanation* is intended to make it clear that a decree may be partly final and partly preliminary. Thus a decree for the recovery of possession of unmoveable property and for mesne profits would be of this mixed character.

The word “within” has been substituted for “mentioned or referred to in” with a view to bringing within the definition of decree orders against sureties (see clause 142) and orders as to Court-fees in pauper suits (see Or XXXIII, 1. 13) and thus providing for appeals therefrom.

The only other modification is for the purpose of excluding a right of appeal from an order of dismissal for default.

*Legal representative*—We have inserted a definition of “legal representative”—an expression which has been variously interpreted by the High Courts as would appear from the reported cases which are not easily reconcilable with one another. See 8 C. W. N. 843, in which almost all the earlier cases are reviewed.

The Committee trust that the definition which has been added by them will set at rest what owing to the absence of any such definition from the present Code is a somewhat debatable point.

*Mesne profits*.—The Committee have altered the definition of “mesne profits” so as to exclude from the calculation any increased rents and profits due to improvements made by the person in wrongful possession for which he cannot at present claim compensation from the rightful owner either by way of mitigation of damages or otherwise.

*Clause 4*.—The clause as drafted will, it is believed, effect all the savings covered by s. 4 of the Code. The concluding paragraph of that section is believed to be obsolete and has accordingly not been reproduced. On this point the opinions of Local Governments are invited.

*Clause 6.*—In view of the extended scope of clause 4 the reproduction of ss. 6 and 7 (except as to the final paragraph of s. 6) does not appear to be necessary.

The words "or proceedings in suits" have been introduced in this clause to negative the view that a Court to which a decree is sent for execution has jurisdiction to execute the decree though the amount exceeds the limits of the pecuniary jurisdiction of the Court, a point on which there is a conflict of opinion (I L. R. 17 M. 309; I L. R. 16 C. 465, 457).

*Clause 7.*—The provisions as to Provincial Small Cause Courts have been re-arranged in what is hoped to be a more convenient form.

## PART I

### SUITS IN GENERAL.

The provisions contained in s. 10 of the Code were first enacted by Act XI of 1836 and were reproduced in the Code of 1859 and in subsequent Codes. In the opinion of the Committee their retention is no longer necessary and they have been omitted.

*Clause 11—Res judicata.*—It is not possible to make a complete exposition of a subject so complex as that of *res judicata* within the limits of a section of an Act and the Committee think it better to re-enact s. 13 as it stands in the Code with such modifications only as experience has shown to be necessary.

The Committee recognise that a proceeding does not come within the language of that section; but they think it better not to deal with this point in express terms for the reason that the applicability of the doctrine of *res judicata* to certain proceedings is not open to doubt, and they foresee that any express reference to proceedings in a crystallised definition might only lead to difficulties (L. R. 11 I. A. 37, and I L. R. 29 C. 707).

The word "another" has been substituted for "former" as being more in conformity with Indian decisions.

*Explanation 1.*—is new and is intended to affirm the view that the competence of the jurisdiction of a Court does not depend on the right of appeal from its decisions.

*Explanation VI.*—The inclusion of *public rights* is to give due effect to suits relating to public nuisances (clause 91).

*Clause 12.*—This clause is new and is necessitated by the transfer of certain of the provisions of the existing Code to Rules.

*Clause 13.*—The provisions as to foreign judgments have been re-arranged and as it is hoped stated more clearly.

*Section 14.*—(Act IV of 1889).—The last paragraph has been omitted. It appears to the Committee that it is not possible to maintain this distinction in the case of all Asiatic Courts. The Courts of Japan for instance are entitled to be treated on the same footing as European Courts. They

know of no satisfactory distinction which could be drawn so to give effect to the intention of the existing provisions; and they recommend that the paragraph should be omitted and that Courts should rely on the powers given by clause 13.

*Place of Suing.*—The provisions under this heading have been collected and rearranged.

*Clause 16 (a).*—The insertion of the words "with or without rent or profits" is intended to remove any difficulty there may be where the defendant does not reside within the local limits of the Court within whose jurisdiction the property is situate.

*Clause 18.*—The Committee have added words to this clause in order still further to restrict the taking of technical objections as to jurisdiction.

*Clause 20.*—The Committee have omitted Explanation III of s. 17, which has become unnecessary owing to the addition made to sub-clause (c) of the words "wholly or in part" in reference to the cause of action.

*Clause 21.*—The words "at any stage" have been added to remove the difficulty created by the view that a suit cannot be transferred after the hearing has once commenced, as to which there is a conflict of decisions.

*Clauses 26-35.*—The provisions in Chapters III to XVIII of the present Code have been in the main relegated to Rules, but such general provisions as are believed to be essential have been preserved in Clauses 26 to 35.

*Clause 12.*—The Committee have omitted the last paragraph of s. 136 of the Code as they think it unnecessary to impose a penal consequence for a default of the class indicated.

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## PART II

### EXECUTION.

*Clauses 36, 37.*—The bulk of the provisions as to execution will be found in the Rules, but the main provisions as to the Courts by which decrees may be executed, the questions to be determined by Courts executing decrees, the limit of time for execution, transferees and legal representatives, procedure in execution, arrest and attachment, the delegation to Collectors of power to execute certain decrees, the distribution of assets and resistance to execution have been retained in the body of the Bill.

*Clause 46—Precept.*—Though a system of execution based on precepts is in the opinion of the Committee open to grave objection, they think the idea may be authorized for the purpose of enabling a decree-holder to obtain an interim attachment where there is ground to apprehend that he may otherwise be deprived of the fruits of his decree. They have for this purpose introduced clause 46 into the Bill. They think it expedient to fix a time for the continuance of this interim attachment but at the same time they have empowered the Court to extend the period to meet the exigencies of particular cases.



After careful consideration they have come to the conclusion that notwithstanding attachment under a precept, re-attachment on ordinary application for execution will still be necessary. Though at first sight it may appear a better course to provide that re-attachment shall not be necessary when the issue of a precept is followed by the ordinary application for execution, after careful consideration they have come to the conclusion that it will be safer to require re-attachment, having regard to the agency by which execution is carried into effect.

*Clause 47.*—The Committee have omitted sub-clauses (a) and (b) of s. 244 of the existing Code because they are strongly of opinion that questions regarding the amount of any mesne profits or interest should be determined by the decree and not in execution. If this view is accepted it will be possible to exercise an effective control over the action taken by Subordinate Courts in dealing with such matters.

The Committee have re-drafted sub-clause (3) and made it compulsory on the Court to determine questions arising as to representatives of parties. In their opinion it is inexpedient that separate suits should be instituted for the decision of such questions. The delay and expense involved are often very great and result in the needless protraction of litigation.

The Explanation is intended to put an end to a conflict of judicial decisions.

*Section 257 A*—The Committee think that s. 257-A may be omitted with advantage. It was first enacted by Act XII of 1879 with a view to protect the interests of judgment-debtors against the exercise of undue pressure by decree-holders. The section has given rise to conflicting decisions, and as interpreted by the majority of the High Courts is found in practice to be of little service to judgment-debtors. Moreover, s. 16 of the Indian Contract Act as amended appears to the Committee to afford adequate protection where it is required.

*Clause 51.*—This clause states generally the powers of the Court in regard to execution leaving the details to be determined by rules. It will be observed that the power to direct immediate execution is no longer restricted to one class of suits but that it is now general in terms. Any limitation that may be found necessary will be imposed by rules.

*Clause 51* has been added by the Committee in order to set at rest a question on which High Courts are divided in opinion. It is true that where a son or grandson takes any ancestral property by survivorship he is bound to pay out of such property all debts of his ancestor not incurred for immoral or illegal purposes; but whether the creditor can follow the property in the hand of the son or grandson in execution is a debateable point under the Code. The question is merely one of procedure, and the Committee have come to the conclusion that any controversy between the parties with regard to the liability of the son or grandson to pay the debts of his ancestor should be determined in execution, it being open to them to raise any objection or defence in such proceedings which they might have raised in a separate suit, instituted by the creditor, the clause in question not imposing upon them a greater liability than that imposed by the Hindu law.

*Clause 55 (a), second proviso.*—The object of this proviso is to prevent vexatious forms of resistance to execution which constantly obstruct decree-holders in the execution of their decrees.

*Clause 55 (b)*—This sub-clause is intended to cover the cases of certain persons or classes of persons whose summary arrest might, as in the case of railway servants, be attended with danger or inconvenience to the public.

*Clause 61*.—The Committee have reproduced this clause from the former Bill (clause 269-B) in accordance with what they understand to be the wishes of the Government. But the conditions should in their opinion be so modified as to relieve the Courts from fixing the portion to be released from attachment.

To impose this duty on the Courts would materially increase their work in a matter in regard to which they are not in a position to form the best opinion and would probably result in an undesirable lack of uniformity.

*Clause 62*.—The Committee have inserted a new provision to authorize the breaking open of the outer door of a judgment-debtor's house. They do not think that it would be safe to extend the operation of this provision to the house of a stranger.

*Section 288*.—This section of the present Code first appears in the Code of 1877. It was not suggested by any decided case and the only explanation offered by the Select Committee, by whom it was introduced, is as follows:—

“ We think that the proclamation of execution sales should state the incumbrances (if any) to which the interest about to be sold is liable and we have provided that no Judge etc., should be answerable for error in the proclamation, unless it has been committed dishonestly.”

The Committee are of opinion that, having regard to the provisions of Act XVIII of 1850, the section may safely be omitted.

*Clause 64*.—An explanation has been added to make it clear that claims within the protection of this clause include claims for rateable distribution of assets.

*Clause 69*.—The provisions as to Collectors have been placed in a separate schedule. They deal with a special matter and are not of general application.

*Clause 73*.—The Committee have slightly altered the wording of this clause in order to bring it into line with the Transfer of Property Act, 1882, s. 96.

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## PART III

### INCIDENTAL PROCEEDINGS.

The general powers of Courts in regard to commission have been summarised in clause 75 and the detailed provision will be found in the First Schedule.

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## PART IV

### SUITS IN PARTICULAR CASES.

The bulk of the corresponding part of the present Code will be found in the Rules. The provisions as to suits by aliens, etc., have been retained in the Bill and a few only of the provisions relating to suits by or against the Government. There is a general clause defining the nature of interpleader suits.

*Clause 81.*—The Committee think that the same measure of protection should be afforded to the defendant where Government undertakes the defence as where the Government makes no application for the purpose, and it appears to the Committee that the proper protection should be that the defendant should be exempt from mesne arrest and his property from mesne attachment. They therefore propose to strike out the proviso from clause 269 and to alter sub-clause (a) of clause 270 so as to give effect to this.

*Clause 86 (2).*—The Committee have inserted words in this sub-clause to make it clear that the decision of the Government is final and not open to question by the Court. A doubt had been raised on the point.

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## PART V

### SPECIAL PROCEEDINGS.

Arbitration and suits relating to public matters have been discussed in the former part of this Report.

*Clause 92 (Public Charities).*—As a doubt has been expressed in at least one reported decision whether s. 539 is or is not mandatory, the Committee have thought it desirable, in order to settle this question, to introduce sub-clause (2).

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## PART VI

### SUPPLEMENTAL PROCEEDINGS.

Here again a leading provision has been retained in the Bill, and the details of procedure have been relegated to Rules.

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## PART VII

### APPEALS.

*Clause 97.*—The Committee have inserted an express provision to compel litigants to appeal from preliminary decrees, and have estopped them, on their failure to do so, from raising objections to such decrees.

appeals from final decrees. On this point they accept the unanimous opinion of the Calcutta High Court. They think it unreasonable that parties should allow proceedings to be carried on to their final stage and large costs to be incurred if they intend to rely upon objections which could be taken at an earlier stage.

*Clause 99.*—The Committee have extended this clause in order to give the Courts a larger discretion in dealing with irregularities in proceedings, and they have inserted express words to meet the point decided in *I. L. R.*, 26 Bom. 239, and *I. L. R.*, 27 Mad., 80, and in a recent decision of the Calcutta High Court.

*Clause 100.*—The Committee have struck out the word “specified” in the expression “specified law or usage,” as being in their opinion redundant.

*Clause 105.*—Though the remarks of the Privy Council in *Moheashur Sing v. The Bengal Government* (7 Moo. I. A., 283) are wide enough to embrace an appeal from an order of remand, the Committee think those orders were probably not in their Lordships’ contemplation when they condemned the view that a failure to appeal from an interlocutory order should deprive the person aggrieved of his right to object to such order when subsequently appealing from the decree. And the Committee think there are good reasons on the score of delay and expense for treating an appeal from an order of remand as a special case and precluding an appellant from taking, on an appeal from decree, any objection that might have been urged by way of appeal from an order of remand.

The Committee have deleted the word “such” to remove a difficulty it creates (10 Moo. I. A., 310; 413; 12 Moo. I. A., 157).

## PART VIII

### REFERENCE, REVIEW AND REVISION.

These provisions are not substantially altered. They are summarised in this Part and the details are in Rules.

## PART IX

### CHARTERED HIGH COURTS.

Is not materially altered.

## PART X

### RULES.

See observations in the former Part of this Re

## PART XI

## MISCELLANEOUS.

The Committee have omitted s. 646 as they see no reason specially to differentiate the case of a Registrar, and it is believed that in practice no use is made of the section.

*Clause 137.*—The Committee have inserted the words "or other person" after the word "officer" in sub-clause (b) in order to give the High Court power to relieve the officers of the Courts of the work of administering affidavits in cases in which it may be necessary to do so. It has been represented to them by the Calcutta High Court that this relief is much required.

*Clause 140.*—The terms of s. 538 of the Code do not justify the practice founded on it, and the Committee have therefore recast the section so as to bring it into closer conformity with that practice.

Clauses 145 and 148 to 150 are new. They are intended to enlarge the discretion of Courts.

## B.—RULES.

The Committee think that the division of the Rules into Orders will be found convenient for purposes of citation and reference.

Under clause 35 the Court has full power to apportion costs. The Committee understand that in practice the provision of s. 26 is not operative in the mufassil, and that part of the section which related to costs has not therefore been reproduced.

*Or. I, r. 3 (s. 28).*—The Committee realize that the words "in respect of the same matter" in r. 3 have given rise to great difficulty, and they think it advisable to follow the wording of the English rule and to omit them.

*Or. I, rr. 5 and 7.*—The Committee thought that it was desirable to add Or. XVI, rr. 5 and 7, of the English Rules.

*Or. III, r. 2 (s. 37).*—The provisions of existing Code which are represented by this clause are in somewhat different terms and are limited to persons holding general powers-of-attorney within certain local limits. The Committee think it unnecessary to preserve these limitations and have made the sub-clause general. It follows that the present clause 37 becomes unnecessary. It is included in sub-clause (a).

The last paragraph of s. 37 has been omitted as no longer necessary.

*Or. III, r. 4 (s. 39).*—The Committee are uncertain whether it is necessary to make a reference to the Court of the Judicial Commissioner Sindh. The point is one for the Government of Bombay.

They also suggest in the alternative that the privilege now enjoyed by all Advocates enrolled in Chartered High Courts shall be extended to those Advocates enrolled in non-Chartered High Courts who are members of the English or Irish bar or of the Faculty of Advocates in Scotland.

*Or. IV.—Institution of suits.*—The greater part of the existing provision on this subject will be found in the Order on Pleadings.

*Or. VI*—The Committee have added a few rules relating to pleadings based upon the system of pleading introduced by the Judicature Acts in England which is generally admitted to be the best form of pleading in civil suits. In this country outside the Presidency-towns the pleadings are seldom artistically drawn. They are neither concise nor precise but contain vague and general statements from which it is difficult to ascertain definitely the real question in controversy between the parties. The sole object of pleadings is thus frequently defeated, the issue is enlarged, the trial is delayed and much unnecessary expense is incurred by the parties who are also liable to be taken by surprise. They have further provided that the forms in the Schedule shall when applicable be used for all pleadings, and when they are not applicable, forms of the like character shall be used. The rules prescribed by us will not prevent the pleader from exercising his discretion; for the amount of detail must necessarily vary with the nature of each suit. It is, however, made clear that there must be particularly sufficient to apprise the Court and the other party of the exact nature of the questions to be tried.

The Committee have also given a party who considers that his opponent's pleading does not give him the information to which he is entitled, the right to apply for further particulars so as to enable him to know what case he has to meet at the trial.

They have, however, endeavoured to modify the rigour of the rules by providing in accordance with s. 55 of the Indian Evidence Act that the Court may, notwithstanding the absence of any specific denial, require any fact to be proved by the party who relies upon it.

*Or. IX.—S. 104* originally formed part of s. 60 of Act VIII of 1859, and in combination with the rest of that section it was appropriate. As a separate section, however, it is misleading, and it certainly is not now required in view of the provisions for service on a defendant residing out of British India and for proceeding with a suit *ex parte* when a defendant does not appear. Its retention would involve a diversity of procedure which the Committee think undesirable (see I. L. R. 23 A. 99).

*Or. IX, r. 13.*—The Committee have inserted words to make it clear that a decree can only be set aside in favour of a defendant against whom the decree has been passed *ex parte*. There is some conflict of Judicial authority upon this point, and the Committee think that the matter should be set at rest in this sense.

*Or. XI.—Interrogatories.*—The provisions in the Code as to discovery are based on the rules of English procedure in force at the time when it was passed. Since then the English procedure has been amended and is now contained in Order 31. This Order has in effect been adopted in the rules regulating the procedure on the original side of the High Courts of Calcutta and Bombay and has, it is believed, been found to work satisfactorily in practice.

On the other hand, in Mufassil Courts little use has yet been made of the machinery of discovery, and the Committee therefore think the rules of the Calcutta and Bombay High Courts on their original sides may be safely adopted without risk of disturbing a procedure with which the Mufassil Courts have become familiarized.

This will secure uniformity of practice and also the advantage of the commentary on the rules prescribed by the English decisions.

*Or. XII—Admissions*—The Committee think the practice of admissions may with advantage be extended to facts as well as to documents.

The procedure is not compulsory but its adoption would result in cheapening and expediting litigation, and it is hoped that its use will be encouraged by the Courts.

*Or. XIV, r. 6 (s. 150)*—There does not seem to be any real conflict as to whether an appeal lies, though at first sight it might appear otherwise. It has therefore been considered unnecessary to provide expressly for an appeal.

*Or. XX, r. 11 (s. 210)*—The Committee have added words to sub-rule (1) of this rule in order to override the ruling of the Bombay High Court in the case of *Ragu Gorind Paranjpe v. Dipchand* (I. L. R., 4 Bom., 96), as the practice inculcated by that ruling seems to prevail only in the Presidency of Bombay and not in the rest of India.

*Or. XX, r. 14 (s. 214)*.—These amendments are based on the rulings contained in the decisions of the High Court of Allahabad at I. L. R., 6 A. 370, 455, and I. L. R., 11 A., 161.

Having regard to the opinion expressed in I. L. R. 21 Mad., at page 463 we have thought it right to make it clear that title vests without an instrument of transfer. To require a transfer now might throw a cloud over numberless titles which rest on the assumption sanctioned by long practice that no instrument of transfer was necessary.

*Or. XX, r. 18 (s. 216)*.—The Committee have introduced an amendment to give effect to the view that appeals from decrees relating to set-off should lie to the Courts to which appeals in respect of the original claim would lie.

*Or. XXI, r. 2*—The Committee have omitted certain words from the last paragraph of s. 258 of the Code in order to make it clear that the Court cannot recognize a payment or adjustment which has not been certified for any purpose whatsoever. It follows that an uncertified payment or adjustment cannot operate to prolong the period of limitation for applying for execution under the Limitation Act.

*Or. XXI, r. 3*—The Committee have inserted this rule to provide for cases, which they are told are not uncommon, of an estate being situated within the jurisdiction of two or more Courts. There are decisions on this point, but they are not harmonious, and the Committee think it well to determine the law definitely.

*Or. XXI, r. 11 (s. 256)*.—The Committee have omitted the limitation imposed under the existing Code on oral applications for immediate execution. They see no reason why this limitation should be preserved.

*Or. XXI, r. 11 (c).*—The Committee have not given effect to the suggestion that this should be limited to payments and adjustments which the creditor executing the decree is bound by law to recognize, as this would remove a valuable incentive to state truly what payments have been made (see *I. L. R. 10 B, 289*).

*Or. XXI, r. 20*—The Committee have omitted the words "or his or their representatives." This will be covered by the general clause.

*Or. XXI, r. 23 (4), explanation and illustration (d), (s. 240).*—This addendum has been introduced in accordance with the views of the Calcutta and Allahabad High Courts as expressed in the cases of *Hury Doyal Guho v. Din Doyal Guho* (*I. L. R. 9 C. 479*) and *Ram Sukh Das v. Tota Ram* (*I. L. R. 14 A. 330*).

*Or. XXI, r. 26 (s. 248).*—The Committee have omitted the reference to a decree passed on appeal, for that is ordinarily the decree to be executed [*Kristo Kinkur Roy v. Raja Burrodacant Roy* (*14 Moo. I. A., 465*) and *Muhammad Sulaiman Khan v. Muhammad Yar Khan* (*I. L. R., 11 A. 267*)].

*Or. XXI, r. 32 (s. 260).*—The Committee have omitted in this rule all reference to a decree for the recovery of a wife, for there can be no such decree under the law, as a wife cannot be treated as a chattel to be delivered over to the husband. Where any third person prevents the wife from returning to her husband, the latter may obtain an injunction against him which may be enforced in case of disobedience either by the imprisonment of the defendant, or by the attachment of his property, or by both.

*Or. XXI, r. 34*—S. 261 has been recast so as to bring it into conformity with the chronological order of events, and a provision has been added to meet the requirements of the Indian Registration Act.

*Or. XXI, rr. 44 and 45.*—These provisions were inserted in Bill No. 11 with the approval of the Government of India, and the Committee have therefore reproduced them in the present edition of the Bill.

*Or. XXI, r. 56.*—The purpose of this rule is to put an end to doubts which from time to time have arisen as to the continuance of an attachment by reason of the practice of "striking off proceedings" or "removing proceedings from the file" for which there is no justification in the Code.

*Or. XXI, r. 57 (s. 278).*—Though the execution of mortgage decree is expressly incorporated in the Code, the Committee still think that claims and objections arising out of the execution of such decrees should not be the subject of summary procedure under this and the following rules, but should be determined in the ordinary course.

*This does not imply that the procedure under the latter rules as to resistance to possession or dispossession does not apply.*

*Or. XXI, r. 76.*—In rules 76 and 83 express reference has been made to resale so as to make it clear that the default mentioned to those rules will attract the consequence indicated in rule 70. In this connection reference may be made to *I. L. R., 7 C. 337*.

*Or. XXI, r. 85.*—The Committee have altered this rule in order to prevent its being obligatory on the Court to forfeit the deposit in every case.



The rule as it stands at present has caused hardship in certain circumstances, vide the case of *Sambasiva Ayyar v. Tydnada Sami*, (I. L. R., 25 M. 535).

*Or. XXI, r. 88 (s. 310A).*—Words have been added so as to make it clear that a purchaser acquiring a title before the sale in execution can claim the benefit of rule. In other respects the Committee consider it advisable to adhere to the wording of the section.

The proposal that the sale should be set aside on payment of the purchase money instead of the amount specified in the proclamation is, in their opinion, fraught with danger—it would be obviously useless unless subsequent protection were given to the property, and such protection might lead to collusion, which would be most prejudicial to the decree-holder.

*Or. XXI, r. 89*—The Committee have struck out the provision as to irregularity in attaching the property, as such irregularity obviously cannot affect the price.

They have introduced the words “rateable distribution of assets” to clear up a doubt which has been the subject of discussion in several cases.

They have altered the language of the proviso in order to meet the doubts which have been raised as to the evidence upon which the Court can act [*Tasadduk Rasul Khan v. Ahmad Husain*, (I. L. R., 21 C. 66)].

*Or. XXI, r. 91.*—The Committee think it proper to retain the provisions of the Code, which make it necessary for the Court to confirm the sale in each case.

*Or. XXI, r. 92 (s. 315)*—The Committee have added words at the commencement of the clause in substitution of the last paragraph of the section which thus becomes unnecessary.

*Or. XXI, r. 95 (s. 316).*—The Committee have preserved the limitation of three years from the date of the certificate as suggested by the Select Committee in Bill No. 11. This clears up a doubt as to the time from which limitation begins to run, which has been discussed on more than one occasion.

*Or. XXII, r. 1*—The Select Committee struck out two of the four illustrations to s. 361 and the Committee think the remaining illustrations may also be deleted as they are too obvious to serve any useful purpose.

*Or. XXII, r. 3*—The Committee have introduced words in order to conform to the language of the Indian Limitation Act, 1877, as amended.

*Or. XXII, r. 5 (s. 366)*—Though *or* is the word used in the Code of 1882 and the Code of 1877, in the Bill of 1877 the word *and* is used, and it appears to the Committee clear that *and* is required by the context. If *and* is not used then the contrast with the preceding section is lost.

The explanation can be omitted having regard to the definition of “legal representative” inserted by the Committee.

*Or. XXIII, r. 3.*—The Committee have considered it expedient to alter the language of s. 375 so as to recognize the power of a Court to inquire into and to record a disputed compromise.

*Or. XXV, r. 1 (3), (s. 380).*—The Committee have deleted the last words of this sub-rule, because the nature of the suit excludes the possibility of the property in suit being immoveable.

*Or. XXIX, r. 2.*—The Committee have enlarged the language of the Code so as to allow of service by post on corporations having a registered office, and by this means the rule is brought into line with the provisions of the Indian Companies Act. Companies authorized to sue and be sued in the name of an officer or of a trustee must be very few, if, indeed, any exist, and they do not appear to the Committee to call for special treatment.

*Or. XXX, r. 1.*—The Committee have adopted with the necessary alterations the English procedure in relation to suits against firms. This new procedure has been in force for some time in the Presidency-towns of Calcutta and Bombay and has worked satisfactorily.

It is hoped that its general application will be found useful by the mercantile community, for the rules remove technical obstacles which under the present procedure may seriously impede this class of litigation, as where a partner has died.

*Or. XXXII, r. 3 (4).*—This is based on s. 443. The Committee think it necessary to ensure that notice should reach one interested in the minor's welfare and this rule aims at securing this result. The form of application and of notice in conformity with this sub-rule will be inserted in the Schedule of forms.

*Or. XXXII, r. 9.*—The Committee think it expedient that where a guardian insists on his right to be appointed next friend in the place of another there should be power to require him to become liable or give security for costs in the suit previously incurred.

*Or. XXXII, r. 15.*—The Committee have extended this rule so as to cover the case of a person incapacitated from protecting his interests by reason of his mental weakness or of his being a deaf mute.

*Or. XXXIII, r. 1 (s. 401).*—The Committee have not preserved s. 402. In the light of the case-law it is misleading, so far as it suggests that a suit will lie for loss of caste or abusive language, and they can see no sufficient reason for withholding from a pauper a right to sue as such in respect of defamation or assault.

*Or. XXXIV, r. 1.*—The proviso to s. 85 of the Transfer of Property Act, 1882, has given rise to certain doubts which the Committee have sought to remove by substituting for it the words now added with a view to making it clear that a person not a party is not bound by a decree [*Ram Nath Rai v. Luchman Ram* (L. R. 2 I. A. 193)].

The explanation has been inserted in order to remove doubts which have arisen from the conflict of authorities on the point.

*Or. XXXIV, r. 2 (b).*—The Committee have inserted the words "if necessary" before "retransfer" as according to mufassal practice a re-transfer is not ordinarily required and they think this practice should not be altered.

*Or. XXXIV, r. 3.*—The Committee have omitted the provision as to the defendant paying money to the plaintiff. They think it better that in every case he should pay it into Court.

*Or. XXXIV, r. 9.*—This rule is new.—It is a recognition of existing practice and remedies an obvious omission in the Transfer of Property Act, 1882.

*Or. XXXIV, r. 11.*—The Committee have inserted this rule in compliance with the suggestion of the Privy Council in *Gupi Narain Khanna v. Bansidhar* (L. R. 32 I. A., 123). This clause was in the Transfer of Property Bill, but was omitted by the Select Committee on that Bill on the ground that it ought to find a place in the Civil Procedure Code.

*Or. XXXV, r. 3.*—The Committee think that the institution of the inter-pleader suit affords a sufficient reason for the stay of other litigation in reference to the same subject-matter and they have modified s. 476 so as to give effect to this view.

*Or. XXXVII, r. 1.*—As Chapter XXXIX of the Code is transferred into rules, the Committee have not reproduced paragraph (c) of s. 538 as its appropriate place will be in rules under the Presidency Small Cause Courts Act, 1882.

*Or. XXXVII, r. 2.*—The explanation to s. 532 was inserted to negative the effect of the decision in *I. L. R., 1 C., 130*, but its meaning, as it stands, is obscure. The Committee have therefore deleted the explanation, and added words in the body of the rule which will remove the doubts at which the explanation was aimed.

*Or. XXXVIII, r. 6 (s. 483).*—The Committee have omitted the words "property within the jurisdiction of the Court," as they have caused a conflict of decision, and they think, as a matter of policy, there should not be the restriction these words suggest.

*Or. XXXVIII, r. 13.*—This rule represents the views of the Government of India as expressed in the former Bill.

*Or. XXXIX, r. 6.*—Words have been added to s. 498 so as to empower the Court to order a sale of securities where the state of the market require such a course.

*Or. XL.*—Having regard to their standard of efficiency, the Committee see no reason to withhold from Subordinate Judges the power to appoint Receivers. They therefore propose that s. 505 of the Code should no longer be retained, for its effect in practice is often to defeat the purpose for which an application is made.

*Or. XLI.*—S. 554 of the Code has been omitted as unnecessary.

*Or. XLI, r. 5 (s. 545).*—The Committee have added words to s. 545 in order to make it clear that proceedings under a decree as well as execution decrees can be stayed by an Appellate Court; the recognition of preliminary decrees makes it the more necessary to have an express power to this effect instead of resting on an inherent power [*Balkishen Sahu v. Khugnu* (I. L. R. 31 C. 722)]. The Committee have introduced express words authorizing an *ex parte* stay, as the need for such an order constantly arises in practice.

*Or. XLI, r. 6 (s. 516).*—The Committee have modified this rule in order to make it clear that security may be required though the property has previously been taken in execution [see *Hukum Chand Bord v. Kamalanand Singh* (1 L. R., 33 C., 927)].

*Or. XLI, r. 7.*—The Committee have added this clause to meet particularly the case where the litigant does not quarrel with the decree but appeals from an order passed in execution of that decree (I. L. R. 28 C. 734).

*Or. XLI, r. 23*—After due consideration the Committee have thought it safer not to give legislative sanction to the views enunciated in *Habib Bakhsh v. Baldeo Prasad*, (1 L. R. 23 A. 167). The power of reversal and remand is liable to be abused, while the procedure under s. 566 is free from this liability and at the same time furnishes an effectual remedy.

The words at the end of the rule have been added to clear up a doubt which is stated by the Select Committee to exist as to whether evidence recorded at the original trial can be used on the trial after remand.

*Or. XLI, r. 34.*—The Committee consider it most important that an Appellate Court should have the fullest power to do complete justice between the parties.

The illustration indicates a type of case for which provision is intended to be made.

*Or. XLII, r. 1 (l)*—The extension of time for the payment of mortgage-money is obviously of much greater moment to the mortgagor than to the mortgagee. Therefore the Committee have provided for an appeal from an order refusing, but not from an order granting, an extension of time.

*Or. XLII, r. 1 (s. 502)*—Words have been added to avoid the conclusion at which the Madras High Court has recently arrived (I. L. R. 26 M. 369).

*Or. XLV, r. 1*—The words "or the construction of a document, which construction may affect the merits," have been omitted, as they appear to be sufficiently covered by the power to refer any question of law.

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# NOTES ON SCHEDULES

## SCHEDULE IV

The Committee have amended s. 22 of the Limitation Act to supply an omission which has been noticed by the High Courts; namely, the absence of any provision with regard to a devolution of interest *pendente lite* where it takes place otherwise than by reason of death. The section as amended will include not only cases in which a devolution of interest takes place *pendente lite* owing to death but also to other cases in which such devolution occurs.

The Code (s. 312) contemplates the confirmation of a sale of immovable property immediately on the expiration of the thirty days allowed by Article 166 of the Limitation Schedule. But the period allowed for an application to set aside a sale on the ground that the judgment-debtor had no saleable interest therein is sixty days (article 172). The result is that in some Provinces the confirmation of a sale is delayed for sixty days; whilst, in other Provinces, sales which have been already confirmed are liable to be set aside. The Committee think that in the matter of limitation an application under s. 313 should be brought into line with an application under s. 311 and they therefore propose to repeal article 172 and to amend article 166 so as to include applications under s. 313.

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## REPORT OF THE SELECT COMMITTEE

The following Report of the Select Committee on the Bill to consolidate and amend the laws, relating to the Procedure of the Courts of Civil Judicature was presented to the Council of the Governor-General of India for the purpose of making Laws and Regulations on the 14th February, 1908 —

We, the undersigned Members of the Select Committee, to which the Bill to consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature was referred, have considered the Bill and the papers noted in the appendix, and have now the honour to submit this our Report, with the Bill as amended by us annexed thereto.

2. The chief feature of novelty in the Bill is the re-arrangement of the clauses and the relegation of minor provisions to a schedule which may be altered by High Courts. We find from the papers before us that this scheme has met with the approval of every local Government and of all the High Courts in India. In our opinion it will give a much needed elasticity to our judicial procedure and will enable minor defects to be remedied as they arise without resort to the Legislature, and we recommend it to the Council. We have introduced two changes into

Part X of the Bill relating to the rule-making powers. In the first place we have provided that rules must be published before they are made; the result will be that s. 23 of the General Clauses Act will apply and that there will be an opportunity for the public to offer criticisms on any proposals for alterations of procedure before those proposals are finally passed into law. We have also made a change in the composition of the Rule Committees. It has been suggested by more than one authority that the interests of the Mofussal were not sufficiently represented on these Committees as constituted under the Bill. We recognise the force of this criticism and have accordingly provided that there shall be a Subordinate Judge on each Rule Committee and that the Vakil or pleader on the Committee shall be enrolled, but need not be practising, in the High Court, so that a Vakil or pleader practising in the Mofussal will be eligible. We further recommend that the Bill shall not come into operation until the 1st January 1909, in order that the public and the profession may have an opportunity of making themselves familiar with the re-arrangement.

3. We have carefully considered the criticisms on the Bill as introduced and the changes which we recommend are summarised below. It will be observed that we do not advise any departures of importance from the conclusions of the Special Committee which met at Simla during the past summer. That Committee had before it a mass of opinions from judicial and other authorities all over India dealing with every point of civil procedure, and they arrived at their conclusions only after a careful consideration of those opinions. We should not therefore in any case have dissented from them without strong reason, but in our judgment those conclusions are right and we accept them. Since the Bill was introduced it has been again examined and revised by some of our Colleagues and the criticisms on it have been digested in the Legislative Department. By these means our deliberations have been much expedited.

## CLAUSES.

*Clause 2 (2)*—The definition of "decree" has been generally accepted.

*Clause 11*.—We have restored the word "former" and have inserted explanation I on the suggestions of Sir Bhashyam Iyengar to remove a conflict of authority as to the meaning of the expression "former suit."

*Explanation V* has been omitted. We think it is liable to misconstruction and that the law is well established apart from the explanation.

*Clause 22*.—We have omitted clause 22 of the Bill as introduced, as in our opinion it is unnecessary. We think that sufficient provision is made for transfers under the succeeding clause.

*Clause 23*.—We have omitted the proviso which compelled applications to the High Court under the clause to be made through the District Court. This in our opinion merely duplicates applications and is undesirable.

*Clause 25*.—Clause 25 of the Bill as introduced has been rendered unnecessary by the omission of clause 22. We have accordingly taken

it out and have put in its place a new clause taking power for the Governor-General in Council to transfer cases from one High Court to another under certain circumstances. We think that the exercise of such a power may sometimes be necessary and it has been brought to our notice that the absence of any provision on the point in the existing Code has given rise to difficulty. The new clause proceeds on the analogy of s. 527 of the Code of Criminal Procedure, 1898.

*Clause 34*—The words "not being a decree for the enforcement of a mortgage or charge" have been omitted in this clause and elsewhere in order to make it clear that a decree for the payment of money does not include a decree for sale in enforcement of a mortgage or charge.

*Clause 46*.—We think that a decree-holder, who has obtained an interim attachment, should not be required to re-attach the property if before the determination of the attachment he applies for execution against the property, and we have altered this clause accordingly. There will now be only one attachment.

*Clause 51*—We have added a power to execute a decree by appointing a receiver, on suggestions of the Advocate-General of Madras.

*Clause 54*.—We have restored s. 265 of the existing Code. It has been pointed out that the provision in the Bill as introduced was opposed to the practice in some provinces under which all partitions of land paying revenue to Government are effected by the revenue-authorities.

*Clause 55*—We have carefully considered the provision as to breaking open dwelling-houses and have come to the conclusion that it should be limited to dwelling-houses in the occupancy of the judgment-debtor.

*Clause 57*—Sub-clauses (2) to (6) have been relegated to Rules (Or. XXI, r 39).

*Clause 59*—The remaining provisions as to the release of judgment-debtors have been brought up from the Rules and incorporated in this clause.

*Clause 60 (i) (g)*—We have omitted the words "Military or Civil" because they appear to be of no value. The word "pensioners" of itself covers every class of pensioner. The exemption has been extended so as to cover pensions granted out of any service family pension fund notified in that behalf by the Governor-General in Council.

*Clause 60 (i) (1)*.—This has been extended at the request of the Government of Burma.

*Clause 61*.—The words "be exempted from liability to attachment or sale in execution of a decree" have been substituted for the words "be released from attachment and shall be free from liability to sale in execution of a decree" in order to make it clear that the exemption extends to produce which has been hypothecated.

*Clause 62* has been brought into line with clause 55 as now amended.

*Clause 66 (1)*.—The wording has been altered on the suggestion of the Hon'ble Mr. Justice Aikman so as to put the meaning beyond doubt.

*Clause 79 (2)*—This saving was accepted by the Select Committee of 1903 and we think it desirable to have it in the Bill in order to avoid possible doubt.

*Clause 92 (1)*—It has been suggested to us by several authorities that Local Governments should be empowered to invest Courts subordinate to District Courts with power to try cases under this clause, and we think that this suggestion should be accepted. The necessary words have been added.

*Clause 96 (3)* of the Bill as introduced has been omitted. The case law on the subject is sufficiently clear and considerable objection has been taken to the sub-clause.

*Clause 98*.—The wording of the proviso has been altered; it now deals only with the decision on the point of law referred.

*Clause 101*.—Sub-clause (1) (b) has been added in order to give a right of appeal against the decision of the Court on a special case, this is in accordance with the recommendation of the Special Committee, but appears to have been omitted from the Bill by mistake.

*Clause 107*, Sub-clause (1) is new. We think it desirable to have in the body of the Code a general provision about the powers of an Appellate Court.

*Clause 134* is new. It supplies an omission.

*Clauses 142 and 143* have been brought up from the Rules. We think they should be in the body of the Code.

*Clause 144*—Sub-clause (2) has been added on the suggestion of the Calcutta High Court. We agree that restitution which may be obtained by application under this clause should not be made the subject of a separate suit.

## SCHEDULE I.

### ORDER I.

*Rules 1 and 3*—The words "act or" have been added before the word "transaction."

*Rule 3*.—This rule has been amplified so as to bring it into line with r. 1.

*Rule 5*.—The words "cause of action" have been struck out. They have given rise to considerable difficulty in England.

*Rule 8*.—We have, on the suggestion of the Advocate-General of Madras, added the words "or for the benefit of" after the words "on behalf of."

### ORDER III.

*Rule 4 (3)*.—We have adopted the alternative draft suggested by the Shinde Committee in their Report.



# ORDER VI.

*Rule 18.*—We have substituted the words " he shall not be permitted to amend as.....the case may be " for the words " such other to amend.....become void."

# ORDER VII.

*Rule 17 (1).*—On the suggestion of the British Indian Association the word " account " has been substituted for the word " book."

# ORDER IX.

*Rule 4.*—We have struck out the provisions about limitation contained in this rule. These provisions will be incorporated in the Bill to consolidate and amend the Limitation Act.

*Rule 13.*—We think it necessary to provide, specially for cases in which it may not be possible, to set aside the decree as against the applicant only.

# ORDER XX.

*Rule 18.*—This rule has been altered so as to correspond with the amended clause 54.

# ORDER XXI.

*Rule 1 (2).*—This sub-rule has been inserted on the suggestion of the British Indian Association.

*Rule 7.*—The words " or of the jurisdiction of the Court which passed it," have been omitted. In our opinion a Court executing the decree of another Court ought not to go into any question as to the jurisdiction of the Court which passed it

*Rule 20.*—This rule is new. It is inserted in order to make it clear that the provisions as to cross-decrees and cross-claims apply to the case of mortgage-decrees. The rule also makes it clear that the expression " decree for the payment of money " and other similar expressions in the Code do not include a decree for sale in enforcement of a mortgage or charge.

*Rule 45*—We have decided to recommend the omission of this rule from the Bill

It was taken from the Bill of 1903 but met with considerable criticism and strong objection has been taken to it by the Madras Board of Revenue and the British Indian Association. In our opinion the procedure prescribed in this rule is cumbrous and there would be little or no practical advantage from it.

*Rule 90.*—The words " or fraud " have been added after the word " irregularity." We think that the existing law as contained in s. 311 of the present Code is defective, the omission in the section to refer to fraud as a ground for setting aside a sale having led some Courts to hold that an order on an application setting up fraud as a ground for relief is, unlike an order made on an application under s. 311, a decree and open to second appeal. This result which often involves a considerable prolongation of these proceedings, is in our opinion undesirable. We think

that applications for the setting aside of sales should, so far as the procedure applicable to them is concerned, stand on the same footing whether they are based on the ground of irregularity or on the ground of fraud.

*Rules 95 and 96.*—We have struck out the provision about limitation contained in these rules. We agree with the Hon'ble Mr. Justice Miller that it would be more appropriate to incorporate them in the Limitation Act, and we have suggested their incorporation in the Bill to amend and consolidate that Act which is now before Council.

## ORDER XXII.

*Rules 3 and 4* —Rules 3 and 4 have been amended so as to provide that if no application for substitution is made within the time allowed by law the suit shall abate. We have struck out the provision that the Court may make an order declaring the abatement as in our opinion it is unnecessary and likely to give rise to difficulty.

*Rule 6.*—The provision as to ante-dating the judgment has been struck out and in its stead we suggest a provision to the effect that the judgment shall have the same force and effect as if it had been pronounced before the death took place. In our opinion this is all that is required.

## ORDER XXXIV.

Some of the rules in the order have been redrafted.

The Transfer of Property Act does not contain any provision for the passing of a final decree in cases where payment is made in accordance with the terms of the preliminary decree. This is in our opinion an omission and we have provided in rr 3 (i), 5 (1) and 8 (1) for the passing of final decrees in such cases.

We approve of the proposal to repeal the provisions of s. 99 of the Transfer of Property Act. We think that those provisions have worked considerable hardship and are not really needed. The first part of the section enacts that a mortgagee shall not bring the mortgaged property to sale otherwise than by instituting a suit under s. 67 of the Act in so far as it precludes the mortgagee from selling the mortgaged property under a judgment unconnected with the mortgage-debt, it is in our opinion inexpedient; it is beyond doubt competent to a mortgagee to purchase the equity of redemption from the mortgagor by an agreement subsequent to and distinct from the mortgage transaction, and we can see no reason why it should not be equally competent to him to have it sold in satisfaction of any claim which he may have against the mortgagor unconnected with the mortgage. (*Khizarajmal v. Daim*, I. L. R. 32 C. 296; *Lisle v. Reeve*, 1902, A. C. 461). In so far as it precludes the mortgagee from selling the property under a judgment for the mortgage-debt, it serves no useful purpose. We understand that the provision was enacted to prevent mortgagees from suing their mortgagors on the debt as such and in execution selling the mortgagor's interest in the property; we, however, think that no such provision was needed, seeing that under the law, as it stood prior to the Act, the Courts never allowed the sale of a bare equity of redemption under a judgment on the covenant (*Syed Eman v. Rajcoomar*, 23 W. R. 187; *Khizarajmal v. Daim*, I. L. R., 32 C. 296).

**ORDER XL.**

*Rule 4.*—We have redrafted this rule on the lines of s. 15 (4 of the Provincial Insolvency Act, 1907). We think that the power to imprison receivers is too wide and should be omitted.

**ORDER XLI.**

*Rule 24.*—We have struck out this rule as in our opinion it is unduly restrictive.

**ORDER XLIII.**

*Rule 1.*—We suggest that there should be appeals from orders pronouncing judgment against a party under Or. VIII, r. 10, Or. X, r. 4, and Or. XVI, r. 20. These orders are under the present law appealable as decrees; but having regard to the definition of a decree in the Code they would no longer be appealable in that way, and we think it necessary to make them appealable as orders. We have also given an appeal against an order made under r. 21 of Or. XI.

*Appendices.*—The forms have been amplified and, where necessary, redrafted. We think that, as now settled they are an improvement on the forms in the present Code.

H. ERLE RICHARDS.  
MADHO LAL.  
H. A. SIM.  
RASHBEHARY GHOSE.  
S. ISMAY.  
Mo. BAH TOO.

*The 12th February, 1908*

# A COMPARATIVE TABLE SHOWING THE SECTIONS OF ACT XIV OF 1882 AND THE CORRESPONDING SECTIONS AND RULES OF ACT V OF 1908

Section of Act XIV of 1882.	Section, Order, Rule of Act V of 1908	Section of Act XIV of 1882.	Section, Order, Rule of Act V of 1908.
1	Sec. 1	40	Or. III, r. 5
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3	Secs. 154, 156, 157, 158	42	Or. II, r. 1
4	Sec. 4	43	" " r. 2
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5	" 7	45	" " rr. 3, 6
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(c) & (d)	Omitted	47	Cf. Or. II, rr. 6, 7
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7	Cf. Sec. 4	49	Cf. Sec. 137
8	Sec. 8	50	Or. VII, rr. 1, 2, 4, 5, 6
9	Omitted	51	Or. VI, rr. 14, 15 (1)
10	Do.	52	" r. 15 (2), (3)
11	Sec. 9	53	" r. 17; cf. Or. VII,
12	" 10		" r. 11
13	" 11	54	Or. VII, r. 11; cf. Or.
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14	" 14	55	" r. 12
15	" 13	56	" r. 13
16	" 15	57	" r. 10
16A	" 16	58	" r. 9
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19	" 19	para	Or. IV, r. 2
20	" 17	59	Or. VII, r. 14
21	Omitted	60	" r. 15
22	Do.	61	" r. 16
23	Secs. 22, 23 (1)	62	" r. 17
24	" 22, 23 (2)	63	" r. 18
24, paras.		64	Sec. 27, Or. V, r. 1
1 & 3	" 22, 23 (3)	65	" r. 2
24, para.		66	" r. 3
2	Omitted	67	" r. 4
25	Sec. 24	68	Or. V, r. 5
26	Or. I, rr. 1, 4 (a)	69	" r. 6
27	" r. 10 (1)	70	" r. 7
28	" rr. 3, 4 (b)	71	" r. 8
29	" r. 6	72	" r. 9
30	" r. 8 (1)	73	" r. 10
31	" r. 9	74	" r. 11
32	" rr. 8 (2), 10 (2),	75	" r. 12
	(3), (5), 11	76	" r. 13
		77	" r. 14
33	" r. 10 (4)	78	Or. V, r. 15
34	" r. 13	79	" r. 16
35	Or. I, r. 12	80	" r. 17
36	Or. III, r. 1	81	" r. 18
37	" r. 2	82	" rr. 19, 20 (1)
38	" r. 3	83	" r. 20, (2)
39	" r. 4	84	" r. 20, (3)

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Section of Act XIV of 1882.	Section, Order, Rule of Act V of 1908	Section of Act XIV of 1882	Section, Order, Rule of Act V of 1908
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86	Or V, r 23	112A	Or. XIII, r. 6
87		113	" r. 7
88	" rr 21, 29	114	" r. 8
89	" r 25	115	" r. 9
90	" r 26	116	" r. 11
91	" r 30 (1) (2)	117	Or. XIV, rr. 1, 2
92	" r 30 (3)	118	" r. 3
93	Or XLVIII, r. 1	119	" r. 4
94	Sec 142, Or XLVIII, r. 2	120	" r. 5
95	Sec 143	121	" r. 6
96	Or IX, r 1	122	" r. 7
97	" r 2	123	Or. XV, r 1
98	" r 3	124	" r. 2
99	" r 4	125	" r. 3
99A	" r 5	126	" r. 4
100	" r 6	127	Or. XVII, r. 1
101	" r 7	128	" r. 2
102	" r 8	129	" r. 3
103	" r 9	130	Or. XVI, r. 1
104	Omitted	131	" r. 2
105	Or IX, r 10	132	" r. 3
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107	" r 12	134	" r. 5
108	" r 13	135	" r. 6
109	" r 14	136	" r. 7
110	Or VIII, r 1	137	" r. 8
111	" r 6	138	" r. 9
112	" r 9	139	" r. 10
113	" r 10	140	" r. 11
114	Cf Or VI, r 2	141	" r. 12
115	Or VI, rr 14, 15	142	" r. 14
116	Or " rr 16, 17	143	" r. 15
117	Or X, r 1	144	" r. 16
118	" r 2	145	" rr. 10 to 13, 17, 18
119	" r 3	146	" r. 10
120	" r 4	147	" r. 20
121	Or XI, r 1	148	" r. 21
122	Cf Or XLVII, r 2	149	Or. XVIII, rr. 1, 2 (1)
123	Or XI, r 3	150	" r. 2 (2), (3), 3
124	" r 5	151	" r. 4
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129	Or XI, rr. 12, 13	156	Sec. 138
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131	" r 15	158	" r. 10
132	" r 17	159	" r. 11
133	" r. 18 (1)	160	" r. 12
134	" r. 18 (2)	161	" r. 13
135	" r. 20	162	" r. 14
136	" r. 21	163	" r. 15
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198	Sec 33, Or XX, r. 1	245	Or XXI, r 17
199	" r. 2	245A	Sec 56
200	} Cf. Sec. 137	245B	Or XXI, r. 37
201		246	" r. 18
202	Or XX, r 3	247	" r. 19
203	" r 4	248	" r. 22
204	" r 5	249	" r 23
205	" r 7	250	" r 24 (1)
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206 para. 3	Sec. 152	252	Sec. 52
207	Or XX, r 9	253	Cf Sec 145
208	" r. 11	254	Or. XXI, r 30
209	Sec 31	255	" r. 12
210	Or XX, r 11	256	" r. 11 (1)
211	) Sec 2, (12)	257	" r 1
212		257A	Omitted
213	) Or XX, r. 12	258	Or XXI, r. 2
214	" r. 13	259	" r. 31
215	" r. 14	260	" r. 32
215 A	" r. 15	261	Or. XXI, r. 34 (1) to (4)
216	" r. 16	262	" r. 34 (5)
217	" r. 19	263	" r. 35
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219	} Cf Sec. 35; (Or XX, r. 6 (3))	265	Sec. 51
220		266	" 60
221		267	Or. XXI, r. 41
222		268	" r 16
223 para. 1	Sec 38	269	" r 43
223 paras. 2	" 39	270	" r 51
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223 " 5	Or. XXI, r. 4	273	" r. 53
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225	" r. 7	276	Sec. 64
226	" r. 8	277	Or. XXI, r. 56
227	" r. 9	278	" r. 58
228	Sec. 42	279	" r. 59
229	" 43	280	" r. 60
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230 para. 1	Or. XXI, r. 10	283	" r. 63
230 " 2	" r. 21	284	" r. 64
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234	" 50	290	" r. 68
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301	" r. 79 (3)	365	Or. XXII, r. 3 (1)
302	" r. 80	366	" r. 3 (2)
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304	" r. 82	368	" r. 4
305	" r. 83	369	" r. 7
306	" r. 84	370	" r. 8
307	" r. 85	371	" r. 9 (1, 2)
308	" r. 86	372	" r. 10
309	" r. 87	372A	" r. 9 (3)
310	" r. 88	373	Or. XXIII, r. 1
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315	" r. 93	378	" r. 3
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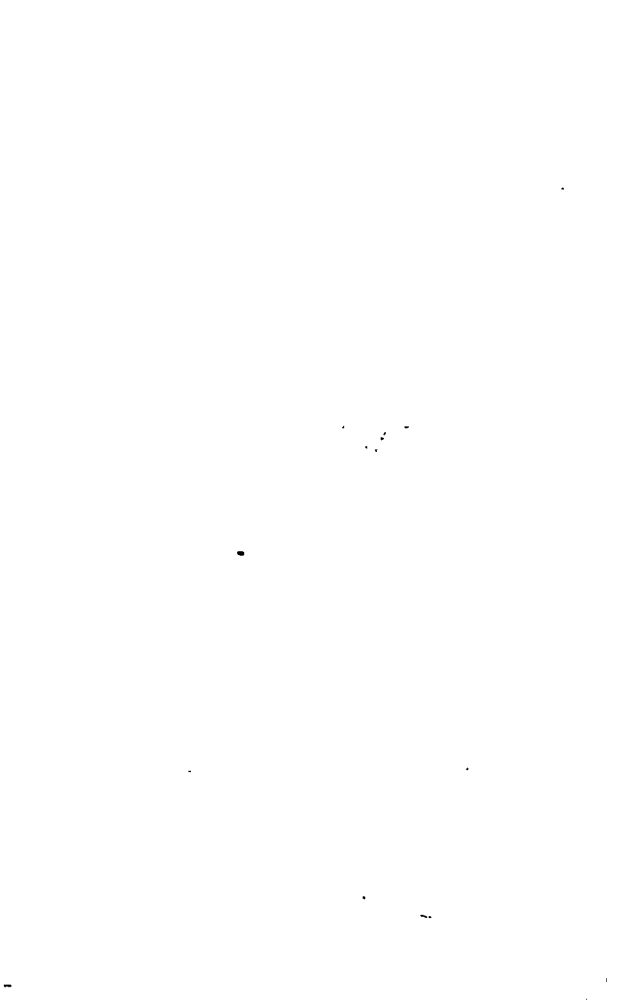
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426	"	485	" " r. 6
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555	" r. 5	605	" r. 10
556	" r. 6	606	" r. 11
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558	" r. 8	608	" r. 13
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578	" r. 28	628	" r. 5
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Sale in execution of decree held after Act V of 1894 came into operation, the execution-proceedings being commenced before. On an application to the High Court under s. 622, C. P. Code, 1882 (s. 115) to set aside the sale, held by the Full Bench, that Act V of 1894, has no retrospective effect, and does not apply to execution-proceedings commenced before that Act came into force.—*Girish Chunder v. Apurba Krishna*, 21 C. 9 (14 C. 630, 15 C. 730 and 393, 16 C. 207, referred to). This case has been overruled by *Jayodanund v. Amrita Lal*, 22 C. 707, F. B.

Where a District Judge directed the administrators appointed under Regulation VII of 1827 to deliver the property of the deceased to one of the rival claimants, who was judicially declared to be the heir of the deceased, held that, so long as the party against whom the decision in the matter of the rival claims was given had a right of appeal, the order of the Judge was one which he could not make under the Regulation: and that being so, the High Court had power to interfere under this section.—*Vishrambhar v. V. Suder*, 16 B. 708 and 711-note.

Where a District Judge relying upon an unverified report from the Secretary of the Bar Association framed and published the names of certain persons in the list of touts, held that the High Court may interfere in such case under the wide powers of superintendence given to it by the Charter Act.—*In re Siddeshwar Boral*, 4 C. W. N. 36

The jurisdiction which the Civil Court acquires upon a reference to it under s. 55 of the Land Registration Act is that of a Civil and not of a Revenue Court and its decision is subject to revision by the High Court. *Ummatul Mehdi v. Kulsum*, 35 C. 120: 12 C. W. N. 16: 8 C. L. J. 24. Followed in *Rameswar Singh v. Raghunath Singh*, 35 C. 571.

An order granting a certificate under the Succession Certificate Act (V of 1889) on the applicant's furnishing security is not subject to revision by the High Court.—*Bai Derkore v. Lal Chand*, 19 B. 790

The High Court is competent to exercise revisionary jurisdiction in civil matters tried by the Consular Court at Zanzibar.—*Khoja Sivji Hasam Gulam*, 20 B. 480.

No Court, other than a Court of Appeal or a High Court acting under this section, can discharge an order of attachment issued by another Court.—*Kolasherri v. Kolasherri*, 4 M. 131.

The fact that a Court has misunderstood the effect of a document in evidence does not constitute a ground upon which the High Court can interfere in revision under this section.—*Dasrath Rai v. Sheodin Rai* 16 A. (15 A. 139, referred to).

A decision taking into consideration as evidence an unregistered lease was set aside under this section.—*Guru Nath v. Chenbasappa*, B. 745.

In the case of two self-contradictory decrees made by the lower Appellate Court in the same matter, the High Court in the exercise of its revisional jurisdiction set aside the whole proceedings and remanded the case to the lower Court for fresh decision; *Asita Mohan v. Syed Haidar*, 19 C. L. J. 9.

The revisional jurisdiction with which the High Court can interfere with an order under s. 36 of the Legal Practitioner Act is of a ve

## COMMENTARY.

The power given to the Local Government by section 269 of the old Code to make rules for the maintenance of attached live-stock is now given to the High Court by s. 129 (2) (b). Or. XXI, r. 43, reproduces the old section 269, but it does not reproduce the provision requiring the officer attaching the property to act in accordance with the rules notwithstanding they may be inconsistent with the provisions of the section. S. 157 of the new Code keeps alive the rules, &c., made under the old Code, so far as they are consistent with the Code of 1908. There is nothing in the Code of 1908, as distinguished from the orders in the first schedule to the Code, which is inconsistent with the rules issued under s. 269, though there is an inconsistency between the rules and Or. XXI, r. 43. But the High Court has power to alter the rules in schedule I. This being so, it does not follow that because the rules made under the old section are inconsistent with the rules in the schedule, they are not consistent with this Code within the meaning of s. 157. But until rules are made by the High Court, the rules made under s. 269 of the old Code are in force. *Re The District Munsif of Tiruvalur* (Referring officer); 87 M. 17 24 M. L. J. 637 20 I. C. 775.

In s. 128 of the C. P. Code of 1908, there is legislative recognition that such suits as were maintainable in respect of debts at the time of the Common Law Procedure Act, 1852, are still maintainable in British India. The Indian Contract Act has not altered the law relating to the recovery of debts and liquidated demands; *P. R. & Co. v. Bhagwandas*, 34 B. 192.

129. Notwithstanding anything in this Code, any High Court established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, may make such rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.

[S. 652 PARA. 3.]

## COMMENTARY.

The italicized words were inserted in the section by the Amending Act XIII of 1916.

This section corresponds to the third para. of s. 652 of the C. P. Code, 1882 with some modifications.

Rules framed by the High Court regarding practice as to granting leave to sue persons out of jurisdiction, in the Presidency Small Cause Court, were held to be *ultra vires* and void.—*Rajam Chetti v. Seshayya*, 18 M 236.

Rule 515-A framed by the High Court so far as it authorises the Registrar or Master to grant leave under cl. 12 of the Letters Patent is

special nature, and cannot be invoked except in furtherance of justice, *Hari Charan v. District Judge of Dacca*, 11 C. L. J. 518.

**Effect of Delay in presenting Revision Petition.**—Where an order was sought to be revised, under this section by a petition presented more than 8 months from the date of the order and after five months of inexcusable delay, there is no sufficient reason to excuse the delay; *Vazhakuttia v. Mamnu Kutti*, 24 I. C. 56.

The High Court interfered on revision although the revision petition was filed after a long delay, directing the petitioner to pay the costs of the opposite party; *Nur Miah v. Chandra Mohan*, 23 I. C. 939.

The High Court will not revise an order made more than three years ago, unless it feels that by interference complete justice can be done to both the parties; *Asita Mohan v. Syed Habibar Rasul*, 19 C. L. J. 9: 22 I. C. 801; *Yagnaswami Aiyar v. Chidambaranatha*, (1922) M. W. N. 180: 65 I. C. 782.

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*ultra vires*.—*Laliteswar Singh v. Rameswar Singh*, 34 C. 619: 5 C. L. J. 405: 11 C. W. N. 649.

No rule of the High Court can add to or modify the conditions and limitations laid down in the Limitation Act. It is true that the Court has the power of making certain rules given by this section, and those rules must be consistent with the Code. But there is no power to frame a rule modifying any rule or mode as to computation of limitation prescribed expressly or by necessary implication in the Limitation Act.—*Chuni Lal v. Lahyabhai*, 32 B. 14. 9 Bom. L. R. 1188.

Power of High Court to make rules regarding counsel's fees—Resolution not published in the Gazette—*Clark v. Cable*, A. W. N. (1905), 83.

When a summons forwarded by registered post, under r. 107 of the Bombay High Court Rules (Original Side), is tendered to, and refused by the defendant, he refuses it at his own risk. Where he disputes the actual delivery or tender of delivery, it is a mere question of fact, and the onus is on him; *Roopchand v. Hajee Hussein*, 16 Bom. L. R. 204: 24 I. C. 487.

The provisions contained in rule 725 of the Bombay High Court rules deal with the deposit of security in all appeals from the original jurisdiction of the High Court, and are inconsistent with the provisions of Or. XLI, r 10 of the C. P. Code and accordingly by virtue of s. 129 of the C. P. Code, Or. XLI, r 10, does not apply; *Behram Jung v. Haji Sultan Ali*, 37 B. 572: 14 Bom. L. R. 1106.

S 129 provides in respect of High Courts established under the Indian High Courts Act and by Letters Patent, "nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code." It is therefore obvious that the new Code of Civil Procedure has nothing to do with a matter governed by old rules in force before 1909; *In re a Vakil's application*, 37 C. 853 (855).

**130.** A High Court not established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, may, with the previous approval of the Local Government, make with respect to any matter other than procedure, any rule which any High Court so established might, under section 15 or section 107 respectively of those Acts, make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency-town. [S. 652, PARA. 2.]

This section corresponds to the second para. of s. 652 of the C. P. Code of 1882, with some modifications.

The words "or the Government of India Act, 1915," were inserted by the Amending Act XIII of 1916. The words "or section 107 respectively of those Acts" were substituted for the words "of that Act" by the same Amending Act.

The word "approval" was substituted for the word "sanction" by the Repealing and Amending Act XXIV of 1917, Sch. I.

## PART IX

### SPECIAL PROVISIONS RELATING TO THE CHARTERED HIGH COURTS.

**116.** This part applies only to High Courts which are or may hereafter be established under the Indian High Courts Act, 1861. [S. 631.]

Part to apply only  
certain High  
Courts.

This section corresponds to section 631 of the C. P. Code, 1882: material change has been introduced in this section.

**117.** Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts. [S. 632.]

Application of  
to High Courts.

### COMMENTARY.

This section corresponds to section 632 of the C. P. Code of 1882. The changes introduced in this section are the substitution of the word "except" for the word "except" and the words "this Part or in Part X or rules," for the words "chapter and in section 652" and the insertion of the word "shall" before the word "apply." Section 652, of the old Code related to the power of the High Courts to make subsidiary rules of procedure.

By the terms of this section the Code is made applicable to the High Court; and Or XLIII, r. 1 gives right of appeal from an order, refusing to set aside an order of dismissal made under Or. X, r. 8; *Mathura Chandra v. Haran Chandra*, 23 C. L. J. 443

Clause 15 of the Letters Patent for the High Court of Judicature at Madras, which allows an appeal to the High Court from the judgment of one Judge of that Court, is controlled by s. 629, C. P. Code, 1882. Or XLVII, r. 1, 9) which provides that an order of a Civil Court rejecting an application for review of judgment shall be final—*Achaya v. Anavelu*, 9 M 253; *Bombay and Persia Steam Navigation Co. v. S. S. Ari*, 12 B 171, and *Aubhoy Churn Shamant v. Lochum*, 16 C 788

Under s. 104 and s. 105 read with s. 117 of the C. P. Code, no appeal lies, under section 10 of Letters Patent for the High Court for N. W. Provinces, from an order of a single Judge refusing an application for leave to appeal in *forma pauperis*.—*Banno Bibi v. Mehdi Husain*, A. 375, (9 M 253 and 447, followed; 9 C 482, distinguished)

This section makes the provisions of Or XLI, r. 10 applicable to High Courts, in insolvency cases; *Lakhipriya v. Raikishore*, 43 C. 243; C. W. N. 140 (27 M. 121 not followed).



131. Rules made in accordance with section 129 or section 130 shall be published in the Gazette of India or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date may be specified have the force of law. [S. 652, PARA. 4.]

This section corresponds to the fourth para. of s. 652 of the C. P. Code of 1892. See, 10 Bom. L. R. 204 noted under s. 129.

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**118.** Where any such High Court considers it necessary that a decree passed in the exercise of its original civil Jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs.

and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation. [S. 634.]

### COMMENTARY.

This section corresponds to section 634 of the C. P. Code, 1882. No material change has been introduced in this section. The words *where any such* have been substituted for the word "whenever"; the word *passed* has been substituted for the word "made" and the word *executed* has been substituted for the word "enforced."

**119.** Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys. [S. 635.]

### COMMENTARY.

This section corresponds to s. 635 of the C. P. Code, 1882, with these exceptions that the word *where* has been substituted for the word "when" just after the word "except" and the word "ordinary" which occurred in the old section before the words "original civil jurisdiction" has been omitted.

The Rule of Court, dated the 22nd May 1883, authorising legal practitioners in certain cases to appoint other legal practitioners to hold their briefs, and appear in their place, was passed to facilitate the work of the Court and for the convenience of the pleaders practising before it, and was fully within the powers conferred upon the High Court by s. 635, C P Code, 1882 (s. 119)—*Matadin v Gangabai*, 9 A. 613.

Reading together sections 7 and 8 of the Letters Patent for the High Court and ss. 2 (s. 2) 36, (Or. III, r. 1), 39 (Or. III, r. 4) and 635 (s. 119) of the C. P. Code, 1882, an Advocate on the rolls of the Court can, for the purposes of the Code, perform on behalf of a suitor all the duties that may be performed by a pleader, subject to his exemption in the matter of a *vakalatnama*, and to any rules which the High Court may make regarding him.—*Bakhtawar Singh v. Sant Lal*, 9 A. 617,

# PART XI

## MISCELLANEOUS.

**132.** (1) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court.

Exemption of certain women from personal appearance.

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code. [S. 640.]

## COMMENTARY.

This section exactly corresponds to s. 640 of the C. P. Code of 1882. The old section has been reproduced without any change of language.

S 56 prohibits the arrest or detention in the civil prison of a woman in execution of a decree for money. *See* notes under that section. *See* also Or. XXVI, r. 1, which provides that a Court may issue a commission for examination of witnesses who are exempted under this Code from attending the Court.

As to examination on commission of woman in criminal cases, *see* the article in 16 C. W. N. 282n.

**Privileges of Pardanashin Women.**—In an application for the examination of a *pardanashin* lady under commission, the question is not whether the lady, who does more or less appear in public, should be made to appear in Court, but whether the Court ought to compel her to continue to appear. *Held*, that the Court should not force into public gaze, a woman who may have gone outside the *Parida*, and who may have offended against the rules of her class—*Moresh Ghunder v. Manick Lall*, 26 C. 650: 3 C. W. N. 751; *Chamatkar Mohiney v. Moresh Ghunder*, 3 C. W. N. 750 26 C. 651-note; *Pravat Kumaree v. Oporba Kissen*, 3 C. W. N. 753 *See* also, *Kisto Mohun v. Adarmoney*, 2 Hyde. 88.

A plaintiff applied under this section, for issue of a commission for the examination of three female witnesses on the grounds that one was in mourning and therefore, according to custom, was not to leave her house for two or three years; the other was too old, sickly, and physically unable to attend the Court; and the third was about to go upcountry, and could not stay in Bombay until the hearing. *Held* that the circumstances alleged were not such as to justify the issue of a commission.—*Rustomji Framji v. Banoobai*, 14 B. 584.

Exception from arrest on process of execution does not extend to all women of rank, but is limited to the women "who, according to the customs and manners of the country, ought not to be compelled to appear in public."—*Davis v. Middleton*, 8 W. R. 288.

The High Court has the power of making rules for the admission of pleaders to practise in the Bombay Court of Small Causes, and the Bombay Court of Small Causes, under section 9 of the Presidency Small Cause Courts Act (XV of 1882), also has the power of making similar rules with the sanction of the High Court—*In re Pleders of Bombay High Court*, 8 B. 105 (p. 134).

A vakil of the High Court has no right to file warrant of attorney before a Judge sitting on the Original Side of the High Court, in respect of an application praying for the removal of a suit pending before the Midnapore District Court to itself in its extraordinary original civil jurisdiction. The C. P. Code, of 1908 has nothing to do with a matter governed by old rules in force before 1909.—*In re Vakils' application*, 87 C. 853.

120. The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20. [SS. 638, 639.]

Provisions not applicable to High Court in original civil or insolvent jurisdiction.

### COMMENTARY.

Sub-section (1) of this section corresponds to the first part of s. 638 of the C. P. Code of 1892. The latter portion of the first part of s. 638 of the old Code, has been omitted and reproduced in Or. XLIX, rule 3, with some modifications.

The other provisions relating to the chartered High Courts are to be found in Or. XLIX.

Sub-section (2) of this section by which it was provided that nothing in this Code shall extend or apply to any Judge of a High Court in the exercise of jurisdiction as an insolvent Court has been repealed by the Presidency Towns Insolvency Act III of 1909, s. 127.

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In the case of an unmarried girl of some 12 years of age, without any distinguished rank or station, but belonging to that class of Hindu society, the female members of which never go out in public, it was held that she was entitled to the privilege even though it was essential to have her testimony in a case recorded by the Judge himself and that her testimony should be taken out of Court under suitable precautions.—*Mainath Singh v. Motta Koor*, 24 W. R. 375.

S. 132 of the C. P. Code covers the case of a Hindu lady of the class and position in society of the defendant who has abandoned entirely the protection of the *Purda*. Such a lady claiming the privilege ought not to be made to pay the costs of the commission but the costs of the commission will be the costs in the cause; *Elias Joseph Cohen v. Jyotsna Ghoshal*, 22 C. W. N. 147 45 C. 452.

On the contention of the defendant that his witness, a *pardanashin* lady was entitled to be examined on commission at a place of her own choice or where she happened to be at the time of the issue of the commission.—*Held*, that she had no such right, *Khitipati Roy v. Dharani Mohan*, 48 C. 448.

Privileges of *pardanashin* ladies, when attending Court, in palanquin as witnesses, considered. The general rule is that the lady should be admitted in the Court in her palanquin and give her evidence in it after being properly identified.—*Rookia Banu v. Roberts*, 1 B. L. R. S. N. 5.

The examination by commission of a *pardanashin* woman is not necessary where she can be examined in Court, in a *palki*, or otherwise, on a proper identification.—*Nusrat Banoo v. Mahomed Sayem*, 18 W. R. 230.

Where a Mahomedan lady of position residing within the town, in which a Court held its sitting, was willing to admit the Court to an interview at her own residence, the Judge was held to have done wrong in insisting upon her personal appearance in Court.—*Zohurutollah v. Asal-oodeen*, 15 W. R. 129.

The provisions of s. 132 of the Code, are not restricted to the examination of witnesses. They apply also to parties to suits or proceedings before the Court; *Rahmatunnissa Begum v. Ahmed Husain*, 11 I.C. 668.

**133.** (1) The Local Government may, by notification in the local official Gazette, exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption.

(2) The names and residences of the persons so exempted shall from time to time, be forwarded to the High Court by the Local Government and a list of such persons shall be kept in such Court, and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such Subordinate Court.

# PART X

## RULES.

- 121.** The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part. [NEW.]
- Effect of rules in First Schedule.

## COMMENTARY.

This section is new. The object of the distribution of the provisions of the Code between its body and the rules and the advantages for such distribution will be found in the report of the Special and Select Committees.

Under section 192 of the Madras Estates Land Act (I of 1908), the provisions of the C. P. Code applied to the presentation of a plaint in a suit under the Estates Land Act under s. 121 of the C. P. Code, 1908, the rules in the first Schedule have effect as if enacted in the body of the Act. Order IV, rule 1, provides that every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf. It is therefore open to the Collector to appoint an officer to whom plaints may be presented but this was not done; therefore presentation of plaints to Head Clerk, who is not authorized to receive plaints, is not valid, *The Receiver of the Estates v. Suraparazu*, 38 M. 295.

- 122.** High Courts established under the Indian High Courts' Act, 1861, or the Government of India Act, 1915, and the Chief Courts of the Punjab and Lower Burma, may from time to time after previous publication make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence and may by such rules annul, alter or add to all or any of the rules in the First Schedule. [NEW.]
- Power of certain High Courts to make rules.

## COMMENTARY.

The italicized words were inserted in the section by the Amending Act XIII of 1916.

Sections 122 to 128 excepting s. 125 provide for rules to be made by Chartered High Courts for regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, e.g., Courts subject to their appellate jurisdiction. S. 128 says that these rules must not be inconsistent with the provisions in the body of the Code.

The High Court has power to alter, amend and add to rules of procedure laid down in the Code of Civil Procedure according to s. 122, but

(3) Where any persons so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs. [S. 641.]

## COMMENTARY.

This section corresponds to s. 641 of the C. P. Code of 1882, with this modification that the words, "*and may, by like notification, withdraw such privilege,*" which occurred in para. 1 of the old Code, have been omitted.

A Rajah instituted a rent-suit through an agent. The Deputy Collector cited the Rajah himself to appear and be examined. He excused himself on the ground of the privilege under this section, and petitioned that the evidence of his general agent might be taken. The Deputy Collector dismissed the suit, holding that the Rajah himself was bound to obey his citation. *Held* that the Deputy Collector was bound to receive the evidence of the general agent, and that the Rajah who had the privilege which he claimed, was not bound to attend.—*Juggut Indur Banwaree v. Soorjacomar*, Marsh. 627.

**134.** The provisions of sections 55, 57 and 59 shall apply, so far as may be, to all persons arrested under this Code. [New.]

Arrest other than  
in execution of dec-  
ree.

This section is new. It has been added to supply an omission. S. 55 relates to arrest and detention in execution of a decree. S. 57 relates to subsistence allowance and s. 59 relates to the release of the judgment-debtor on the ground of illness.

**135.** (1) No Judge, Magistrate or other Judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court.

Exemption from  
arrest under civil  
process.

(2) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue-agents and recognized agents and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process other than process issued by such tribunal for contempt of Court while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal.

(3) Nothing in sub-section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for immediate execution or where such judgment-debtor attends to show cause why he should not be committed to prison in execution of a decree. [S. 642.]

it has no power to alter the period of limitation provided by the Limitation Act; *Madan Gopal v. Malwa Ram*, 1923 L. 96.

S. 5 of the Limitation Act, as it stands, does not extend to applications to set aside *ex parte* decrees, but it is within the powers of a High Court acting under s. 122 of the C. P. Code to frame a rule making its provisions applicable to the periods of limitation prescribed in that Act for presenting applications of this nature; *Sennimalai Goundan v. Palani Goundan*, 32 I. C. 975

123. (1) A Committee, to be called the Rule Committee, shall be constituted at the town which is the usual place of sitting of each of the High Courts referred to in section 122.

Constitution of Rule Committees in certain provinces.

(2) Each such Committee shall consist of the following persons, namely:—

(a) three Judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge or (in the Punjab or Burma) a Divisional Judge for three years.

(b) a barrister practising in that Court,

(c) an advocate (not being a barrister) or vakil or pleader enrolled in that Court,

(d) a Judge of a Civil Court subordinate to the High Court, and

(e) in the towns of Calcutta, Madras and Bombay, an attorney.

(3) The members of each such Committee shall be appointed by the Chief Justice or Chief Judge, who shall also nominate one of their number to be president:

Provided that, if the Chief Justice or Chief Judge elects to be himself a member of a Committee, the number of other Judges appointed to be members shall be two, and the Chief Justice or Chief Judge shall be the President of the Committee.

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the Chief Justice or Chief Judge in this behalf; and whenever any member retires, resigns, dies or ceases to reside in the province in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said Chief Justice or Chief Judge may appoint another person to be a member in his stead.



## COMMENTARY.

**Alterations made in the Section.**—This section corresponds to s. 642 of the C. P. Code of 1882. The first part of this section has been reproduced exactly from the old Code.

Some changes have been introduced in sub-section (2): The words "and except as provided by s. 337 A, sub-sec. 5, and ss. 256 and 643," have been omitted, and the words "other than process issued by such tribunal for contempt of Court," have been inserted after the words "civil process," to give effect to the decision in 4 B. L. R. O. C. 90, noted below.

Sub-section (3) is new. It is an exception to the general rule laid down in sub-sec. (2). It provides that the judgment-debtor will not be entitled to exemption from arrest, when an order for immediate execution is made under Or. XXI, r. 11 (1); or when he appears before the Court in obedience to a notice calling upon him to appear and show cause against his arrest and detention, under Or. XXI, r. 37 (1).

"While going to or returning from."—This section seems to be defective in as much as it simply says "while going to or returning from." This section would have been more clear if the words, "home or place of residence" had been added after those words, as has been pointed out in 32 A. 3 p. 7.

**Exemption from Arrest.**—Where a defendant in a suit in the High Court was arrested in execution of a decree of the Calcutta Court of Small Causes while attending before an arbitrator appointed by the High Court, to take a reference in the suit, it was held that he was privileged from such arrest while so attending, and that the High Court had power to direct his release from custody. Small Causes Courts in the Presidency Towns are subject to order and control of the High Court.—*In the matter of Juggessur Roy*, 5 C. L. R. 170. See also, *In re Amrito Lal Day*, 1 C. 78.

Where a witness was arrested in execution of a decree, and the circumstances under which the arrest had taken place showed the absence of a *bonafide* belief on his part that his attendance in Court was required for the purpose of giving evidence in the case in which he had been subpoenaed, the Court refused to allow his claim to privilege from arrest.—*Wooma Churn v. Teil*, 14 B. L. R. Ap. 19.

Held that, on the facts shown in the affidavit, the prisoner was privileged as a witness at the time of his arrest.—*In the matter of Amrito Lal*, 1 C. 78.

Where a native of Patna came from Calcutta to Madras on 24th October on account of a suit pending, in which he was plaintiff, and the case having been adjourned on 27th October for seven weeks, remained in Madras on account of the suit, and was arrested on 10th November, held that he was privileged under s. 642 of the C. P. Code, 1882 (s. 135).—*In re Siva Buz*, 4 M. 317.

A party against whom a writ of attachment for contempt has been issued is not entitled to his right of privilege from arrest, while proceeding to Court or leaving Court on the hearing of his suit.—*Joan v. Carter*, 4 B. L. R. O. C. 90.

(5) There shall be a Secretary to each such Committee, who shall be appointed by the Chief Justice or Chief Judge and shall receive such remuneration as may be provided in this behalf by the Governor-General in Council or by the Local Government, as the case may be. [New.]

## COMMENTARY.

The words " the town which is the usual place of sitting of each of the High Courts referred to in section 122 " in sub-section (1) were substituted for the words " each of the towns of Calcutta, Madras, Bombay, Allahabad, Lahore and Rangoon " by the Amending Act XIII of 1916.

The provisions of ss. 122 and 123 of the C. P. Code have no application to the Patna High Court. The fact that the rules made by the High Court were not submitted to any Rule Committee and that no Rule Committee is in existence in Patna would make those rules *ultra vires*; *Rajindra Kishore v. Kamakshya Narain*, 5 Pat. L. J. 719: (1921) Pat 97.

**124.** Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the First Schedule or to make new rules, and before making any rules under S. 122 the High Court shall take such report in consideration. [New.]

Committee to report to High Court.

**125.** High Courts, other than the Courts specified in s. 122, may exercise the powers conferred by that section in such manner and subject to such conditions as the Governor-General in Council may determine:

Power of other High Courts to make rules.

Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court. [New.]

## COMMENTARY.

" Any rules which have been made by any other High Court."—The general rules and circular orders of the Calcutta High Court govern the procedure of mofussil Courts in the province of Behar and Orissa. Although these rules have not been published by the Patna High Court, the rule by which they were extended having been published, the omission to publish the entire body of the Calcutta High Court Rules and circular orders was not material under s. 125 proviso, C. P. Code; *Ram Chandrika Prasad v. Ram Niraji Lal*, 2 Pat. L. T. 45: 61 I C. 666.

**126.** Rules made under the foregoing provisions shall be subject to the previous approval of the following authorities, namely:—

Rules subject to sanction.

An *ex parte* decree was passed by the Sub-Judge of Benares against the judgment-debtors who were residents of Bombay. They applied to have it set aside and for that purpose they came up to Benares from Bombay. Their application was dismissed and after returning from the Court they proceeded to the Benares railway station and were seated in the train with tickets to Allahabad when they were arrested in execution of that *ex parte* decree: Held that they were not exempted from arrest, as they were actually on their way to Allahabad which is not their home; *Ardshirji Framji v. Kalyan Das*, 32 A. 3 p. 6:6 A. L. J. 912. (4 M. 317 not approved; 14 B. L. R. App. 13 referred to).

**"Parties thereto, their pleaders, etc."**—The general rule that a party to a suit is protected from arrest upon any civil process while going to the place of trial, while attending there for the purpose of the cause, and while returning home, applies to a defendant to a suit, under the summary procedure sections of the Civil Procedure Code, who has not obtained leave to appear and defend, and who, therefore, cannot be heard at the trial. Questions as to the privilege of exemption from arrest, in the case of persons arrested under writs issued from the Small Cause Court in Calcutta, must be governed by the English law, and not by s. 642 of the C. P. Code, 1882 (s. 135).—*In the matter of Surendro Nath*, 5 C. 106.

Where an insolvent having been discharged from jail was immediately arrested on a warrant obtained by a judgment-creditor, held that the insolvent was not privileged from arrest as being on his way back from Court.—*Samarapuri v. Barry & Co.*, 13 M. 150 (8 M. 97, overruled).

Section 642, C. P. Code, 1882 (s. 135) only protects an accused person while he is attending a Criminal Court, from arrest 'under that Code.' Held, therefore, where a person, who had been convicted by a Magistrate, and had been fined, was arrested in execution of the process of a Revenue Court while waiting in Court until the money to pay such fine was brought, that such person was not protected from such arrest by the provisions of that section.—*Empress of India v. Harakh Nath*, 4 A. 27.

A defendant in a suit summoned by, and examined as a witness for, the plaintiff is entitled to protection from arrest on civil process during the time reasonably occupied in going to, attending at and returning from the place of trial.—*Appasamy v. Govindan*, 4 Mad. H. C. 145.

A defendant who appears in Court to defend his suit is exempt from arrest under s. 135 of the C. P. Code; *Odayamangalath Appanni v. Ishak Maccadam*, 37 M. L. J. 435: 43 M. 272.

A pleader while acting in his professional capacity is protected from arrest.—*Rajendro Narain v. Chunder Mohun*, 23 C. 128.

Arrest under civil process of a Mofussil Court on Sunday is legal in this country.—*Anonymous*, 4 Mad. H. C. Ap. 62; *Abraham v. Queen*, 1 B. L. R. A. C. Cr. 17; *Graseman v. Gardner*, 3 W. R. Rec. Ref. 2; and *Paramshook v. Rasheed Ooddowlah*, 7 Mad. H. C. 285.

**Appeal.**—Where judgment-debtor arrested in execution of a decree claims exemption from arrest under this section, but the exemption is not allowed, the order is one under s. 47 and is appealable; *Gobindasamy v. Union Bank Ltd*, 47 M. L. J. 678: 84 I. C. 513: A. I. R. 1924 Mad. 900.

- (a) if the rule is made by a High Court established, under the Indian High Courts Act, 1861, or the Government of India Act, 1915, to the approval of the authority prescribed by the proviso to section 107 of the latter Act for rules made under that section;
- (b) if the rule is made by any other High Court, to the approval of the Local Government. [New.]

### COMMENTARY.

**Amendments to the Section.**—The word "approval" in the section was substituted for the word "sanction" wherever it occurred in the section by the Amending Act XIII of 1916.

The words "or the Government of India Act, 1915," were inserted by the Amending Act XIII of 1916.

The words "the proviso to section 107 of the latter Act" were substituted for the words "section 15 of that Act" by the same Act.

**127.** Rules so made and approved shall be published in the Gazette of India or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule. [New.]

The word "approved" was substituted for the word "sanctioned" by the Repealing and Amending Act XXIV of 1917.

**128.** (1) Such rules shall be not inconsistent with the provisions in the body of this Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts.

Matters for which rules may provide.

(2) In particular, and without prejudice to the generality of the powers conferred by sub-section (1), such rules may provide for all or any of the following matters, namely:—

- (a) the service of summonses, notices and other processes by post or in any other manner either generally or in any specified areas, and the proof of such service;
- (b) the maintenance and custody, while under attachment, of live-stock and other moveable property, the fees payable for such maintenance and custody, the sale of such live-stock and property and the proceeds of such sale;

**135-A.** (1) No person shall be liable to arrest or detention in prison under civil process—

- (a) if he is a member of either Chamber of the Indian Legislature or of a Legislative Council constituted under the Government of India Act, during the continuance of any meeting of such Chamber or Council;
- (b) if he is a member of any committee of such Chamber or Council, during the continuance of any meeting of such committee;
- (c) if he is a member of either Chamber of the Indian Legislature, during the continuance of a joint sitting of the Chambers, or of a meeting of a conference or joint committee of the Chambers of which he is a member;

and during the fourteen days before and after such meeting or sitting.

(2) A person released from detention under sub-section (1) shall, subject to the provisions of the said sub-section, be liable to re-arrest and to the further detention to which he would have been liable if he had not been released under the provisions of sub-section (1). [NEW.]

This is a new section and was added to the Code by Act XXIII of 1925 (Legislative Members Exemption Act).

**136.** (1) Where an application is made that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment and send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate, a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

(2) The District Court, shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment.

Procedure where person to be arrested or property to be attached is outside district.

- (c) procedure in suits by way of counter-claim, and the valuation of such suits for the purposes of jurisdiction.
- (d) procedure in garnishee and charging orders either in addition to, or in substitution for, the attachment and sale of debts;
- (e) procedure where the defendant claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not;
- (f) summary procedure—
  - (i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising—
    - on a contract express or implied; or
    - on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or
    - on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only; or
    - on a trust; or
  - (ii) in suits for the recovery of immoveable property, with or without a claim for rent or mesne-profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant;
- (g) procedure by way of originating summons;
- (h) consolidation of suit, appeals and other proceedings;
- (i) delegation to any Registrar, Prothonotary or Master or other official of the Court of any judicial, quasi-judicial and non-judicial duties; and
- (j) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of Civil Courts. [New.]

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court or unless he furnishes sufficient security for his appearance before the latter Court or for satisfying any decree that may be passed against him by that Court, in either of which cases the Court making the arrest shall release him.

(4) Where a person to be arrested or moveable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal or at Madras or at Bombay or of Chief Court of Lower Burma, the copy of the warrant of arrest or of the order of attachment, and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras, Bombay or Rangoon, as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court. [S. 648.]

## COMMENTARY.

This section corresponds to s. 648 of the C. P. Code of 1882. No material change has been introduced in this section, except the change of a few words and sentences.

Under s. 648 (s. 136) read with s. 483, (Or. XXXVIII, r. 6), C. P. Code, 1882, the Court can attach property outside its jurisdiction.—*Ram Pertab v. Madho Rai*, 7 C. W. N. 216. (6 B. 170; 8 B. H. C. 29; 8 B. L. R. 335; and 8 C. L. R. 336, referred to). See also, *Veerayya v. Annamalachetty*, 31 M. 502. But see, *Krishnaswami v. Engel*, 8 M. 20.

Where an officer, proceeding from Burma to England on leave, resided a few days in Madras on the way, held that such residence was sufficient, for the purpose of s. 648, C. P. Code, 1882 (s. 136) to render him liable to arrest before judgment.—*Everet v. Frere*, 8 M. 205.

A decree of a Small Cause Court can be executed by it at any place within the local limits of the District Court to which it is subordinate without having recourse to the procedure under s. 648, C. P. Code, 1882 (s. 136), which applies only to cases in which a decree passed in one district has to be executed in another district.—*Badan Babajee v. Kalachand Babajee*, 4 C. 823.

S. 648, C. P. Code, 1882, (s. 136), does not apply to a case in which the defendant resides within the same district in which the Court issuing a warrant is situate. Consequently a Small Cause Court may issue a warrant for the arrest of a person residing in another district, but not if he resides within the same district in which the Court is situate, but outside its local jurisdiction.—*Chuni Lal Sobharam v. Purbiu Dass Kuraandas*, 2 B. 560.

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Attachment before judgment of property situate outside the Court's jurisdiction is allowable under the present Code; *Somasundaram v. Muthurecrappa*, 10 I. C. 794.

**137.** (1) The language which, on the commencement of this Code, is the language of any Court subordinate to a High Court shall continue to be the language of such Subordinate Court until the Local Government otherwise directs.

(2) The Local Government may declare what shall be the language of any such Court and in what character applications to and proceedings in such Court shall be written.

(3) Where this Code requires or allows anything other than the recording of evidence to be done in writing in any such Court such writing may be in English; but if any party or his pleader is unacquainted with English a translation into the language of the Court shall, at his request, be supplied to him; and the Court shall make such order as it thinks fit in respect of the payment of the costs of such translation. [S. 645.]

### COMMENTARY.

Clauses (1) and (2) of this section correspond to clauses (1) and (2) of s. 645 of the C. P. Code of 1882 with some additions and alterations. The words, "*and in what character applications to and proceedings in such Court shall be written*," have been added in the latter part of clause (2).

Clause (3) is new but to a certain extent it corresponds with the proviso to s. 49 of the old Code of 1882 and it refers to all other writings in any Court, except the recording of evidence.

**138.** (1) The Local Government may, by notification in the local official Gazette, direct with respect to any Judge specified in the notification, or falling under a description set forth therein, that evidence in cases in which an appeal is allowed shall be taken down by him in the English language and in manner prescribed.

(2) Where a Judge is prevented by any sufficient reason from complying with a direction under sub-section (1), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court. [S. 185A.]

### COMMENTARY.

This section corresponds to clauses (1) and (2) of s. 185-A of the C. P. Code of 1882, with some change of language.

ceedings; *Dinonath v. Jogendranath*, 26 I. C. 890; *Jiwa Ram v. Nand Ram*, 44 A. 407; 20 A. L. J. 226.

Section 141, when read with s. 104, does not give a right of appeal, to a judgment-debtor whose application to set aside a sale of his property has been dismissed under Or. IX, r. 8, and whose application to set the dismissal aside has been refused under Or. IX, r. 9. S. 141 is not intended to confer any right of appeal not expressly given elsewhere by the Code—*Ningappa v. Gangawa*, 10 B. 433. Followed in *Ghasiti Bibi v. Abdul Samad*, 19 A. 596. See also, *Parasurama v. Seshier*, 20 M. 504 (508). Followed in *Damodara v. Kittappa*, 36 M. 16; 21 M. L. J. 618.

An order under s. 5 of the Court Fees Act is not appealable as a decree, and s. 141 does not apply to it.—*Balkaran Rai v. Gobind Nath*, 12 A. 129, p. 157.

Or. XXII, r. 10 has no application to proceedings in execution of decree and a Court has no jurisdiction, reading Or. XXII, r. 10, with s. 141, C. P. Code, to bring in a party after decree, and make him a judgment-debtor for the purposes of execution.—*Goodall v. Mossorie Bank*, 10 A. 97 (5 C. 726 referred to).

S. 141, does not operate to extend the rule laid down in respect of a suit in Or. XXIII, r. 1 to an application for execution—*Bunko Behary v. Nil Madhub* 18 C. 635. Approved in *Thakur Prasad v. Fakirullah*, 17 A. 106, P. C. (10 A. 711 and 12 A. 392 overruled; 12 A. 179 reversed) See also *Lakshmi Narasimha, v. Atchauna*, 15 M. 240; and *Pragdas v. Girhardas*, 26 B. 76 (82).

Where an application for execution was struck off in consequence of non-payment of *talabana*, no fresh application (being precisely of similar nature) was entertainable.—*Pheku v. Prithi Lal*, 15 A. 49.

There is nothing in the Civil Procedure Code which authorizes a Court to apply to execution proceedings any of the procedure enacted in Chapter VII of the Code. Accordingly a Court cannot, under Or. IX, r. 9, restore to the file an application for execution which has been dismissed for default. Alterations in forms of procedure are retrospective in effect, and apply to pending proceedings.—*Hijrat Akramnissa v. Valiunnissa*, 18 B. 429. See also, *Tirthasami v. Annappayya*, 18 M. 131; *Ramu Rai v. Dayal Singh*, 16 A. 390; *Dhonkal Singh v. Phakar Singh*, 15 A. 84. But see, *Tukaram v. Khandu*, 20 B. 541.

An order passed in proceedings in execution of a decree passed under s. 9 of the Specific Relief Act (I of 1877) is not appealable by virtue of s. 141, *Thomas Souza v. Gulam Moidin*, 26 M. 438

No second appeal lies against an order made in the course of proceedings in execution of a rent decree below Rs. 100 in value—*Sayama Churan v. Debendra*, 4 C. W. N. 269

No second appeal lies against an order passed in execution of a decree in a suit of the nature cognizable in the Court of Small Causes—*Narayan v. Nagindas*, 30 B. 113; 7 Bom. L. R. 641.

S. 141 C. P. Code does not apply to proceedings under s. 105 B. T. Act, as they are filed in a Revenue Court and before Revenue Officers. *Hazari Lal v. Ambica Gir*, A. I. R. 1923 Pat. 273.

Clauses (3) and (4) of the old Code have been omitted.

The Government of Bengal has authorized all Munsifs and Sub-Judges to record evidence in English, *vide* the Calcutta Gazette, dated 12th June, 1907, Pt. I, p. 1012. The Government of Eastern Bengal and Assam has also issued similar notification in the Gazette of the same province in the previous week.

Oath on affidavit  
by whom to be ad-  
ministered.

**139.** In the case of any affidavit under this Code—

- (a) any Court or Magistrate, or
- (b) any officer or other person whom a High Court may appoint in this behalf, or
- (c) any officer appointed by any other Court which the Local Government has generally or specially empowered in this behalf,

may administer the oath to the deponent.

[S. 197.]

## COMMENTARY.

This section corresponds to s. 197 of the C. P. Code of 1882. The changes introduced in this section are the insertion of the words, "*or any other person*," in clause (2), and the substitution of the words, "*to the deponent*," for the words, "*of the declarant*" in the last paragraph.

"The Committee have inserted the word "*or other person*" after the word "*officer*" in sub-clause (b), in order to give the High Court power to relieve the officers of the Courts of the work of administering affidavits in cases in which it may be necessary to do so. It has been represented to them by the Calcutta High Court that this relief is much required."—*See the Report of the Special Committee.*

Instructions to District Judges as to the exercise of their powers to appoint Commissioners to administer oaths on affidavits.—Calcutta High Court, Rule No. 9 of 16th March, 1892.

District Judges in Bengal and Bombay have been empowered under cl (c) to appoint Commissioners to administer oaths on affidavits.—Calcutta Gazette, 18th July, 1891. Bombay Gazette, Part I, 1877.

"**Any Court or Magistrate.**"—A plaintiff filed, in support of proof of service of process on the defendant, an affidavit sworn in the Bar Library by the identifier before a pleader who is also an Honorary Magistrate. *Held* s. 132 of the Code contemplates that at the time when an Honorary Magistrate administers the oaths, he shall be acting in his judicial capacity as a Magistrate; *Ramjiban v. Ahmad Khan*, 5 I. C. 537.

**140.** (1) In any Admiralty or Vice-Admiralty cause of salvage, towage or collision, the Court, whether it be exercising its original or its appellate jurisdiction, may, if it thinks fit, and shall upon request of either party to such cause, summon to its assistance, in

Assessors in causes  
of salvage, etc.

The effect of this section is not to make the provisions of the C. P. Code applicable to proceedings under s. 195, Cr. P. Code, which are of criminal rather than of a civil nature.—*Rama Iyer v. Venkatachala*, 30 M. 311: 17 M. L. J. 123.

There is no power to review conferred by s. 141 of the C. P. Code on Courts acting under special enactments; *Anantharaju Chetty v. Appu Hegade*, 37 M. L. J. 162: 53 I. C. 56.

Or. XLVI, rule 1, read with s. 141, C. P. Code, does not authorize a reference to the High Court in a matter which is neither a suit nor an appeal. Section 141 does not authorize a Court to invoke the jurisdiction of another Court any more than it authorizes a party to do so by way of appeal. Such a right must be expressly conferred by statute; *Damodara v. Kittappa Menon*, 36 M. L. J. 613.

**"Proceedings in any Court of civil jurisdiction."**—The word "proceedings" in this section refer to original matters in the nature of suits, such as proceedings in probate, guardianship and so forth, and do not include execution proceedings; *Thakur Prosad v. Fakirullah*, 17 A. 106: 22 I. A. 44. An enquiry before a Commissioner appointed by a Court to ascertain the amount of mesne profits payable by one party to another is a proceeding within the meaning of this section. Hence the provisions of Or. XVIII, r. 4 applies to the proceeding; *Ramakka v. Negasam*, 47 M. 800: 92 I. C. 133: A. I. R. 1925 Mad. 145. So is an application under s. 12 of the Guardian and Wards Act, 1890; hence a receiver may be appointed in such a proceeding under Or. XL, r. 1; *Bai Jamnabai, In re*, 36 B. 20, *Chandrawati v. Jagannath*, 7 Lah. L. J. 281: 90 I. C. 611: A. I. R. 1925 Lah. 489. But an application for a succession certificate under the Succession Certificate Act, 1889, is not such a proceeding; *Kanhaiya v. Kanhaiya*, 46 A. 372: 79 I. C. 363: A. I. R. 1924 All. 376. An application for the appointment of a Common Manager under s. 93 of the Bengal Tenancy Act is a proceeding and a receiver may therefore be appointed under Or. XL pending the application; *Asad Ali v. Mahomed*, 43 C. 980: 36 I. C. 177. The words "any Court of civil jurisdiction" in s. 141 include the Court of a District Judge holding an enquiry under the Legal Practitioners Act and order may be legally made by the District Judge in such a proceeding calling for the production of a document under Or. VI, r. 12, C. P. Code; *Nando Lal v. Basir Ali*, 23 C. W. N. 560.

**Other Cases Bearing upon this Section.**—The scope of s. 114, and Or. XLVII, r. 1 is wide enough to admit of the review of an order dismissing an execution-case.—*Asoka Kumar v. Khetramoni*, 2 C. W. N. 606.

Under s. 158, B. T. Act (VIII of 1885), the landlord is authorized to include in one application two or more tenancies held by the same tenant.—*Dijendra Nath v. Soyendra Nath*, 24 C. 197, p. 202.

The proceeding under s. 174, B. T. Act (VIII of 1885), may be a proceeding relating to the execution of a decree, but it does not come within s. 141, as being an application for the execution of a decree. No appeal lies from an order under s. 174, Bengal Tenancy Act.—*Sukh Narain v. Goroke Prasad*, 3 C. W. N. 344.

The procedure to be followed upon the sale of an under-tenure is now that prescribed by the Civil Procedure Code. Or. XXI, r. 90 does not

such manner as it may direct or as may be prescribed, two competent assessors; and such assessors shall attend and assist accordingly.

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be prescribed. [S. 645-A.]

This section corresponds to s. 645-A of the C. P. Code of 1882, with the change of a few words only.

**141.** The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction. [S. 647, PARA. 1.]

. Miscellaneous proceedings.

## COMMENTARY.

This section corresponds to the first paragraph of s. 647 of the C. P. Code of 1882, with some change in the language. The second paragraph and the explanation to s. 647 have been omitted.

The Explanation ran thus.—“*This section does not apply to applications for the execution of decrees, which are proceedings in suit.*”

“*The procedure provided in this Code.*”—This section extends the procedure provided in this Code in regard to suits to proceedings in Civil Courts. It does not, however, confer any substantive right not expressly given elsewhere by this Code; *Parasurama v. Sesheir*, 27 M. 504; *Damodara v. Kittappa*, 36 M. 16; 10 I. C. 879; consequently, unless an order comes within the purview of Or. XLIII, no appeal lies from an order passed in a “proceeding” of the kind contemplated by this section; *Chandar v. Durga*, 46 A. 538; 79 I. C. 323; A. I. R. 1924 All. 682; *Hara v. Murari*, 36 C. L. J. 181; 69 I. C. 1003; A. I. R. 1922 Cal. 572; *Habibar v. Said-unnessa*, 38 C. L. J. 358; 77 I. C. 907; A. I. R. 1924 Cal. 327; *Chandrawati v. Jagannath*, 7 Lah. L. J. 281; 90 I. C. 611; A. I. R. 1925 Lah. 489.

**Applicability of this Section to Execution Proceedings.**—Under s. 647 of the C. P. Code, 1882, it was held by the Allahabad and the Bombay High Courts, that s. 647 of the old Code was applicable to execution proceedings, but the Calcutta High Court held otherwise. In this state of authorities, an Explanation to s. 647 was added by Act VI of 1892, declaring that s. 647 of the old Code, was not applicable to execution proceedings. Subsequently, their Lordships of the Privy Council in *Thakurprosad v. Fakirullah*, 17 A. 106, P. C., held that independently of the Explanation, the section was not applicable to execution proceedings. The above Privy Council case finally settled the question. But in s. 141 of the present Code, the Explanation attached to s. 647 of the old Code has been omitted; but the omission of the Explanation has again given rise to divergence of judicial opinion as will appear from the following rulings.—The following are the observations of JENKINS, C. J., in *Hari Charan*, 41 C. 1; 18 C. W. N. 343: “This section s. 647 of the previous Code. But in these terms: ‘This section does not

apply only to sales made under Or. XXIX, and the sale of an under-tenure may be set aside upon any of the grounds mentioned in that section.—*Azizoonessa v. Gora Chand*, 7 C. 163· 8 C. L. R. 498

An Appellate Court has power to stay execution, when an appeal from an order in execution-proceedings is pending before that Court.—*Pasupati Nath v. Nanda Lal*, 28 C. 731.

The Court can require an appellant from an order made under s. 47 in execution of a decree to give security for the costs of the appeal and of the original suit —*Dagdu v. Chandrabhan*, 24 B. 314

The defendant in a redemption-suit, against whom a decree has been passed, appealed to the High Court, which, on his application, granted the usual stay of execution pending the appeal, upon security being given by him. The Sub-Judge, feeling doubt as to whether the actual value of the property or the value stated in the plaint should be regarded in fixing the security, referred the case to the High Court under s. 113. *Held*, even assuming that section to apply to a proceeding of this kind under s. 141, that no reference would lie under s. 113. The question as to the amount of the security was a question relating to execution as contemplated by s. 47 and, therefore, an order determining that question would be appealable under s. 2 of the Code —*Ishwargar v. Chudasama*, 12 B. 30.

**142.** All orders and notices served on or given to any person under the provisions of this Code shall be in writing. [S. 94.]

Orders and notices to be in writing.

under the provisions of this Code shall be in writing.

[S. 94.]

This section corresponds to s. 94 of the C. P. Code of 1882, with some modifications. The words "and shall be served in the manner hereinbefore provided for the service of summons," have been omitted, and reproduced in Or. XLVIII, r. 2.

**143.** Postage, where chargeable on a notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed before the communication is made :

Postage.

Provided that the Local Government, with the previous sanction of the Governor-General in Council, may remit such postage, or fee, or both or may prescribe a scale of Court-fees to be levied in lieu thereof. [S. 95.]

## COMMENTARY.

This section corresponds to s. 95 of the C. P. Code of 1882. No material change has been made in this section except the change of a few words.

"Increased facilities have been given for the service of process to which further reference is made in the 'Notes on Clauses.' It is hoped that in the gradual introduction of service by post may be found a solution of the principal defects in our legal system." *See the Report of the Special Committee.*

apply to applications for the execution of decrees which are proceedings in suits.' That Explanation has been omitted, and it has been argued before us that this omission is an indication that the Legislature in passing the present Code intended that s. 141 should have a wider operation than s. 647. There is a certain amount of force in this argument, but it overlooks the history of this section and the case-law. At one time there was a considerable divergence of judicial opinion as to whether s. 647 applied to execution proceedings; and, it was in consequence of this that by Act VI of 1892 this Explanation was introduced into the section of the Code of 1882. But after this alteration in the law, the Privy Council by a case, *Thakurprosad v. Fakirullah*, 17 A. 106, decided on s. 647 as it stood before the Explanation was added, that the section did not apply to execution proceedings. The purpose of the Legislature in omitting that Explanation was to do away with that which was shown to be unnecessary by the Privy Council decision and to rely upon the terms of the section as interpreted by the Privy Council. So it was that the Explanation came to be omitted. This may have been an unfortunate way of proceeding, because it involves some knowledge of the history of s. 647 and of the decision on that section to appreciate the effect of this change; but this is how the matter was dealt with by the Legislature. The result is that s. 141 does not make applicable to proceedings in execution all the procedure provided by the Code, and I think for very good reasons as is indicated by MR JUSTICE MOOKERJEE in *Asim Mondal v. Raj Mohan*, 13 C. L. J. 532. To hold otherwise would lead to complication and to results which never could have been contemplated. It is not as though there was any necessity in the interests of justice that the provision of rule 13, Or. IX, should be applicable to proceedings in execution, because the order is not conclusive, but is subject to the right of the person aggrieved to bring a suit. I therefore hold that Or. IX, r. 13, is not applicable to a proceeding under rules 100 and 101 of Or. XXI."

Similar view was also taken in *Asim Mandal v. Raj Mohan Das*, 13 C. L. J. 532, as will appear from the following observations of MOOKERJEE, J.:—"The learned vakil for the judgment-debtors has argued in answer to this contention, that the effect of s. 141 of the Code is to render Or. IX, r. 9, applicable to execution proceedings; and that consequently successive applications for execution of decrees are not contemplated by the new Code. He has further argued that s. 141 has, in this respect, materially altered the law as embodied in s. 647 of the Code of 1882, and in support of this view, he has relied upon the observations of this Court in 12 C. L. J. 6. After a careful consideration of the arguments addressed to us on both sides, we have arrived at the conclusion that successive applications for execution of a decree are not barred by the provisions of the new Code and that the order of the Court below cannot be sustained. It has not been disputed before us, that under s. 647 of the Code of 1882, successive applications for execution could be made in respect of the same decree (18 C. 635). The contrary view taken in Bombay and Allahabad (6 B. 681, 12 A. 179), was superseded by the intervention of the Legislature, i.e., by Act VI of 1892 by which an explanation was added to s. 647. Shortly after the enactment of the Civil Procedure Code Amendment Act of 1892, the decision of the Allahabad High Court in the case last mentioned was reversed by the Judicial Committee (17 A. 106 P. C.). The Judicial Committee pointed out that s. 647 of the Code of 1882 was, on its true construction, inapplicable to execution of decrees, and this was so, independently of the legislation of 1892. There is no force, therefore, in



A notice to quit under the Bengal Tenancy Act (VIII of 1885) cannot be served by post, but must be served according to the rules framed by the Local Government under section 189 of the Act.—*Lala Mahan Lal v. Kuldip Narain*, 27 C. 774. But under the T. P. Act (IV of 1882), service of notice to quit by post was held good.—*Subadini v. Maharaja Durga Churun*, 4 C. W. N. 790: 28 C. 118.

**Service of Process by Post—Presumption.**—A person refusing a registered letter sent by post cannot afterwards plead ignorance of its contents.—*Lootf Ali v. Pearree Mohun*, 16 W. R. 223. Followed in *Jogendra Chunder v. Dwarka Nath*, 15 C. 681.

The presumption that notice sent by post was duly served, is not a conclusive presumption of law; it is merely a presumption of fact; and whether it arises in a particular case or not, depends upon all the circumstances.—*Mir Tapurah Hossein v. Gopi Narain*, 7 C. L. J. 251. See also *Radhay Koer v. Ajadhaya Das*, 7 C. L. J. 263; *Gobindachandra v. Dwarkath*, 20 C. L. J. 455: 19 C. W. N. 489.

**144.** (1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1). [S. 583.]

## COMMENTARY.

**Scope of the New Section.**—This Section has been substituted for s. 583 of the C. P. Code of 1881. The language of the old section has been completely changed, and it has now been so framed that the Court of first instance will be competent to make complete restitution to the party entitled to any benefit, by way of restitution or otherwise, under the decree passed in appeal. The present section is more comprehensive and clear than the old section. The old section was applicable only to reversal in appeals, under Chapter XLI of the Code of 1882 and not to reversal on review or otherwise. The present section has been so framed as to include all kinds of reversals whether in appeal, review, revision or otherwise. Thus the scope of this section is wider than the old section.

Under the provisions of the old Code, the remedy of the person entitled to restitution in consequence of the reversal or modification in appeal, of a decree, was twofold, both by means of an application in execu-

the contention of the learned vakil for the judgment-debtors, that the omission of the explanation, when s. 647 of the Code of 1882 was re-enacted with a slight variation as s. 141 of the Code of 1908, does in any way indicate a change in the law. The explanation has been omitted for the obvious reason that it was superfluous, as pointed by their Lordships of the Judicial Committee. We are not prepared to accept as well-founded the contention of the judgment-debtors, that the law has, in this respect, been changed by the new Code. If we were to accede to the contention of the judgment-debtors that procedure laid down for suits is applicable in its entirety, to execution proceedings, complications of the gravest character may arise. It is sufficient to mention that if we were to uphold the view, put forward by the defendants, Or. II, r. 2, (corresponding to s. 43 of the Code of 1882), Or. IX (corresponding to ss. 92 to 109 of the Code of 1882), Or. XVII, rs. 2 and 3 (corresponding to ss. 157 and 158 of the Code of 1882), and Or. XXIII, r. 1 (corresponding to s. 373 of the Code of 1882) would all become applicable to applications for execution of decrees. Such a view would necessarily imply a fundamental alteration in the law of which we can find no indication in the new Code.

Similar view was also taken by MOOKERJEE, J., in *Charu Chandra v. Chand Charan*, 19 C. W. N. 25, where it has been held that s. 141 of the Code which replaces s. 647 of the Code of 1882, has not effected and alteration in the law.

Similar view has also been taken in *Bala Subramania Chetti v. Swarnammal*, 38 M. 109; 25 M. L. J. 367: (1913) M. W. N. 685; 14 M. L. T. 196; *Bhubaneswar v. Tulukdhari*, 4 Pat. L. J. 135; *Lingam Viraraghava v. Mallapragada*, 30 I. C. 246; 1915 M. W. N. 793; 2 L. W. 688; in *Faridbi v. Md. Amin*; 9 N. L. R. 33; 19 I. C. 97; *Lalbur v. Choithram*, 29 I. C. 592; 8 S. L. R. 327; See also *The Punjab Banking Co., Ltd. v. Duran Dhanpat Rai*, 75 I. C. 487; A. I. R. 1923 Lah. 506; *Harlal v. Narayan*, 18 N. L. R. 152; 64 I. C. 420; *Shanker Rao v. Manik Rao*, 68 I. C. 643; *Bholu v. Ram Lal*, 2 Lah. 66; 60 I. C. 720; *Hanseswari v. Radhika Prasad*, 63 I. C. 855; *Bhagram v. Dattatraya*, 50 B. 457; 96 I. C. 411; A. I. R. 1926 Bom. 377.

But a different view has been taken in *Safdar Ali v. Kishun Lal*, 12 C. L. J. 6, where it has been held that s. 141 of the new Code has deliberately changed the provisions of s. 647 of the old Code and that an application for re-hearing of execution proceedings is maintainable under Or. IX, r. 9, and is not barred under Or. XXI, r. 103 of the C. P. Code of 1908. In *Diljan Nichha Bibi v. Hemanta Kumar*, 19 C. W. N. 758; 29 I. C. 395, where an application for setting aside a sale under Or. XXI, r. 90, had been dismissed for default, it was held that Or. IX was applicable for setting aside that order of dismissal. Again in *Bepin Behary v. Abdul Bari*, 44 C. 950; 21 C. W. N. 30; 24 C. L. J. 446; 35 I. C. 618, it was held (following *Diljan Nichha v. Hemanta Kumar*, 19 C. W. N. 758), that when an application for the restoration of a Small Cause Court suit dismissed for default is in its turn dismissed for default, an application under Or. IX, r. 9, for the revival of that application lies under s. 141. See also, *Nihal Chandra v. Chand Singh*, 82 P. L. R. 1912; 3 P. W. R. 1912; 13 I. C. 859, where it has been held that s. 141 of the C. P. Code is applicable to execution proceedings, and an application for execution dismissed for default under Or. IX, r. 8, can be restored under Or. IX, r. 9 (12 C. L. J. 6; 7 I. C. 241 followed).

tion or by a separate suit, but now that it has been added to prevent the enforcement of appeals of decrees, by a separate suit, the present section the right of remedy is made to extend to an application under this section and even to the institution of a separate suit. The object of the addition of an express provision is to remove any multiplicity of suits.

The principle of the summary of justice is that on the reversal of the judgment, the law raises an obligation on the party to the record, who received the benefit of the erroneous judgment, to make restitution to the other party for what he had lost. This obligation is a duty of the Courts to enforce unless it is shown that making it would be directly contrary to the real purpose of the decree. It is the legal effect of a decree of reversal that the party against whom the decree was given is to have restitution of all that he has been deprived of under it. See 23 M. 600, 32 A. 79, 13 C. L. J. 243, 247, 15 C. L. J. 187 noted below.

"The terms of s. 563 of the Code do not justify the practice founded on it, and the Committee have therefore amended the section so as to bring it into closer conformity with that practice.—See the Report of the Special Committee.

"Sub-clause (2) has been added on the suggestion of the Calcutta High Court. We agree that restitution which may be obtained by application under this clause, should not be made the subject of a separate suit."—See the Report of the Select Committee.

Under the old Code there was much diversity of judicial opinion as to whether restitution would be enforced by a separate suit or only by an application under s. 563, C. P. Code, of 1882, but the point has been set at rest by the addition of sub-section (2).

The cases under the old Code, which decided that restitution could be obtained by a separate suit are no longer the law.

**Short History of the Law of Restitution and Effect of the Change Introduced by Section 144.**

I. **Meaning of Restitution.**—The word "restitution" literally means the yielding up again or restoring of any thing unlawfully taken from another. In this section it means restoring to a party what he has lost in execution of a decree, which is subsequently reversed or modified in appeal or otherwise. The doctrine of restitution is based upon the principle that upon the reversal of a judgment, the law raises an obligation on the party to the record who received the benefit of the erroneous judgment, to make restitution to the other party for what he had lost; and it is not merely in the power of the Courts, but it is a duty cast upon them, to enforce that obligation. See—*Hukum Chand v. Kamalanand*, 33 C. 927 (942); 3 C. L. J. 67. In *Huroo Chunder v. Shoorodhoney*, 9 W. R. 402 p. 407; B. L. R. Sup. Vol. 985, Peacock, C. J., observed: "It is the legal effect of a decree of reversal that the party against whom the decree was given is to have restitution of all that he has been deprived of under it. A Court of appeal does not necessarily enter into the question whether a decree which it is about to reverse has been executed or not. A decree of reversal by a superior Court necessarily contains, by necessary implication a direction to the Court below to cause restitution to be made of all

An elaborate research into the history of s. 141 and an exhaustive analysis of case-law bearing on it will be found in the recent judgment of PAGE, J., in the case of *Basaratulla v. Reazuddin*, 53 C. 679: A. I. R. 1926 Cal. 773. "There is no substantial difference between the terms of s. 647 of the Code of 1882 in its original form and s. 141 of the Code of 1882, and in my opinion the broad and general principles may be laid down that none of the provisions of the Code are made applicable to execution proceedings by reason of the provisions of s. 141. The following decisions, in so far as they are based upon, or support a view of, the law inconsistent with what is stated above to be the meaning and effect of s. 141, in my opinion, must now be regarded as having been incorrectly decided; *Krishna Chandra v. Protap Chandra*, 3 C. L. J. 276; *Safdar Ali v. Kishun Lal*, 12 C. L. J. 6; *Diljan Nichha v. Hemanta*, 19 C. W. N. 758; *Bhuban v. Dharendra*, 20 C. W. N. 1203; *Bipin Behari v. Abdul Barik*, 44 C. 950: 21 C. W. N. 30: 24 C. L. J. 446;" (per PAGE, J.). The same view was taken in the recent case of *Sarat Krishna v. Bisweswar*, 54 C. 405: 31 C. W. N. 576: A. I. R. 1927 Cal. 534, where MUKHERJEE and GRAHAM, JJ., observed: "Now amidst the hopelessly conflicting mass of judicial decisions which have clustered round s. 141, and s. 647, which stood in its place before, the solid bed-rock on which it is safe to take one's stand is the decision of the Judicial Committee in the case of *Thakurprosad v. Fakirullah*, 17 A. 106 P. C.: 22 I. A. 44. Their Lordships' decision makes it perfectly plain that the section does not apply to applications for execution, but only to original matters in the nature of suits such as proceedings in probates, guardianships and so forth. The expression 'so forth' must in my opinion, be read as meaning proceeding *cjusdem generis* with the instances that precede it, and include such proceedings as in divorce, in insolvency, for succession certificate and the like, and the expression 'original matters' in my opinion confirm that view as meaning matters which originate in themselves, and not those which spring up from a suit or from some other proceeding or course in connexion therewith."

The decision of the Judicial Committee in *Thakurprosad v. Fakirullah*, 17 A. 106 may therefore be considered to be the settled law on the subject.

**Proceedings to Which this Section Applies.**—S. 141 provides for the procedure to be followed in miscellaneous matters other than suits and appeals, and its provisions, read with Or. XLI, r. 5 and r. 6, give no power to the Court or a Judge, after the passing of a final unappealable decree, and before the granting of an application for review of judgment, to order a stay of execution of the decree.—*Amir Hasan v. Ahmad Ali*, 9 A. 36.

This section does not apply to applications for execution but only to original matters in the nature of suits, such as proceedings in probate, guardianships, and so forth; *Thakurprosad v. Fakirullah*, 22 I. A. 44: 17 A. 106; *Sarat Krishna v. Bireswar*, 54 C. 405: 31 C. W. N. 576: A. I. R. 1927 Cal. 534.

This section is intended to apply to all original proceedings in Civil Courts such as probate, etc. *Bala Subramania v. Swarnammal*, 38 M. 199: 25 M. L. J. 367.

S. 141, C. P. Code, applies only to proceedings in original suit; *Lachman Lal v. Padarath Singh*, 4 Pat. L. T. 735.

the benefits of which the successful party was deprived by the enforcement of the erroneous decree of the Court of first instance."—See 32 A. 79 (84).

II. Before the passing of the C. P. Code of 1908, there was no legislative expression as to the extent of the Court's power relating to restitution. Section 14<sup>f</sup> of the present Code empowers the Court, in cases of reversal or modification of a decree, to cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been reversed or varied. For this purpose the Court is empowered to make any orders, including orders for the refund of costs, and for the payment of interests, damages, compensation and mesne profits, which are properly consequential on the reversal or variation. In the Civil Procedure Code of 1859 (Act VIII of 1859), there was no express provision specifically dealing with the question of restitution. But their Lordships of the Privy Council in *Shama Pershad v. Hurro Pershad*, 10 M. I. A. 203; 3 W. R. 11 P. C. held that if the original decree under which property was recovered is reversed or superseded, the money recovered under it ought certainly to be refunded, and is recoverable either by summary process or by a new suit or action.

III. The Courts in India, however, relying upon s. 11 of Act XXIII of 1861, (which corresponded to s. 244 of the Code of 1882 and to a certain extent to s. 47 of the present Code), held that restitution of property on reversal or modification of a decree in appeal could not be the subject of a new suit or action, but should be determined in execution. See *Narsing Churn v. Bidyadhuree*, 2 W. R. 275; *Shibnarain v. Kishore*, 10 W. R. 131; *Nagindas v. Natha*, 10 B. H. C. 297; *Anunt Ram v. Kuralce*, 23 W. R. 441.

IV. In this state of authorities, the Civil Procedure Code (Act XIV of 1882) was passed, in which express provision was made for restitution in s. 583 which provided that restitution of property taken under a decree subsequently modified or reversed by an appellate Court could be had by an application under that section; and in accordance with the provisions of that section, it was held by the High Courts, that where the decree of the first Court was reversed or modified in appeal, the effect of the Appellate Court's decree was to direct restitution of any sum paid under the first Court's decree, which was disallowed by the appellate Court's decree and that the question was clearly one for determination by the Court executing the decree and not by a separate suit.—See 7 A. 432, 8 A. 545, 14 C. 484, 11 M. 261, 13 B. 485, 20 M. 448, 18 A. 262, 20 A. 430, 21 A. 1, 22 A. 79, 25 A. 441, 29 A. 348.

V. Under section 583 of the C. P. Code, 1882 application for obtaining restitution after reversal or modification of a decree were treated as proceedings in execution and were held to be governed, for purposes of limitation, by Art. 179 of the Limitation Act, 1877. See 8 A. 545, 20 M. 448, 22 B. 998, 11 C. L. J. 541, 30 A. 476. In 10 M. 66 and 28 C. 116, it was however held that such applications were governed by art. 178 and not by art. 179 of the Limitation Act. Under the present section it has been held that the period of limitation for an application for restitution is three years under art. 181 of the Limitation Act. See *Asha Bibi v. Nuruddin*, 8 Bur. L. T. 105,

S. 113 and Or. XLVI, r. 1 and s. 141, C. P. Code, apply when doubts arise in the proceeding of a suit or appeal or execution or other proceeding. S. 113 was not intended to provide for supposititious cases which do not naturally arise in a proper proceeding before the Court.—*Mahmad Haji v. Ahmad Bhai*, 25 B. 327.

The only proper mode of dealing with a case, whether a regular suit or a miscellaneous proceeding, when the parties do not appear, is to dismiss it. A case so dismissed can be restored on application under Or. IX, r. 13, which is, by s. 141, applicable as well to execution proceedings as to suits and appeals.—*Biswa Sonar Chunder v. Binanda Chunder*, 10 C. 416 (11 C. L. R. 17 followed).

This section renders the whole procedure of Act XIV of 1882, including the power of admitting a review, applicable to a proceeding to compel registration under the Registration Act.—*Reasut Hussain v. Abdoolah*, 2 C. 131, P. C. 26 W. R. 50 (reversing 10 B. L. R. 394 10 W. R. 303).

An Additional Judge appointed to hear cases under the Land Acquisition Act, 1870, is a District Judge within the meaning of section 39 of the Act. Under s. 141 an appeal from the decision of an Additional Judge so appointed lies to the High Court.—*Poreshnath v. Secretary of State*, 16 C. 81.

S. 141 is applicable to proceedings before the Land Acquisition Judge and consequently the provisions of Or. IX, r. 8 and r. 9, C. P. Code, are also applicable.—*Bhandi Singh v. Ramadhin Rai*, 2 C. L. J. 359, p. 368: 10 C. W. N. 991.

There is nothing in the Indian Companies Act (VI of 1882) or the High Courts Act (24 Vict., c. 104) or the Letters Patent which prevents the High Court from calling for the record of the proceedings in the winding up of a company under the Companies Act, and transferring those proceedings to its own file. Such a power is given to the High Court by s. 141, read with s. 24.—*In the matter of the West Hopetown Tea Company*, 9 A. 180. See also *Bombay Burmah Trading Corporation v. Darabji Cursetji*, 27 B. 415.

An executor who is not in possession of the property of his testator may be allowed to petition for, and if entitled thereto, to obtain a probate *in forma pauperis*. S. 141, makes the provisions of the Code applicable to all miscellaneous civil proceedings.—*In the matter of the Will of Dawubai*, 18 B. 237.

S. 141, contemplates that certain formalities of procedure are to be observed even in miscellaneous applications which are not suits. An application under s. 18 of Act XX of 1863 should therefore be duly verified, and presented either in person or by pleader as in the case of complaints.—*Amdoo Miyan v. Muhammad Davud Khan*, 24 M. 685.

An appeal lies under s. 141 against an order of a District Court under s. 5, Act XX of 1863.—*Sultan Acheni v. Bava Malimiya*, 4 M. 295.

Where a petition under Or. XII, r. 10, praying that an appellant might be required to give security for costs, was dismissed for default on account of absence of counsel to support it, held that Or. IX, r. 3 and r. 4 were applicable to the case by virtue of s. 141.—*Lackmichand v. Gutto Bai*, 7 A. 542. Referred to in *Manakji v. Suraj Mal*, 7 N. L. R. 82: 10 I. C. 70

VI. In another class of suits under section 583 of the Code of 1882 it was held that a suit to recover mesne profits or fruits of property received by a party to the suit while in possession obtained in execution of a decree, subsequently reversed in appeal is not barred by s. 214 (now s. 47), because the question raised in such suit, is not one relating to execution, discharge or satisfaction of the decree, (*see* 7 A. 170 F. B.; 14 C. 481, 605, 11 M. 261, 22 C. 501; 3 C. 720; 21 C. 340; 989; 29 P. R. 1902), and that a separate suit was maintainable for that purpose. In *Girdhari Lal v. Kamakhya*, 31 A. 361, it was held that s. 583 only applied to a case where a party is entitled to a benefit by way of restitution or otherwise under a decree passed in an appeal and where there is no decree passed in an appeal, this section was not applicable and a separate suit was maintainable for restitution of property taken in execution of *ex parte* decree which was afterwards set aside under s. 108 of the old Code. It would thus appear from the cases above referred to that for obtaining restitution of fruits of property recovered in execution of a decree subsequently reversed in appeal, a separate suit was maintainable, and that there was also an alternative remedy by an application to the Court which had executed the original decree. As regards the nature of the application, it was treated as an application either under s. 583 of the old Code, or under the Court's inherent power to remedy the wrong done by its process irrespective of that section; that is, the Court will not permit an injustice to be done by reason of an erroneous order made by it, when that erroneous order has been reversed. In 35 C. 265, it was, however, held that section 244 of the old Code did not apply in its entirety to proceedings held under s. 583 of the Code of 1882 for restitution of property taken in execution of a decree, which is reversed in appeal. Proceedings in restitution can be had either by summary process or by a new suit or action.

VII. In the new Civil Procedure Code (Act V of 1908) the old section has been wholly recast and its language has been completely changed to bring it into conformity with the practice founded on it (*See the Report of the Select Committee*). Under the old Code, its place was in Chapter XLI, dealing with "*appeals from original decrees*," and consequently it was held in 20 A. 189, that section 583 did not apply to cases of restitution under an order of His Majesty in Council; and in *Collector of Meerat v. Kalka Pershad*, 28 A. 665; 3 A. L. J. 556, and it was held that where a defendant in a partition suit, was deprived by the High Court, of a house allotted to him by the first Court and subsequently the High Court acting under Chapter XLVII, set aside its order on review, section 583 had no application, as the order entitling the defendant to restitution was passed under Chapter XLVII, and not in appeal under Chapter XLI of the Code of 1882.

VIII. In the present Code of 1908, its position has been changed and it has been inserted in Chapter XI headed "*Miscellaneous*." The effect of the change of the language and the position of the section is not to restrict its operation to cases of restitution where the decree is reversed or modified in appeal but to extend its operation to all cases of reversal, including the reversal of decree by an order of His Majesty in Council, or on review, or under Or. IX, r. 13 setting aside *ex parte* decree or under Or. XX, r. 14 in pre-emption cases or under s. 152 (amendment of decree) or under section 115 of the Code (revision).

The procedure laid down in the C. P. Code regarding suits must be followed also in cases of application to set aside dismissal for default and as such Or. IX, and Or. XLIII, r. 1 (c) apply to an order of dismissal of such an application; *Kali Charan v. Ratan Singh*, 19 N. L. R. 119: 75 I. C. 589; *Kripa Singh v. Mula Singh*, 1 P. L. R. 1919: 10 P. W. R. 1919.

A suit having been dismissed for plaintiff's default, he applied for restoration, and a notice was issued to the defendant which was returned unserved, owing to plaintiff's neglect to identify the defendant to the serving officer. The plaintiff having applied for a fresh notice, the Sub-Judge rejected the application. *Held* that the Court had no power to reject the application for fresh notice. Or. IX, r. 6, which, by s. 141, is made applicable to such a proceeding, only enables the Court to order a fresh notice to issue, and if it thought proper to order the plaintiff to pay the costs occasioned by the necessary postponement.—*Lallubhai v. Bai Magangavri*, 18 B. 59 *Referred to in*; *Manakji v. Surajmal*, 7 N. L. R. 32: 10 I. C. 705.

Section 141 of the Code makes applicable to proceeding on a petition under the Guardian and Wards Act (VIII of 1890) the sections and the orders of the C. P. Code, dealing with the appointment of Receivers; *In re Bai Jamnabai*, 36 B. 20: 13 Bom. L. R. 487.

Where an objection under Or. XXI, r. 59, was struck off for default, *held* that the proper remedy of the objector was an application under Or. IX, r. 9, read with s. 141 or a suit under Or. XXI, r. 63, C. P. Code, 1908, and that the High Court should not interfere in revision.—*Sheo Prasad v. Kastura Kuar*, 10 A. 119.

The procedure prescribed by the Code is as widely applicable as possible to miscellaneous proceedings by s. 647, C. P. Code, 1882 (s. 141).—*Minatoonnessa v. Khatoonnessa*, 21 C. 479.

S. 141 applies to proceedings under the Legal Practitioners Act; 1 Pat. L. J. 576: 37 I. C. 484.

The same procedure that applies to High Court decrees in Appellate jurisdiction must also be applied under s. 141, to the High Court's orders in revisional jurisdiction.—*Gold v. Goldenberg*, 16 B. 550.

S. 141 is wide enough to make the provisions of s. 10 apply to arbitration proceedings; *Firm of Jai Narain Batu, Lal, In the matter of*, A. I. R. 1922. Sind 6: 66 I. C. 796.

In a revision petition filed under s. 25 of the Provincial Small Cause Court Act (IX of 1887), *held* that s. 141, enables the High Court to apply to revision petitions of this kind the procedure applicable to an appeal, and that a memorandum of objections lies in such revision petitions.—*Krishna Aiyangar v. Appanaiyengar*, 17 M. L. J. 62.

By virtue of s. 141, a superior Court may, for sufficient cause, transfer a claim registered under Or. XXI, r. 99 to a subordinate Court for trial.—*Sithalakshmi v. Vythilinga*, 8 M. 548.

Where, after the execution proceedings had been struck off, and the decree declared to be satisfied, the judgment-debtor applied for refund of a certain sum of money as overpaid, after examining the state of the



IX. Although the scope of section 144 of the present Code is much wider than the provisions of section 583 of the old Code (*see* 16 C. L. J. 135), its provisions are by no means exhaustive as they do not cover cases where the right of restitution arises by the setting aside of a sale and such other similar cases and not merely by variation or reversal of a decree. That this is so, will clearly appear from the judgment of, Mookerjee J. in *Beni Madho v. Pran Singh*, 15 C. L. J. 187, p. 189, where His Lordship observed, "It is well settled that the power of a Court to grant restitution is not confined to the cases covered by the provisions of s. 144. The power extends also to cases which do not come strictly within the section, because the Court has an inherent right, irrespective of the section, to order restitution. *See*, 14 C. 484, 21 C. 989, 2 C. L. J. 537, 6 C. W. N. 710, 28 A. 665, 29 A. 143. These decisions furnish illustrations of cases in which orders have been made for restitution, though the cases do not strictly fall within the scope of s. 583. The principle upon which restitution is directed in such cases was explained by the Judicial Committee in *Rogers v. Comp-toir*, L. R. 3 P. C. 465. That principle is, that the Court will not permit an injustice to be done by reason of an erroneous order made by it. When that erroneous order has been reversed, the Court will restore the parties to the position which they would otherwise have occupied. That a Court has inherent power to make an order of this description cannot now be disputed, as s. 151 of the present Code has given legislative sanction to the principle." S. 144 is to be read with s. 151 of the Code, which is an auxiliary to s. 144; both the sections have been placed under the heading "Miscellaneous" and are close to each other.

X. The definition of the word "decree" in s. 2, cl. (2) of the present Code, includes the determination of any question within section 47 or section 144. This clearly indicates that an application under section 144 is not a proceeding under s. 47, and is not to be treated as a proceeding in execution. If an application for obtaining restitution is not to be treated as an application in execution, then the question arises: What is the period of limitation for an application under section 144? In *Asha Bibi v. Nuruddin*, 8 Bur. L. T. 165, the Chief Court of Burma has held that an application under s. 144 of the C. P. Code, 1908 for restitution is not in the nature of an application to execute any decree and therefore art. 181 of the Limitation Act applies to such an application.

XI. Although an application for restitution is not in the nature of an application to execute any decree, the determination of any question within section 144 is a decree within the meaning of s. 2, and any order passed by a Court in determining any question under s. 144 may be executed as a decree by virtue of s. 36 of the present Code, which provides that the provisions relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders; therefore, the provisions of s. 48 and other provisions of the Code relating to execution, so far as they are applicable, would apply to the execution of orders passed under s. 144 or s. 151.

XII. *Effect of Change—Advantage and Disadvantage.*—The scope of the present section has, no doubt, been made wider than that of s. 583 of the old Code, by recasting the whole section and changing the position thereof, but it seems that the procedure for obtaining restitution has not been simplified nor made convenient. On the contrary it has caused

account: *Held* that the question must be determined with reference to the provisions of s. 141, and the only course open to the judgment-debtor would have been to apply for a review of the order, which declared the decree to be satisfied, and struck off the execution proceedings—*Fakar-uddin Mahomed v. The Official Trustee*, 10 C. 538.

The Provisions of the Letters Patent of 1865, s. 36, that, when the Judges of a Division Bench are equally divided in opinion, the opinion of the senior Judge shall prevail, has been superseded by s. 98 (which is extended to miscellaneous proceedings of the nature of appeals by s. 141 of that Code), so far as regards cases to which s. 98 is applicable.—*Appaji Bhirrau v. Shirlal*, 3 B. 204.

S. 141 C. P. Code does not make the provisions of Or. IX, r. 4 and all cognate provisions applicable to execution proceedings, *Sheonandan Chaudhury v. Debilall*, 4 Pat. L. T. 93 A. I. R. 1923 Pat. 78.

Where an application for revision is dismissed for default of the petitioner, such petition can be restored under Or. IX, r. 9, by virtue of the provisions of this section.—*Jimani v. Bhagel Singh*, 97 P. R. 907; *Shanker Rao v. Manikrao*, 1923 Nag. 18. But see, *Mt Jamna v. Mt Ramraji*, 9 O. L. J. 627; 74 I. C. 380; *Maula Baksh v. Ram Das*, 2 Lah. L. J. 627; 56 I. C. 25; *Abdul Rahiman v. Sahana*, 1 Lah. L. J. 189; 58 I. C. 748.

A District Court is competent, under s. 24 and s. 141, C. P. Code, to withdraw an application for execution of a decree from a subordinate Court including the Small Cause Court, and to dispose of it himself, or to transfer it to another subordinate Court competent to deal with it.—*Gaya Pershad v. Bhup Singh*, 1 A. 180; *In the matter of Balaji Ranchoddas*, 5 B. 680; *Krishna Velji v. Bhau Mansaram*, 18 B. 61; *Nassarawanji v. Kharsedji*, 22 M. 778. *Contra* in *Kishori Mohun v. Gul Mohamed*, 15 C. 177.

*Held* that the rule in Or. XXIII, r. 2, by virtue of s. 141 applies to applications for execution of decree, and clause 4, art. 197, of Act XV of 1877, must be made subject to the rules contained in Or. XXIII, r. 2 and s. 141, C. P. Code.—*Kifayat Ali v. Ram Singh*, 7 A. 359 (6 M. 250 dis-sented from). See also *Pirjadi v. Pirjadi*, 6 B. 681.

Although a Court executing a decree is bound by the terms thereof, and cannot add to or vary or go behind them, the effect of Or. XXIII, r. 3, read with s. 141 of the C. P. Code, is that, when a decree is put into execution, the proceedings taken therefor amount to a separate litigation in which the parties can enter into a compromise much in the same manner as in a regular suit.—*Muhammad Sulaiman v. Jukki Lal*, 11 A. 228.

Or. XXI, r. 17 is analogous to the provisions of Or. VI, r. 17 and Or. VII, r. 11, which direct the Court to return plaints, before filing, for amendment in certain particulars. It does not therefore take away the power of the Court under s. 141 by analogy to Or. VI, r. 17; Or. VII, r. 11, C. P. Code, to amend applications for execution at any time before disposal.—*Sallappa Chetti v. Jagi Soorappa*, 17 M. 67.

The Presidency Small Cause Court has an inherent power to set aside an order made *ex parte* and to set it aside on proper cause being shown. It is erroneous to suppose that Or. IX, r. 18 has no application to proceedings under Chapter VII of the Presidency Small Cause Courts' Act.

several disadvantages. For instance, under the present section after the modification or reversal of a decree, a litigant has to make an application for restitution to the Court which passed the decree stating the facts and circumstances under which he claims restitution. The Court after receiving the application, shall treat it as a *miscellaneous case*, then invoking the aid of section 141 and applying its provisions, issue notice to the opposite party fixing a date for hearing his objections if any; on the date fixed for hearing or on any date to which the hearing may be adjourned, the Court after hearing the objections of the opposite party, may either grant or refuse the relief, (the order is of course appealable under s. 2 (2) of the Code). After the order is passed, the party obtaining the order for restitution, shall have to make application to enforce the order of restitution under s. 36 of the C. P. Code, in the form prescribed for execution of decree, and it would then be treated as an application for execution, and all the provisions relating to execution of decrees including limitation and the provisions of s. 18 of the Code would apply, but the initial application for restitution must be made within three years under art. 181 of the Limitation Act.

On the other hand, under the provisions of section 583 of the Code of 1882, the procedure was simpler, as the applicant for restitution could at once apply to the Court which passed the decree in the form of an execution petition; then that petition was treated in all respects as an application for execution of the decree of the appellate Court and all the provisions relating to execution, including limitation, and the provisions of the ss. 230 and 214 of the old Code became applicable.

Thus, under the present section, the procedure has not been simplified, but an intermediate step has to be taken before the order for restitution could be enforced by execution petition and thus the present section, instead of simplifying the procedure, has rather caused much disadvantage and hardship.

"Where and in so far as a decree is varied or reversed."—An order under Or. XXI, r. 90, C. P. Code, refusing to set aside a sale held in execution of a decree was reversed on appeal but the auction-purchaser was not made a party to the proceedings for setting aside the sale or to the appeal therefrom. The judgment-debtor subsequently applied for restitution against the auction-purchaser: *Held*, that s. 144, C. P. Code, did not in terms apply, as no decree was varied or reversed but only an order under Or. XXI, r. 90, was reversed on appeal; *Subbamma v. Chennaya*, 41 M. 467; 47 I. C. 628.

**The Court of First Instance shall Cause Such Restitution to be Made.**—An application for restitution under this section is to be made to the Court which passed the decree against which appeal was preferred; *Khem Narain v. Ganesho Kuar*, 5 C. W. N. 287. See also, *Hirachand v. Kastur Chand*, 18 B. 224.

The words "Court of the first instance" in this section include the Court to which a decree is transferred for execution; such Court has power to order restitution under section 144; *Mir Abdul Hussain v. Bibi Sona*, 7 S. L. R. 19; 20 I. C. 540. See also, *Venkayya v. Ragavacherlu*, 20 M. 448 (8 A. 545 followed).

Where an ejectment decree is passed by a Revenue Court and duly executed, but afterwards the decree was reversed in appeal, any application

It is quite true that it has not a direct application, because a proceeding under Chapter VII is not a suit, nor is an adjudication in the proceedings, a decree.—*Tyeb Beg Mohamed v. Allibhai*, 81 B. 45: 8 Bom. L. R. 803.

Where a Court grants permission to a *mutwalli* to lease wakf properties, the order is passed under s. 141 and is appealable neither under the Code nor any other law; *Habibai Rahman v. Saidannissa*, 38 C. L. J. 358.

Under s. 141 of the C. P. Code, the provisions of the C. P. Code are applicable to proceedings under the Lunacy Act; *Moni Lal v. Nepal Chandra*, 22 C. W. N. 547: 27 C. L. J. 205.

In hearing an application for certificate of guardianship, the Court ought to record the statements of witnesses in the manner provided by the C. P. Code.—*Ghafuran v. Chhanga*, A. W. N. (1906) 64: 3 A. L. J. 841.

If a pauper application is improperly framed, the Court has inherent power to amend the application. Moreover, section 141 of the C. P. Code, which is applicable to miscellaneous applications, does not cover pauper applications; *Kanakammal v. ...* M. L. J. 343: (1914) M. W. N. 329: 23 I. C. ... v. *Burjarjee*, 7 L. B. R. 60: 6 Bur. L. T. 141: 20 I. C. 649, where it has been held that s. 141 C. P. Code, does not apply to pauper applications.

S. 141 and Or. IX, r. 9.—It is extremely doubtful whether s. 141, C. P. Code, applies at all to proceedings under Or. IX, r. 9, and even if it does apply, s. 141 cannot operate to give an appeal from an order not otherwise appealable under Or. XLIII, r. 1; *Hara Kumar v. Murari Mohan*, 36 C. L. J. 184.

S. 141 of the C. P. Code, does not make Or. IX, r. 9 applicable to an application under Or. XXI, r. 2; *Hanseswari v. Radhika*, 63 I. C. 855.

Successive applications for execution are allowed by the C. P. Code of 1908 and the mere fact that a previous application was dismissed for default is not sufficient to bar a subsequent application; *Asvin Mandal v. Raj Mohan*, 13 C. L. J. 532 (12 C. L. J. 6 distd.).

**When an Application to Restore a Suit Dismissed for Default is Itself Dismissed for Default, Whether Another Application to Restore the First Application Lies.**—A suit having been dismissed for default, an application to restore the suit was put in. This application was also dismissed for default and then a petition was put in to set aside the latter dismissal. Held, by virtue of s. 141, Or. IX, applies to applications put in under Or. IX itself and the Court has jurisdiction to restore the application. An application under Or. IX is not a petition in a suit but is an original matter in the nature of a suit covered by s. 141; *Venkatanarasimha v. Suryanarayana*, A. I. R. 1926 Mad. 325: 50 M. L. J. 75; *Bepin Behari v. Abdul Barik*, 44 C. 950: 21 C. W. N. 30; *Abdul Rahaman v. Shahanna*, 1 Lah. 339; *Lallubhai v. Bai Magangarar*, 18 B. 49; *Salar Beg Saheb v. Karumanchi*, 23 L. W. 538: 94 I. C. 151: A. I. R. 1926 Mad. 654.

**Proceedings to which this Section does Not Apply.**—Section 141 of the C. P. Code does not make section 144 applicable to execution pro-

for restitution must be made to the Revenue Court as " the Court of first instance." No separate suit is maintainable in respect thereof; *Kashi Prasad v. Balbhadar*, 20 A. L. J. 133: 44 A. 283.

The Code has not defined, for the purpose of s. 144, what is " the Court of first instance " when " the Court of first instance " has lost territorial jurisdiction. Where the Court which passed a decree lost territorial jurisdiction over the locality and another Court was given that jurisdiction, an application for restitution was put in the latter Court, as on that date it had territorial jurisdiction. *Held*, that " the Court of first instance " under s. 144 was the latter Court invested with territorial jurisdiction; the Court must proceed upon some general principle in interpreting the phrase " the Court of first instance," which would apply even to cases where the Court of first instance has been abolished, and must apply such general principle also to cases where the Court of first instance has ceased to have jurisdiction; *Panchapakesa v. Natesa Pattar*, 51 M. L. J. 161: A. I. R. 1926 Mad. 813: 95 I. C. 587.

Where a decree passed by a temporary subordinate Court was reversed on appeal by the High Court but meanwhile the temporary subordinate Court which made the decree ceased to exist and another temporary subordinate Court had been established in its place to which the High Court remitted the case for a retrial. *Held*, that the new temporary subordinate Court was the Court of first instance within the meaning of s. 144 and that it had jurisdiction to order restitution though the original temporary subordinate Court had ceased to exist; *Lakshmana Goundan v. Subramania*, 13 L. W. 67: 61 I. C. 962.

Under the terms of s. 144 of the present Code, an application for restitution is not in the nature of an application to execute any decree; and the word " shall " in this section gives no discretion to the Court, either to grant or refuse the application, but the Court is bound to proceed to cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed.

In the case of orders passed by His Majesty in Council, section 144 can come into play after the course of action prescribed by Or. XLV, r. 15, has been followed; *Damodar Das v. Birj Lal*, 37 A. 567.

" On the application of any party entitled to any benefit by way of restitution or otherwise."—Under s. 583 of the old Code of 1882, in order to obtain restitution upon modification or reversal of a decree, it was necessary to make an application for execution of the appellate decree in the form prescribed for application for execution and then the Court had to proceed to cause the restitution in accordance with the rules prescribed for the execution of decrees in suits, and such application was held to be a proceeding in execution of the appellate decree and subject to the limitations prescribed for execution of decrees.

It was further held under section 583 of the old Code, that as the appellate decree was to be executed according to the rules prescribed for executions of decrees, therefore the provisions contained in s. 244 (now s. 47) were applicable.

But section 144, C. P. Code of 1908, prescribes a very different mode of procedure; under the present section, order for restitution can be obtained

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by making an application to the Court of first instance for that purpose, and it is not necessary that the application for restitution should be made in the form prescribed for execution of decrees and neither section 47 of the present Code, nor the limitation prescribed for applications for execution is applicable to such petition. An application for restitution under section 144 of the present Code is not in the nature of an application to execute any decree, therefore, art. 181 of the Limitation Act applies to such an application, and not arts. 178 or 179.

**"Place the parties in the position which they would have occupied but for such decree."**—The principle embodied in this section is that upon reversal of a decree, it is competent to the Court to grant relief by way of restitution, that is, by restoring to the successful party what he has lost in execution of the erroneous decree passed against him and subsequently reversed. In other words, the Court shall cause restitution to be made of all the benefits of which the successful party in appeal was deprived by enforcement of the erroneous decree of the Court of first instance. It is the legal effect of a decree of reversal that the party against whom the decree was given is to have restitution of all that he has been deprived of under it. See, *Parbhu Dayal v. Ali Ahmad*, 32 A. 79, *Dorasami Ayyar v. Annasami*, 23 M. 300; *Collector of Meerut v. Kalka Prasad*, 28 A. 665, *Hurro Chandra v. Shoorodhoni*, 9 W. R. 402.

Proceedings under s. 144, C. P. Code, are not proceedings, although they are in the nature of proceedings in execution to enforce directly or indirectly the final decree. The section is very wide in its terms. It includes matters which an execution Court or appellate Court could not ordinarily deal with, and the word "party" is not used in the section in the sense of "party to the suit" but must mean "party to the application," *Bry Lal v. Damodar Das*, 44 A. 55: 20 A. L. J. 456.

Courts acting under s. 144, C. P. Code, will only replace parties in the position which they actually occupied at the time of the order reversed and will not consider all the various subsequent positions voluntarily taken up by the parties as the remote consequences of that order; *Kedarnath v. Jai Berhma*, 5 Pat. L. W. 238: 37 I. C. 863.

Where an assignment has taken place even after the appellate decree, which is the basis of the claim for restitution, the assignee is entitled to the benefit of s. 144, C. P. Code. Parties in s. 144 do not mean only persons who were impleaded as parties at the time of the decree of the trial Court but includes also their representatives whether by assignment or devolution. *Shaikh Kamaruddin v. Baja Thakur Barham*, A. I. R. 1918 Pat. 243; 5 Pat. L. W. 141.

**Restitution may be Made Where Possession of Property is Taken Otherwise than by Execution.**—It has also been held that under s. 144 of the Code, restitution may be made even when the possession of the property was taken otherwise than by execution; *Harachandra v. Chintamani*, 21 I. C. 84. See also, *Sheodihal v. Bhawani*, 29 A. 348: 4 A. L. J. 188; *Raghu Sing v. Shew Prosad*, 16 C. L. J. 135.; *Surya Datt v. Jamna Datt*, 42 A. 568: 57 I. C. 148; *Narain Singh v. Bachan Singh*, 8 Lah. 41: 28 P. L. R. 62: 8 Lah. L. J. 551: A. I. R. 1927 Lah. 37 (42 A. 568 *fold.*; A. I. R. 1924 Cal. 769 *distd.*).

**Court's Inherent Power to Order Restitution Irrespective Section.**—It is well settled that the power of a Court to gra



*Appaji*, 30 B. 506: 8 Bom. L. R. 367. S. 253, C. P. Code, 1882 (s. 145) applies to persons who have become sureties before the passing of a decree in an original suit. A surety who was not made a party to the decree at the time of its alteration under s. 210, C. P. Code, 1882 (Or. XX, r. 11) for its payments, cannot be proceeded with under this section.—*Chandan Kuar v. Trikham*, 3 A. 809. The words "before the passing of the decree in the original suit" in s. 253, C. P. Code 1882 (s. 145) mean before the decree in the original suit which had not been made, but which would be made if the litigation proceeded, and for the performance of which the surety became liable—*Sonatun Shaha v. Deno Nath*, 20 C. 222: 3 C. W. N. 228.

"For the restitution of any property taken in execution."—As to security for restitution, see Or. XLI, r. 6 and the notes and cases under s. 144.

"For the payment of any money."—See the following sections and orders of the Code.—S 32 (d), ordering a witness to furnish security for his appearance. S 55 (4), which relates to security to be furnished by a judgment-debtor who after arrest expresses his intention to apply to be declared an insolvent. S. 91, directing the defendant to furnish security for production of any property belonging to him. Or. IX, r. 13, security bond executed for performance of any decree that may be eventually passed. Or XXV, r. 1, security for costs. Or. XXXII, r. 8, costs by retiring next friend. Or. XXXVII, r. 3, leave to defend in summary procedure. Or. XXXVIII, r. 2, security in cases of arrest before judgment. Or. XXXVIII, r. 5, security for attachment before judgment. Or. XLI, r. 5, security from appellant on stay of execution. Or. XLI, r. 10, security for costs of appeal. Or. XLV, r. 7, security for respondent's costs in appeal to the King in Council. Or. XLV, r. 13 (2) (b), security from respondent in appeal to Privy Council when decree appealed from allowed to be executed.

"Surety for fulfilment of any condition imposed on any person," etc.,—the above words in clause (c) have been added to do away with the effect of the ruling in 22 M. 268 noted below. By the addition of the above words, surety bonds such as mentioned in the Madras case are now enforceable under this section. A surety entered into a bond, undertaking to produce certain debt bonds if the defendant failed to produce them, or to pay the amount thereof. Upon an application being made that execution should issue against the surety. *Held* that a bond, so worded, did not make the surety liable for the performance of the decree so as to bring the case within s. 253, C. P. Code, 1882 (s. 145) and that the liability of the surety could not be enforced in execution.—*Narayanamma v. Ramayya Chetti*, 22 M. 268.

A debtor who had been arrested and imprisoned in a civil jail, was released upon his filing a petition in insolvency and upon a person depositing cash security for his production. After the insolvency petition was dismissed the security failed to produce the debtor. The Court thereupon ordered the surety money deposited to be forfeited to the Government. *Held* that security money cannot be forfeited to Government, but the attaching creditor is entitled to get it; *Basanti v. Chhedu*, 16 C. W. N. 664: 39 C. 1048. But it must be credited against the decree and is not to be made available to the decree-holder over and above his decretal amount; *Surendra Nath v. Keshab Lal*, 25 C. W. N. 36.

is not confined to the cases covered by the provisions of s. 144. The power extends also to cases which do not come strictly within the section, because the Court has an inherent right, irrespective of the section, to order restitution. The principle upon which restitution is granted in such cases is that the Court will not permit an injustice to be done by reason of an erroneous order made by it; when that erroneous order has been reversed, the Court will restore the parties to the position which they would otherwise have occupied. See, *Beni Madho v. Pran Singh*, 15 C. L. J. 187; *Mookoond Lal v. Mahomed Sami*, 14 C. 484; *Raja Singh v. Kooldip Singh*, 21 C. 989; *Dinesh Prasad v. Sankar Chaudhury*, 2 C. L. J. 537; 9 C. W. N. 381; *Raday Singh v. Mangni Ram*, 6 C. W. N. 710; *Collector of Meerut v. Kalka Prasad*, 28 A. 665; *Shiam Sunder v. Kaisar Zamani*, 29 A. 143; 4 A. L. J. 19; *Saroda Prasad v. Saudamini*, 3 C. L. J. 181; *Udit Narain v. Radhika Prasad*, 6 C. L. J. 662; *Parbhu Dayal v. Ali Ahmad*, 32 A. 79; *Sasirama Kumari v. Meherban Khan*, 13 C. L. J. 243 (247); *Dinonath v. Jogendranath*, 26 I. C. 890; *Kartick Chandra v. Haragobind*, 21 C. L. J. 75 (78); *Amirunnissa v. Kurimunnessa*, 18 C. W. N. 1299; 22 I. C. 839; *Sham Pershad v. Ram Chand*, 10 P. R. 1914; 25 P. W. R. 1914; *Nepal Chundra v. Ramendra*, 24 I. C. 284; *Narendra v. Jogendra* 20 C. L. J. 409 (476); *Raghu Singh v. Shew Prasad*, 16 C. L. J. 135.; *Rai Charan v. Debi Prasad*, 26 C. W. N. 408; 35 C. L. J. 53; *Allah Din v. Chiragh Din*, 63 I. C. 43; *Jagannath v. Fatteh Chand*, 61 P. R. 1917; 41 I. C. 910; *Khair Din v. Ahmad*, 2 Lah. L. J. 207; *Radha v. Sakhu*, 54 I. C. 664.

In cases not comprehended strictly within the letter of s. 144 of the C. P. Code (which makes grant of restitution obligatory in certain circumstances), restitution is not a matter of right but depends upon the sound discretion of the Court and will be ordered only when the justice of the case calls for it; but the test of what is just must be determined with reference to the imperative requirements of the law applicable to the subject-matter. An obligation is imposed upon the Court to dismiss an application for execution of a decree, if the application is barred by limitation. Hence the Court cannot withhold relief by way of restitution, when a sum has been paid out on the strength of an erroneous decision upon a point of limitation; *Ashutosh v. Upendra Prasad*, 24 C. L. J. 467; 21 C. W. N. 564.

If, pursuant to an erroneous order of a Subordinate Court under s. 73 of the Code, money had been paid out to a litigant, the High Court can direct that person to bring back the money into Court. The Court has inherent power to direct such restitution to enable it to do effective and complete justice between the parties; *Gopal Chandra v. Hari Mohun*, 21 C. L. J. 624. (11 C. L. J. 538; 32 C. 595; 17 C. W. N. 1057 referred to).

The discretionary powers given to a Court by s. 151, C. P. Code, cannot enlarge the scope of s. 144 and cannot convert an application for a relief which has nothing to do with restitution into an application for restitution; *Gopisetti Narayanaswami v. Kunaparaju Chinna Venkataraju*, 4 L. W. 400; 34 I. C. 774.

**Who Is Entitled to Restitution and Against Whom Restitution can be Enforced.**—Under s. 583, C. P. Code, 1882 (s. 144), the decree of the Appellate Court has to be executed, and by the very scope of the section, it can only apply to the parties to the appeal; it cannot be executed against a person who was no party to the decree of the Appellate Court, that is, it cannot be executed against the assignee of the decree appealed against

Where on releasing a judgment-debtor from arrest, the Court ordered that his sureties should furnish security for his appearance on a certain day, but the bond taken, however, was for due performance of any decree that may be passed against the judgment-debtor. *Held* what the Court ordered and what the surety agreed to, was to secure the appearance of the judgment-debtor on the particular day and that having been fulfilled, the sureties were discharged. *Quære*—Whether the bond not complying with the order of the Court or any provision of the Code, is enforceable at all; *Chandi Charan v. Ram Kumar*, 7 Bur. L. T. 5: 23 I. C. 349.

A surety under s. 55 (4) continues liable until both the conditions, *viz.*, (1) judgment-debtor applying to be declared an insolvent, and (2) the judgment-debtor appearing when called upon to do so, are satisfied. In default of either, the surety remains liable; *Kailasa v. Arunachalla*, 15 M. L. T. 224.

“Under an order of the Court.”—The words “under an order of the Court” in clause (c) of s. 145, which applies equally to the payment of money and the fulfilment of a condition must in each case refer to the original order of the Court. They do not refer, in respect of the condition, to the original order imposing it, and, in respect of the payment to a second order to be passed in subsequent proceedings, *Amolak Sao v. Kashi Nath*, 64 I. C. 430.

**Enforcement of Security Bond.**—Where an *ex parte* decree was set aside on defendant's furnishing security to the extent of any amount that might be found due from the defendant by any decree to be eventually passed in the suit, such surety bond may be enforced under this section; *Sonatun v. Dino Nath*, 26 C. 222: 3 C. W. N. 228.

The mode of enforcing payment against a surety is by summary process in execution and not by separate suit—*Kusaji v. Vinayak*, 23 B. 478. *See also*, *Abdul Waheb v. Faroodonnissa*, 16 C. 323; and *Chunder Kant v. Ram Coomar*, 3 C. L. R. 505.

Where an attaching officer acting under Or. XXI, r. 43, C. P. Code, entrusted the property for safe custody and for production in Court to a villager and took a bond with two sureties, it is not open to the decree-holder to enforce in execution the bond so taken against the sureties on failure to have the property produced in accordance with its terms; *Rajah of Venkatagiri v. Surakrishna Naidu*, 39 M. L. J. 472: (1920) M. W. N. 784.

Under s. 145 a decree-holder cannot execute a decree against a surety who becomes one under Or. XXI, r. 43, C. P. Code, as amended by the High Court in respect of property entrusted to him. The proper mode of enforcing such a bond is by assigning it in favour of the decree-holder; *Subbareddi v. Veerarya Tata*, 25 M. L. T. 220; (1910) M. W. N. 210.

In execution of a decree certain moveable properties were attached and were put in the custody of certain persons by the Amin and they executed a security bond undertaking to produce the properties in Court or to pay their price. They failed to produce the properties when demanded. The decree-holders applied to execute their decree by proceeding against those persons. *Held*, that the decree-holders were entitled to do so as the case fell within the general rule laid down by s. 145, C. P.

when that assignee had been no party to the appeal.—*B. L. Frizoni v. Raja Ram*, 5 C. W. N. 426. See also, *Bhagwati Prasad v. Jamna Prasad*, 19 A. 136; *Sadiq Husain v. Lalla Prasad*, 20 A. 139; *Safaraddi v. Durga Prasad*, 16 C. L. J. 83; *Abbas Husain v. Dilband Begam*, 16 O. C. 225. But see, *Gorindappa v. Hanumanthappa*, 38 M. 36; 23 M. L. J. 513.

S. 144, C. P. Code, allows restitution to be made against the decree-holder who obtains any benefit under a decree which is afterwards reversed in appeal. It does not allow restitution against a third party such as a stranger auction-purchaser; *Balwant Singh v. Mt. Laiqa Begam*, L. R. 4 A. 526; 75 I. C. 238; *Raja Rao v. Ananthanarayanan*, 42 M. L. J. 308. (1922) M. W. N. 255; *Pearry Lal v. Hanifunnissa*, 38 A. 210.

A bona fide purchaser, who is a stranger to the decree, does not lose his title to the property by the subsequent reversal or modification of the decree. But where the decree-holder himself is the purchaser, the sale may be set aside if the decree is subsequently reversed or modified. Where the purchaser is a stranger, the judgment-debtor whose property is sold is entitled only to the sale-proceeds of the property on the subsequent reversal of the decree. But where the purchaser is the decree-holder, he is bound to restore the property to the judgment-debtor; *Zainal Abedin v. Muhammad Asgar Ali*, 10 A. 166; 15 I. A. 12; *Chinna Vavanon v. Chettiappa*, A. I. R. 1926 Mad 78.

S. 144 is not confined to cases where restitution is claimed on the reversal of the decree in first or second appeal. Provided the decree is varied or reversed, the section applies, however the reversal or variance has been decreed; *Sitalakshmiammal v. Krishnasami Iyer*, (1922) M. W. N. 186; 65 I. C. 797.

Plaintiffs sued to set aside a decree in execution of which they had paid money to the decree-holder. The decree was declared to be null and void. Plaintiffs then applied for restitution of the amount paid by them under s. 144, C. P. Code—*Held*, that s. 144 applied. There is no restriction in s. 144 as to the manner in which the decree has been varied or reversed, *Ghulam Mahomed v. Lal Chand*, 13 S. L. R. 153; 53 I. C. 552.

Where a preliminary decree for partition is set aside on appeal, the final decree which may have been passed pending the appeal from the preliminary decree becomes ineffective. Consequently, a party from whom any money has been levied under the final decree so rendered inoperative, is entitled to restitution of the amount from the party who levied it on the basis of the final decree; *Atul Chandra v. Kunja Behari*, 27 C. L. J. 451; 43 I. C. 775.

It is not necessary that a person asking for restitution under this section should have been a party to the successful appeal if the appeal is in effect and substance in favour of such party. Under this section, the parties must be placed in the position they were previously in, irrespective of any other rights accruing to any of the parties during the litigation.—*Ganga Prasad v. Brojo Nath*, 12 C. W. N. 642. See also, 38 M. 36; 23 M. L. J. 513.

On the reversal of a judgment, the law raises an obligation on the party to the record, who received the benefit of the erroneous judgment, to make restitution to the other party for what he had lost; and it is the duty of the Courts to enforce that obligation, unless it be shown that restitution would be clearly contrary to the real justice of the case. But with reference to

Code. Or. XXI, r. 43 only makes distinct the liability of the Amin so far as the Court is concerned and does not affect in any way the liability of a person who expressly takes charge of attached property to either the Court or the decree-holder; *Madho Prasad v. Pearcey Lal*, 19 A. L. J. 247.

The execution of the decree of an Appellate Court was stayed pending an application for review of judgment, upon the judgment-debtor giving a security for the execution of the decree, and a surety was accepted on his behalf. *Held* that the judgment-creditor could not proceed summarily against the surety under the provisions of s. 253, C. P. Code, 1882.—*Balaji v. Ramasami*, 7 M. 284.

Where pending the disposal of an appeal, execution of the decree was, stayed on the judgment-debtor giving a security bond and the appeal was eventually dismissed—*held* that the furnishing of the security in no way detracted from the right of the decree-holder to enforce his decree as against his judgment-debtor in any way he thought fit in accordance with the law. The fact that the security is given does not take away any legal right which a decree-holder otherwise has, *Rajbans Sahai v. Surju Lal*, 3 Pat. L. J. 176. 4 Pat. L. W. 216

Where after the passing of a decree for arrears of rent, a person executed security-bond, rendering himself personally liable, and hypothecating certain immovable property to secure the performance of the decree. *Held* that the obligation created by such security-bond could not be enforced by a Court of Revenue by the sale of the hypothecated property.—*Behari Lal v. Jagannadan*, 19 A. 247

If a surety against whom a surety-bond is sought to be enforced summarily in execution, applies for and obtains time to pay the money, he is estopped from raising the objection, that the surety-bond cannot be executed summarily, when the decree-holder again applies for execution against him.—*Kamizuddi v. Fauzdar Khan*, 10 C. W. N. 830: 4 C. L. J. 311.

S. 145 of the C. P. Code does not apply to proceedings for the enforcement of surety-bonds taken by the decree-holder outside the Court; *Subbaraya Pillai v. Sathanatha Pandaram*, 24 M. L. T. 416; (1918) M. W. N. 764.

It is not open to a surety to reopen the question as to his liability, when in a prior execution proceeding he accepted the finding of the Court as to his liability.—*Waman Hari v. Hari Vithal*, 31 B. 128.

The liability of the surety of a Receiver may be enforced under this section; *Rashmani v. Barada Kant*, 20 C. L. J. 123

S. 145 applies where any person has become liable as surety for a Receiver and such surety can be ordered to pay the sum which he has bound himself to pay; *Maung Po Thein v. Ma Waing*, 13 Bur. L. T. 91: 59 I. C. 844.

"To the extent to which he has rendered himself personally liable."—A surety-bond creating a personal liability may be enforced under this section; but where by a surety-bond immovable properties are mortgaged, the mortgaged properties cannot be sold for satisfaction of the debt due under the surety-bond, otherwise than by instituting a suit for sale in enforcement of the mortgage. *See* Or. XXXIV, r. 14.

the position of innocent third parties, the rule that a plaintiff in an action to recover land cannot, by his writ of restitution or assistance, dispossess a stranger to the proceeding holding possession on an independent title or claim of title and not in collusion with the defendant, does not apply when the party seeking to be restored possession has been wrongfully dispossessed by the agency of the Court.—*Doraiswami Ayyar v. Annasami Ayyar*, 23 M. 306: 10 M. L. J. 307. Referred to in *Hukum Chand v. Kamalanand*, 33 C. 927: 3 C. L. J. 67. See also, *Jari Berham v. Kedarnath Marwari*, 49 I. A. 351 (P. C.).

A decree awarded costs against two defendants both of whom appealed but the costs were paid by one alone, who died pending the appeal. His son was not brought upon the record and the appeal was heard at the instance of the surviving defendant alone and the decree was reversed in appeal. The son of the deceased defendant applied for restitution of costs realized from his father. Held that he was not entitled to restitution as he was not a party to the appeal.—*Natesa Ayyar v. Annasamy Ayyar*, 25 M. 426.

The assignee of a decree-holder is his representative and is a party entitled to the benefits, by way of restitution or otherwise under the decree within the meaning of this section. This section must be read with s. 244, C. P. C. of 1882 (s. 47)—*Jamini v. Debi Prosad*, 33 C. 857: 4 C. L. J. 192.

An attaching creditor of sale-proceeds, payable to a vendor decree-holder not being a party to the decree in execution of which the sale took place nor to an application for substitution as a vendee of the decree-holder, is not a representative of the said vendor decree-holder within the meaning of s. 144 of the Code; *Jatindra Nath v. Sarat Chundra*, 29 C. L. J. 360.

The application for restitution is maintainable not merely against the original plaintiff but also against the purchaser in execution who is in law a representative of the plaintiff and in no better position than the plaintiff himself; *Basanta Kumari v. Balmukund*, 2 Pat. 277: 1 Pat. L. R. 338. 72 I. C. 912.

No restitution can be ordered where the original decree was executed jointly and some of the decree-holders are dead and no substitution had been effected. The liability to make restitution being joint, in the absence of some of them, the claim must fail as against all; *Gajo Singh v. Amrit Naram*, 2 Pat. L. T. 234.

**Court is Not Restricted to the Specific Orders Contained in the Appellate Decree, but may Make any Other Order Consequential on Reversal or Modification.**—A decree of reversal by an Appellate Court, contains, by necessary implication, a direction to the Court below to cause restitution to be made of all the benefits of which the successful party in the appeal was deprived by the enforcement of the erroneous decree of the Court of first instance. The absence of a specific direction in the decree of the appellate Court for payment of mesne profits, does not deprive the Court of first instance, of its jurisdiction, to award mesne profits by way of restitution. Such Court has not only jurisdiction, to restore to the successful party, the possession which he had lost, but all other benefits of which he had been deprived; *Parbhu Dayal v. Ali Ahmad*, 32 A. 79. See also *Raja Singh v. Kooldip Singh*, 21 C. 989; *Screenath v. Ram Ratan*, 24 A. 361;

S. 145 of the C. P. Code has no application to cases where the instrument of suretyship creates no personal liability but gives only charge on the property; *Raja Raghubar Singh v. Thakur Jai Indra Bahadur Singh*, 42 A. 158: 46 I. A. 228, P. C.: 55 I. C. 550.

The liability under s. 145 attaches only in the case of a person who is "surety" for the payment of any money under an order of the Court and not a surety liable to pay owing to default. But where the surety undertakes to produce certain property of the judgment-debtor attached in execution of a decree or in default to be liable for its value, the security-bond can be enforced by way of execution apart from the provisions of s. 145. Although the case does not come within the terms of s. 145, the Court has the inherent power to enforce its bond without recourse to a suit; *Sankunni v. Vasudevan*, 51 M. L. J. 239: 97 I. C. 787: A. I. R. 1926 Mad. 1005.

Where the defendants as well as the person giving security both agreed that the security over the immoveable property might be realised by means of execution and that no separate suit was necessary, it is open to the decree-holder to proceed against the surety in execution; *Sukumari v. Mungnee Ram*, 30 C. W. N. 683: 95 I. C. 908: A. I. R. 1926 Cal. 889.

When s. 145 lays down that the decree or order against the original judgment-debtor may be executed against the surety to the extent to which he has rendered himself personally liable, the "decree" is clearly the decree against the judgment-debtor for the performance of which the surety has rendered himself liable; *Amir v. Madho Prasad*, 39 A. 225: 15 A. L. J. 76.

S. 145 of the C. P. Code applies only where the surety has rendered himself personally liable for the decretal amount; it does not apply where, the surety deposits Government Securities for fulfilment of the decree; *Brajendra Lal v. Lakshmi Naram*, 19 C. W. N. 961: 29 I. C. 149.

Where in a surety-bond immoveable properties are mortgaged for costs of the Privy Council and there is also personal liability, the personal liability may be enforced under this section but not the charge created by the mortgage, *Chandrabati v. Madho Prasad*, 19 C. W. N. 178: 27 I. C. 365 (32 C. 494 referred to).

The Secretary of State for India not being personally liable under the bond, the decree would not be executable against him, under s. 145 nor would that section preclude the Secretary of State from questioning the validity of the security in a suit for enforcement; *Srinivas Prasad v. Kesho Prasad*, 38 C. 754: 15 C. W. N. 475: 13 C. L. J. 365.

As to attestation of surety-bond by which immoveable properties are mortgaged, see the cases under s. 68 of the author's Evidence Act. As to registration, see s. 17 of the Registration Act.

**This Section does Not Bar a Regular Suit for Enforcement of Surety Bond.**—This section it seems, does not bar a regular suit for enforcement of the surety-bond against the surety; but is an additional remedy against the surety; the word used in the section is "may" which gives the party an option to enforce the bond either in the summary way in the execution department or by means of a regular suit. This view is supported by the decision of the Bombay High Court in *Moti Lal v.*

*Dinesh Prasad Shankar*, 9 C. W. N. 381; 2 C. L. J. 537; 11 O. C. 235, p. 237; *Dino Nath v. Jogendra Nath*, 26 I. C. 890; *Municipal Council, Kumbakonam v. Sadagopachariar*, 29 I. C. 380.

S. 144 makes it unperative on the Court of first instance to cause restitution as far as may be and for the purpose of restitution it is empowered to make any necessary order; *Ragharachari v. Pakkiri Muhammad*, 30 M. L. J. 497, 19 M. L. T. 381.

S, having obtained a decree against M and another, brought to sale and purchased M's property pending appeal. The decree having been reversed, *held*, that M was entitled to the restoration of his property, and not merely to the proceeds of the sale thereof—*Sadasiva v. Muttee*, 5 M. 100. See also, *Lati Koer v. Sobadra Koer*, 3 C. 724.

The procedure provided by s. 583, C. P. Code, 1882 (s. 144) for obtaining any benefit by way of restitution or otherwise, under a decree passed on appeal is not confined to cases where the restitution desired is provided for by the decree itself—*Balvanta v. Sadrudin*, 13 B. 485. See also, *Kasim Saib v. Luis*, 17 M. 82; 4 M. L. J. 1.

The Court of first instance dismissed a suit with costs. On appeal the Appellate Court directed that the original decree should be affirmed and the appeal dismissed, and that the appellant should pay the respondent's costs in the Appellate Court, which were specified. The decree of the Appellate Court did not contain any specification of the costs of the original Court. *Held*, that the Court executing the appellate decree might execute it for the costs of the original Court looking to the decree of that Court to ascertain the amount thereof.—*Behari Lal v. Khub Chand*, 6 A. 48. See also, *Himayat Hussain v. Jai Devi*, 5 A. 589.

The Court has power to award to a successful appellant interest upon an amount found on appeal to have been improperly levied in execution of a decree.—*Ayyavayyar v. Shastram Ayyar*, 9 M. 506; *Neelakandan Nambudri v. Vasudevan*, 45 M. L. J. 323; (1923) M. W. N. 503.

Where a suit was decreed with costs but the order as to costs was reversed on appeal and the defendant applied for restitution of the amount of costs which the plaintiff had recovered from him and also interest thereon. *Held*, that, in accordance with the provisions of s. 144 C. P. Code, the defendant was entitled to get interest on the amount of costs.—*Gokul Prasad v. Ram Devi*, 19 A. L. J. 771; 63 I. C. 513. The restitution to be awarded under this section must be "properly consequential" on the reversal of the decree. The Court may therefore in a proper case refuse to make an order for the refusal of costs; *Tarachand v. Champi*, 46 A. 767; 84 I. C. 75; A. I. R. 1924 All. 713.

A successful appellant in an appeal to the High Court applied, in execution of his decree, for a refund of a sum of money which he had paid to the respondent, by way of costs with interest thereon, in execution of the lower Court's decree. He further applied for interest on the refund claimed, to which the respondent objected. *Held*, that, the appellant was entitled to the interest.—*Ram Sahai v. Bank of Bengal*, 8 A. 262.

A Party Entitled to Restoration under this Section is also Entitled to Mesne Profits in Eviction.—A Court reversing a decree, under which



*Thakore Chandra*, 36 B. 42, in which it has been held that where a bond is passed as security for restitution in the event of decree being reversed in appeal, a suit based upon the bond is maintainable.

This section gives an additional remedy to the decree-holder against the surety. It does not prevent the decree-holder from bringing a suit on the surety-bond to enforce the contract made with him by the surety. —*Abdul Kadir v. Hurec Mohun*, 6 N. W. P. 261.

Where A having been brought under arrest in execution of a decree, B handed over two Government Securities to decree-holder's pleader upon the understanding that the latter should hold them as security for the due fulfilment of the decree against A. Held, that the case did not come under s 145 B only created an equitable charge upon the notes in favour of the decree-holder by depositing them as security and his liability could only be enforced in a regular suit; *Brajendra Lal v. Lakshmi Naram*, 19 C W. N. 961.

**Surety Bond need Not be in Favour of Court.**—There is no warrant for the proposition that it is only a security-bond in favour of the Court which can be executed against the surety under s 145. In a case where a person has contracted expressly that he will guarantee the performance of any of the obligations set out in s. 145, whether such a contract be oral or in writing, he has rendered himself liable to be proceeded against in execution of the decree as prescribed in s 145; *Joyman Bewa v. Easin Sarkar*, 30 C W N. 609. A. I. R. 1926 Cal. 877

**Surety's Right of Appeal.**—Under the express provision of this section, the surety shall be deemed a party within the meaning of s. 47; consequently any order passed against him in execution is appealable

A surety against whom a decree is sought to be enforced under s 253, C. P. Code, 1882 (s 145) has a right of appealing against an order made in the execution proceedings.—*Suleman v. Sivram*, 12 B 71.

An order refusing to enforce a security-bond is appealable. Section 145 does not bar such appeals against sureties. The contention that that section justifies only an appeal by a surety cannot be recognized. Section 145 deals with the procedure, not the extent of surety's liability; *Gallamudi v. Chaparalu*, (1914) M. W. N. 714.

An order directing the arrest of a surety passed by a Court exercising ordinary civil jurisdiction in execution of a Small Cause Court decree transferred to it, is appealable; *Adhar v. Pulin*, 20 C. L. J. 129.

**Notice to the Surety.**—The intention of s 253, C. P. Code, 1882 (s. 145) is that the surety must have a notice in writing that the decree is going to be executed against him. It is immaterial whether such notice is given by the Court which passes the decree or the Court to which it is sent for execution.—*Lakshmishankar v. Raghmal*, 29 B 29.

Notice to the surety under this section is a condition precedent to the validity of an order for execution against him. An attachment issued without such notice is illegal; *Tankin v. U Che Si*, 2 Rang. 567: 84 I. C. 998; A. I. R. 1925 Rang. 185.

A Court is not entitled to pay the surety's money in Court to the judgment-creditor without notice to the surety and without a finding that

possession of property has been taken, has power to order restitution of the property taken possession of, and with it, any mesne-profits which may have accrued during such possession.—*Raja Singh v. Kooldip Singh*, 21 C. 989 (3 C. 720; 14 C. 484, *refd. to*; 10 A. 170 *explained*). *Abdul Rahman v. Allah Baksh*, 53 I. C. 119. *See also*, *Radhey Singh v. Magni Ram*, 3 C. W. N. 710, where the plaintiff was put into possession under s. 501, C. P. Code, 1882 (Or. XXIX, r. 9) and the defendant claimed mesne-profits after the dismissal of the suit. In *Sri Nath v. Ram Ratan*, 24 A. 361, it has been held that a separate suit for mesne-profits for the time during which the plaintiff had been out of possession, is barred by s. 244, C. P. Code, 1882 (s. 47).

A person who did not enter into possession of the property by virtue of a decree in his favour cannot be made liable to pay mesne profits by way of restitution; *Nand Ram v. Jiva Ram*, 41 I. C. 23.

A person entitled under s. 583, C. P. Code, 1882 (s. 144) to the restoration of any benefit of which he has been deprived by reason of a decree which has been subsequently reversed in appeal is entitled, if the thing to be restored is money, to interest for the time during which he has been deprived of the use of it, or, if the thing to be restored is land, to mesne-profits for the time during which he has been kept out of possession.—*Hardat v. Izzatunissa*, 21 A. 1. *See also*, *Phul Chand v. Shankar Sarup*, 20 A. 430; and *Bhaqwan Singh v. Ummatul Hasnain*, 18 A. 262; *Jai Berham v. Kedar Nath*, 49 I. A. 351 (P. C.); *Sagore Mandal v. Mofjuddin*, 24 C. W. N. 50; 29 C. L. J. 486.

*Semble*.—That if a summary order under s. 583, C. P. Code, 1882, (s. 144) awarding mesne profits had been made prior to the decree-holder's attachment, it might have amounted to a decree within the meaning of s. 273 (Or. XXI, r. 53).—*Vasudeva v. Narayana Pattar*, 24 M. 341.

A judgment-debtor is entitled to restitution with mesne-profits under this section after the sale is set aside by the Appellate Court.—*Thakur Kamakhya Singh v. Munshi Prag Narain*; 8 O. C. 254.

**Court's Power to Award Interest on Restoration.**—When a decree-holder withdraws money under a decree which is afterwards reversed on appeal, he is bound to restore the amount with interest at the rate of 6 per cent. per annum from the date of withdrawal to the date of repayment into Court; *Ashutosh Goswami v. Upendra Prasad*, 21 C. W. N. 564; 24 C. L. J. 467; *Indrachand v. Forbes*, 2 Pat L. J. 149.

S. 144 is very comprehensive and applies when a decree has been reversed by the Privy Council, and in such a case interest should be allowed on money which has to be paid back in consequence of that reversal; *Hanuman Prasad v. National Bank of India*, 7 Lah. 232; 8 Lah. L. J. 338; 93 I. C. 954; A. I. R. 1926 Lah. 488.

**Sub-section (2)—Bar of Suit.**—This sub-section is new. It expressly prohibits separate suit for the purpose of obtaining any restitution or other relief which can be obtained by application to the Court of first instance by an application under sub-section (1). Under the old Code, there were conflicting rulings on the point. This sub-section has been added to set at rest the conflicting rulings and it *supersedes the following cases* so far as they decided that restitution may be enforced by a separate suit; and it also supersedes the

the conditions of the bond had not been complied with; *Krishnaswami v. Rangaswami*, 30 I. C. 517.

"Such person shall, for the purposes of appeal, be deemed a party."—S. 145 in express terms provides that the surety shall be deemed a party to the suit within the meaning of s. 47 only for the purposes of appeal and excludes by implication the inference that he is a party to the suit in proceedings before the original Court; *Noor Mohamed v. Dhani Ram*, 96 I. C. 234; A. I. R. 1926 Sind 105.

**Discharge of Surety and Duration and Extent of his Liability.**—A surety must be taken to have entered into his contract only for the time during which the relation created by the instrument of suretyship exists, and with reference only to the person to whom he made himself responsible—*Mohip Narain v. Shaw*, 25 W. R. 250

As a general rule, the acceptance of interest in advance by the creditor does operate as giving of time to the principal debtor, and consequently as a discharge to the surety.—*Protab Chunder v. Gour Chander*, 4 C. 132 (Affirmed by the P. C. in 6 C. 421). See, however, *Damodar Das v. Muhammad Husain*, 22 A. 351.

A mere gratuitous agreement by a creditor to give time to the principal debtor will not discharge the surety. In order to have such effect, an agreement to give time to the principal debtor must amount to a contract, that is, there must be consideration therefor.—*Damodar Das v. Muhammad Husain*, 22 A. 351. See also, *Hodges v. The Delhi and London Bank*, 23 A. 137, P. C.

A was arrested before judgment and B became a surety for him. The surety-bond provided that if a decree was passed against A and the decretal amount was not realized from him, B would be liable for the amount. Eventually a compromise decree was passed by which A was given certain period for payment of the amount—*Held*, that as the decree that was passed was not capable of immediate execution, the surety was no longer liable for the decretal amount; *Abdul Gafur v. Mannalal*, A. I. R. 1927 Cal. 239; 98 I. C. 988.

The omission of a creditor to sue his principal debtor within the period of limitation discharges the surety.—*Ranjit Singh v. Naubat*, 24 A. 504 (8 A. 259 and 11 A. 310 followed; 5 B. 647 dissented from).

In a suit against the principal and surety, where the representatives of the principal debtor are made parties after the prescribed period of limitation, the surety still remains liable, though the remedy against the principal is barred.—*Kristo Kishore v. Radha Ramun*, 12 C. 330 (5 B. 647 approved).

Where certain crops attached as the property of the judgment-debtor were allowed to be removed on execution of a surety bond that if the claim was not allowed, the sureties would pay the decree holder, a certain sum, the mere fact that the execution case against the judgment-debtor was dismissed after the claim was disallowed does not affect the liability of the sureties under the bond; *Ajitulla Sarkar v. Namdoor Muhammad*, 22 C. W. N. 910.

In execution of an *ex parte* decree of a Court of Small Causes, the decree-holder attached a bullock belonging to the judgment-debtor. The

cases noted below, so far as they decided that the question of restitution was determinable by the Court executing decree and not by a separate suit, inasmuch as restitution can now be obtained by mere application and not by an execution petition.

Where a decree of the first Court is superseded by that of the Appellate Court, the Court executing the decree is competent to make complete restitution to the party entitled to any benefit (by way of restitution or otherwise) under the decree passed in appeal; or the right of restitution may be enforced by a separate suit, notwithstanding s. 244.—*Coffin v. Karbari Rawat*, 22 C. 501. See also, *Ramghulam v. Dwarka Rai*, 7 A. 170; *Lati Koor v. Sobadra Koor*, 3 C. 720, *Gannu Lal v. Ram Sahai*, 7 A. 197; *Kaliana Sundaram v. Egnardeswar*, 11 M. 261; *Mokoond Lal v. Mahomed Sami*, 14 C. 584; *Azisuddin v. Ramanoogra*, 14 C. 605, *Rohini Singh v. Hodding*, 21 C. 340; *Shama Pershad v. Hurro Pershad*, 3 W. R., 11: 10 M. I. A. 203; *Mashiullah v. Majidunnissa*, 26 A. 149; and *Vasudeva v. Narayana*, 24 M. 341.

Where the decree of the first Court was modified in appeal, the effect of the Appellate Court's decree was to direct restitution of any sum paid under the first Court's decree which was disallowed by the Appellate Court's decree and that the question was clearly one for determination by the Court executing the decree and not by, separate suit, being expressly provided for by s 583, C. P. Code, 1882.—*Jaswant Singh v. Dip Singh*, 7 A. 432. See also, *Bhagwan Singh v. Ummatul Hasnain*, 18 A. 262; *Phul Chand v. Shankar Sarup*, 20 A. 430; *Hardat v. Izzatunnissa*, 21 A. 1; *Saran v. Bhagwan*, 25 A. 441; *Sheodahal v. Bhawani*, 29 A. 348; 4 A. L. J. 188; *Prag Narain v. Kamakhya Singh*, 31 A. 551 P. C.: 14 C. W. N. 55 P. C.; 10 C. L. J. 257 P. C.; *Gangadhar v. Lachman*, 11 C. L. J. 541. In *Matiram Marwari v. Ram Kumar*, 35 C. 265, a different view was taken.

Where restitution cannot be obtained by application under s. 144 (1), C. P. Code, there is no bar to the institution of a suit. Consequently a suit for recovery of damages by a successful defendant against an unsuccessful plaintiff for bringing a false suit which involved great injury to the defendant is maintainable: *Arjun Singh v. Parbati*, 44 A. 687: 20 A. L. J. 636.

Separate suit for restitution was held not to be maintainable in the following cases:—*Chhida Singh v. Abdul Majid*, 17 A. L. J. 174.

Is a Proceeding under this Section, a Proceeding in Execution?—It was laid down by the Privy Council, in *Prag Narain v. Kamakhya*, 31 A. 551: 36 I. A. 197, that proceedings under section 583 of the old Code (s. 144) were proceedings in execution. There is a conflict of authorities on the question whether a proceeding under this section is a proceeding in execution. It has been held by the High Courts of Madras and Bombay that a proceeding under this section is a proceeding in execution; *Umamalai v. Mathan*, 33 M. L. J. 413: 42 I. C. 530; *Muthun Pillai v. Sudalaimuthu*, A. I. R. 1923 Mad. 270; *Somasundaram v. Chockalingam*, 40 M. 780: 38 I. C. 806; *Panchapakasa v. Natesa Aiyar*, 51 M. L. J. 161: A. I. R. 1926 M. 813. On the other hand, the Patna and Allahabad High Courts have held that it is not; *Jiwanram v. Nandaram*, 44 A. 407: A. I. R. 1922 All. 223 *Bajinath v. Balmukund*, 47 A. 98: 82 I. C. 321: A. I. R. 1925 All. 187; *Balamukund v. Basanta Kumari*, 3 Pat. 371; 78 I. C. 200: A. I. R. 1925 Pat. 1 F. B.

latter applied to set aside the decree and under s. 17 of Act IX of 1887, the petitioner stood surety on his behalf not only for the restitution of the cattle attached but also for the payment of the entire decretal amount. The bullock was released. On the dismissal of the debtor's application, the surety produced the bullock and contended that the liability had come to an end. *Held* that the surety was liable for the full amount of the decree under s. 145 of the Code. *Schat Ali v. Farzand Ali*, 38 I. C. 90.

Attachment before judgment—Surety for defendant—Death of defendant before trial—Substitution of legal representative—After the death of the defendant, the surety applied to the Court that he might be discharged and his surety bond cancelled. *Held* that the liability of the surety continued notwithstanding the defendant's death for the cause of action survived against the legal representative of the defendant and that such liability continued until the time for execution had arrived, *Chandulal Dalsukhram v. Jeshang Bhai Chhotalal*, 41 B 202 19 Bom. L. R 112.

Where a person has rendered himself liable as a surety for any amount that might be decreed against the defendant, the fact that the principal debtor has died since, does not absolve the surety from performing his contract; *Mauladad v. Wadhawa Singh*, 71 I. C. 46

A judgment-debtor having under s. 55 (4) of the C. P. Code, found a surety that he would apply to be declared an insolvent within a specified time, and would appear when called upon, died before the expiration of such time. *Held* that the surety was discharged on the death of the judgment-debtor, *Nabin Chandra v. Mirtunjoy*, 41 C. 50. 17 C. W. N. 1241 (24 M. 637 followed). *See*, however, *Wadara Devan v. Ma Kin*, 8 I. C. 985.

The liability of a surety for a debt ceases to exist when his principal's debt is extinguished by an act which causes the merger of the estate of the debtor and the creditor. It does not make any difference that the surety bond in the case was executed to the Court under s. 145 of the C. P. Code; *Jekannusami Aiyar v. Ramaswami*, 44 M. L. J. 171.

Surety bond to produce the judgment-debtor on week's notice or in default to pay certain sum—The application for execution dismissed for default of the decree-holder.—*Held* that the bond was only in force during the pendency of the execution case during the course of which it was executed and that liability did not continue to exist after the decree-holder's application for execution had been dismissed; *Nirus Narain v. Peari*, 21 I. C. 612.

A security bond ceases to have effect, at any rate, for the purpose of s. 145 C. P. Code, when the suit is once dismissed, and the liability of the surety is not revived by the appellate Court's order remanding the suit for trial on the merits; *Maung Po Khet v. Maung Sanya*, 8 I. C. 980. Followed in *Sankar v. Ram Kishen*, 53 P. W. R 1915. *See also*, *Ma Bi v. S. Kalidas*, 5 L. B. R. 156; 5 I. C. 985; 3 Bur. L. T. 191; *Gollamudi v. Chaparala*, (1914) M. W. N. 714; 26 I. C. 76.

Suit against principal and surety—Removal of principal's name as summons could not be served on him.—Suit can proceed against surety alone, if suit against principal not time barred; *Nathabhai v. Ranchod Lal*, 39 B. 25.

**Application for Restitution and the Period of Limitation.**—See notes and cases under the heading "*Short History of Law of Restitution*," para. V, *ante*.

If an application under this section is one by way of execution, it would be governed by Art. 182 of the Limitation Act; *Kurgodigouda v. Ningangouda*, 41 B. 625; *Hamid Ali v. Ahmedalli*, 45 B. 1137; 62 I. C. 283; *In Shirbai v. Yesoo*, 43 B. 235; 48 I. C. 130. But if such an application is not in the nature of an application to execute any decree, it would be governed by Art. 181; *Gujar Mall v. Narain Singh*, A. I. R. 1926 Lah. 685; *Ram Singh v. Sham Parshad*, 67 P. R. 1918; 36 P. W. R. 1918; 44 I. C. 301; *Asha Bibi v. Nuruddin*, 8 Bur. L. T. 165; 30 I. C. 680; *Balmukund v. Basanta Kumari*; 3 Pat. 371; A. I. R. 1925 Pat. 1 F. B.

**Appeal Against an Order Passed under S. 144.**—An order passed under this section is a decree, and is therefore appealable; *Dino Nath v. Jogen-dra Nath*, 26 I. C. 890; *Arthanari v. Nagoji Rao*, (1912) M. W. N. 513; 14 I. C. 536.

A decision on an application for restitution, to be appealable under s. 2, must be a decision on the merits of the application and not on a question incidentally arising or collateral to the application. So an order that an application under s. 144 is not barred by limitation is not appealable; *Ram Chand v. Sham Parshad*, 117 P. L. R. 1914; 22 I. C. 851.

Where one of the issues was whether s. 144 applied to the facts and the judges decided one way or the other, an appeal, lies even though one of the grounds of appeal is that the decision on that issue is wrong; *Sheikh Chhutan v. Jwala Prasad*, A. I. R. 1924 All. 64; 73 I. C. 602.

Where an order is made under the provision of s. 151, but in fact in exercise, by analogy, of the jurisdiction under s. 144, an appeal does lie from the order; *Gnanoda Sundari v. Chandra Kumar*, 30 C. W. N. 290; A. I. R. 1927 Cal. 285.

**Enforcement of liability of surety.** **145.** Where any person has become liable as surety—

- (a) for the performance of any decree or any part thereof, or.
- (b) for the restitution of any property taken in execution of a decree, or
- (c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed against him to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of s. 47 :

Where sureties agreed to produce the judgment-debtor but failed, they can, without further notice, be made liable on their bonds for their failure; *Nagier v. Krishnan Chettiar*, (1923) M. W. N. 770.

Where a condition is imposed on a surety under an order of Court, the surety can be compelled to fulfil that condition in execution proceedings under s. 145, C. P. Code, without any second formal order being passed against the principal; *Amalak Sao v. Kashi Nath*, 64 I. C. 430.

**Liability of Legal Representatives, on Death of Surety.**—Where a surety under s. 145, dies, execution can proceed against his legal representatives; *Mohan v. Mt. Bhagbai*, 19 S. L. R. 165: 98 I. C. 136: A. I. R. 1926 Sind 294.

On this point see the provisions of the Indian Contract Act, Chapter VIII.

**Limitation—Application for Execution Against Surety.**—Before the passing of an original decree, a person becomes liable as surety for the due performance by party of the decree. The decree was passed in 1893. The decree-holder filed several applications for execution against the judgment-debtor alone. All these applications were within the prescribed period of limitation. But it was only in 1902, that he filed an application for execution under s. 253 of the Code of 1882 (now s. 145) as against the surety. Held that the application for execution against the surety was barred; the decree cannot be treated as passed jointly as against the judgment-debtor and surety within the meaning of art. 179 of the Limitation Act, 1877. The words "passed jointly" in that article refer to a decree which is passed jointly against more persons than one, and do not mean a decree where a joint liability may be deduced by combining the surety bond and the provisions of s. 253, C. P. Code, 1882, with the decree in dispute; *Narayan v. Timmaya*, 31 B. 50: 8 Bom. L. R. 807.

**146.** Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him. [New.]

## COMMENTARY.

This section is new; there was no similar provision in the old Code of 1882. It has been framed to set at rest the conflicting rulings of the Allahabad, Madras and Calcutta High Courts. In 21 A. 274 and in 39 M. 361, it was held that when a defendant, against whom an *ex parte* decree has been passed, dies, his representative is not competent to set aside the *ex parte* decree. But in 29 C. 33, the Calcutta High Court, and in 29 A. 574, the Allahabad High Court took a contrary view. The section has adopted the principle laid down by the Calcutta High Court. See, *Venkata Subbaiyer v. Krishnamurthy*, 38 M. 442: 12 M. L. T. 369: 21 I. C. 569. Again, there were conflicting rulings under the old Code as to whether the expression *certified purchaser* in s. 317 (section 66) includes his representatives; but this section has set at rest the conflicting

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

# COMMENTARY.

**Changes Introduced in the Section and their Effect.**—The section corresponds with s. 253 of the C. P. Code of 1882, which is reproduced below. The proviso to this section is almost similar to that of the old section.—

"Whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same, or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable in the same manner as a decree may be executed against a defendant."

On a comparison of this section with s. 253 of the old Code, it would appear that s. 253 of the old Code was applicable only to persons who became liable as sureties prior to the passing of a decree in the original suit, and not to persons who became sureties after the passing of the decree in the Appellate Court. But the language of the present section is wide enough to include the cases of persons who become sureties either before or after the passing of the decree in the Appellate Court or in execution or other proceedings.

Under the old Code there was much diversity of judicial opinion with regard to the mode of enforcement of a surety bond. In some of the cases under the old Act, it was held that it could be enforced summarily in execution proceedings; and in others it was held, that surety bond could be enforced only by a separate suit. The question has been set at rest by the present section which provides that to the extent to which he has rendered himself personally liable the decree or order may be executed against him summarily in execution. Under the old Code, there were two classes of surety, namely, (1) a person who, before the passing of the decree in the original suit became surety, either before or after the passing of the decree in the Appellate Court, and (2) a person who became surety after the passing of the decree in the original suit, either in the execution proceedings, or in the Appellate Court. But the distinction seems to have been done away with by the present section, adopting the principle laid down in the Punjab Full Bench Case noted below.

But where a surety bond is executed hypothecating immovable properties, such a bond cannot be enforced but by a separate suit.

The present section has also given the surety the right of appeal against any order that may be passed against him, by insertion of the words "and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47."

This section seems to have been framed adopting the principle laid down in the Full Bench case of *Raghubar Das v. Sahg Ram*; 109 P. R. 1900, of the Punjab Chief Court. In that case it has been held that no distinction could be drawn between the case of a surety who, before the passing of a decree in an original suit, has become liable as such for the performance of the same, as well as, that of a surety who has given security for the costs of an appeal, both of whom might be proceeded against in execution, under sections 253 and 549 of the C. P. Code, 1882,



ruings by adopting the principle laid down in 31 B. 61: 8 Bom. L. R. 873. See, notes under section 66.

**Proceedings By or Against Representatives.**—The proper interpretation of s. 146 is that a person who is entitled to make an application or file an appeal which could have been made or filed by another under whom he claims but which has not been made or filed, is also entitled to continue the application or appeal which has been made or filed by such person when that application or appeal is not properly prosecuted, or when such person dies before the application or appeal is disposed of; *Radha Krishna v. Srinivasa*, 51 M. L. J. 10 93 I. C. 831: A. I. R. 1926 Mad. 573.

The proceedings contemplated by s. 146, C. P. Code includes an appeal and the expression "claiming under" is wide enough to cover the case of devolution of interest mentioned in Or XXII, r 10; *Sita-ramaswami v. Lakshmi Narasimha*, 8 L. W. 21. 48 I. C. 840.

The presentation of a *darkhast* for execution by one of the surviving co-parceners of the deceased decree-holder cannot be said to be invalid so as to render the proceedings before the Collector invalid and so as to prevent the deduction of the time mentioned in sub-para. (3) of para 11 of the 3rd Sch. of the Code; *Madhav Prabhakar v. Balaji Gorind*, 29 Bom L. R. 75: A. I. R. 1927 Bom. 123

A transferee from an auction purchaser is competent to apply for possession of the property transferred under Or XXI, r 92 and s 146 C. P. Code; *Buddhu Misser v. Bhagurathi Koer*, 40 A 216 16 A L J. 150 42 I. C. 936.

An auction-purchaser under a simple money decree is a representative of the judgment-debtor for the purpose of Or XXI, r 98, C. P. Code; against whom proceedings can be taken under s 146 of the Code, *Manicka Gramani v. Parasuram Mudaly*, 12 L. W. 350: (1920) M. W. N. 787.

Where a party dies after a suit is dismissed against him, but before appeal is filed, his legal representative can file appeal; *Munnoji Rao v. Munmanjappa*, 1 Mys. L. J. 46.

**147.** In all suits to which any person under disability is a party, any consent or agreement as to any proceeding shall, if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement. [New.]

## COMMENTARY.

This section is new, and corresponds to English Order XVI, r. 21. It has been framed in accordance with the principles laid down in several rulings of the High Courts and of the Privy Council. In *Lall Majlis Sahai v. Narain Bibi*, 7 C. W. N. 90, it has been held that every person acting as a next friend or guardian for the suit to a minor must

respectively, and a surety who has given security, for the performance of the Appellate Court's decree, under section 545 of the C. P. Code, 1882 and who could therefore, as well be proceeded against summarily in execution as the other sureties above referred to. The above Full Bench ruling clearly explains the meaning of the present section.

*Sureties for due performance of appellate decree.*—See Order XLI, rr. 5 & 6.

**Scope of the Section.**—To bring a case within the scope of s. 145 of the C. P. Code, 1908, it must be established that the person against whom execution is sought, has become liable as surety. The section as framed, does not provide that this liability must have accrued upon an application presented to the Court, or a surety bond filed in the proceedings. The application of the section cannot be limited to cases where the liability of the surety is undisputed or is a matter of record. If the jurisdiction of the Court under the section is invoked and the applicability of the section is denied, the Court must adjudicate upon the question and investigate the existence of the circumstance upon proof whereof the Court can take cognizance of the matter brought before it. If it is established that the person against whom execution is sought, has become liable as surety, the Court must exercise its jurisdiction. If, on the other hand, such fact is not established, the application must be refused; *Lakshmi Naram v. Guru Datta*, 16 I. C. 859.

**Person Becoming Bound by Oral or Written Contract is Liable.**—In a case where a person has contracted expressly that he will guarantee the performance of any of the obligations set out in s. 145, whether such a contract be oral or in writing, he renders himself liable to be proceeded against in execution of the decree, as provided in s. 145; *Joyman Bewa v. Easin Sarkar*, 30 C. W. N. 609 43 C. L. J. 493; A. I. R. 1926 Cal. 877.

**"For the performance of any decree."**—The scope of this section is wider than the scope of s. 253 of the C. P. Code of 1882, inasmuch as that section applied to persons who became sureties before the passing of a decree in an original suit and did not apply to sureties for the performance of appellate decrees. But the present section is applicable to sureties for the performance of any decree, that is, it applies to security given for the performance of either original or appellate decrees. It also applies to surety bond given for performance of any decree which may be eventually passed after setting aside an *ex parte* decree under Or. IX, r. 13.

The present section *supersedes the following cases* so far as they decided that s. 253 of the old Code applied only to persons who became sureties before the passing of a decree in an original suit.

Section 253, C. P. Code, 1882, is not applicable to a surety who has become security in an Appellate Court. A security-bond, therefore, executed by a surety on behalf of an appellant for his costs of an appeal under s. 549, C. P. Code, 1882 (Or. XLI, r. 10), cannot be summarily enforced against the surety in the execution proceedings; the remedy is by a separate suit.—*Kali Charan v. Balgobind*, 15 C. 497; *Radha Perahad v. Phuljuri Koer*, 12 C. 402; *Tokhan Singh v. Udwan Singh*, 22 C. 25; *Surjo Das v. Balmakund*, 23 C. 212; and *Arunachellam v. Arunachellam*, 15 M. 203; *Hardeo Das v. Zaman Khan*, 8 A. 639. *Lakshman v. Gopal*

take the leave of the Court before entering into an agreement or compromise on his behalf, and no exception is made in the case of a certificated guardian. The policy of the law is to protect minors from being taken at a disadvantage by their guardians. In order that a compromise may be binding upon a minor, leave of the Court must be *express* and it must be arrived at upon the exercise of a judicial discretion as to the propriety of the compromise in the interest of the minor. See also, 17 A. 531, 21 M. 91 and 29 M. 104. In *Manohar Lal v. Jadu Nath Singh*, 28 A. 585, 4 C. L. J. 8, 10 C. W. N. 89, 8 Bom. L. R. 489, 16 M. L. J. 291, their Lordships of the Privy Council held that in order to maintain the validity of a compromise entered into on behalf of a minor when such compromise is subsequently challenged, it must be proved that the attention of the Court was directly called to the fact that a minor was a party to the compromise and it ought to be shown by an order on a petition, or in some way not open to doubt, that the leave of the Court was obtained.

This section is to be read with Or. XXXII, r. 7, which corresponds to section 462 of the C. P. Code of 1882.

**148.** Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired. [New.]

## COMMENTARY.

**Object of the Section.**—This section is new, and corresponds to English Or. LXIV, r. 7. It is intended to enlarge the discretion of the Courts. This section has set at rest the much debatable point which hitherto existed. The section expressly empowers the Court to extend any time fixed by it even after the expiry of the period originally fixed, and is a legislative recognition of the rule laid down in *Bhugwan Das v. Haji Abu Ahmed*, 16 B. 263. See, *Amir Hossain v. Nanak Chand*, 12 C. L. J. 62; 14 C. W. N. 882, and *Gauranga Sahu v. Batakrisna*, 32 M. 305 F. B., where all the conflicting rulings on the point, have been referred to and discussed.

“For the doing of any act prescribed or allowed by the Code.”—This section applies only to acts prescribed by the Code and not to acts prescribed by the decrees which have become final; *Kaniz Kubra v. Bande Husain*, 28 I. C. 458. The section applies only to proceedings before decree; *Niranjan v. Jagannath*, 18 O. C. 58.

S. 148 of the C. P. Code does not authorize the Court to grant extension of time for filing the security bond, which is an act required by the Provincial Small Cause Court Act and not by the C. P. Code; *Ram Chantra Ram v. Hastim Khan*, 1 Pat. L. T. 323 (1920) Pat. 203.

Where a decree embodies certain conditions and provides that a suit shall stand dismissed if those conditions are not complied with, e.g., where the date is fixed in the decree for paying in money and in the event of non-compliance it is provided that the suit shall be dismissed,

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the Court has no jurisdiction to interfere with the decree by altering any of the conditions, *viz.*, by extending the time; *Sajjadi Begum v. Dilwar Hussain*, 40 A. 579: 16 A. L. J. 625.

This section applies only where a period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Court; it does not apply to extend the period fixed by a decree. For instance, this section does not entitle the Court to extend the time fixed by the decree for payment of the purchase money in pre-emption cases; *Suranjan Singh v. Ram Bahal*, 35 A. 582: 11 A. L. J. 950 (on appeal from 10 A. L. J. 520); *Muhamad v. Charag*, 140 P. W. R. 1910; *Jug Ram v. Jewa Ram*, 6 A. L. J. 647. See also, *Bachu Lal v. Rajaram*, 16 O. C. 5: 19 I. C. 347; *Hasibunnissa v. Mahmudunnissa*, 17 O. C. 377, 27 I. C. 419; *Nathu Khan v. Gulab Khan*, 61 I. C. 242; *Janga Singh v. Lachmi Narain*, 23 O. C. 254: 7 O. L. J. 378. See, however, *Naba v. Pathana*, 60 P. R. 1913: 53 P. L. R. 1913: 72 P. W. R. 1913, 18 I. C. 86; *Abu Mahomed v. Pertab Narain*, 20 C. W. N. 860.

Where a decree of the High Court passed in second appeal directed delivery of property to plaintiff on paying a certain sum within a certain time and that order was not complied with. Held that the specific direction as to time given in the decree was an essential part of it; and the High Court has no power to extend the time or modify the decree in respect of it, *Moideen Kuppal v. Ponnasami*, 16 M. L. T. 430: 1 L. W. 882. See also, *Nori v. Pratipathi*, 24 I. C. 825.

S. 148 does not apply to periods fixed by a decree. The general rule is that no executing Court can vary a decree without the consent of the parties; *Hukam Chand v. Hayat*, 99 P. R. 1912: 121 P. W. R. 1912: 15 I. C. 941 (15 C. W. N. 685 followed).

Once an order rejecting a plaint is set aside in review, the Court has full power under ss. 142 and 148 of the C. P. Code, to extend the time for payment of the deficit Court fee, and the plaint having been originally filed within the period of limitation, the suit was not barred; *Surendra Prasad Lahiri Choudhury v. Attabuddin Ahmed*, 26 C. W. N. 391.

The Court has no power to extend the time allowed by a decree for the payment of money under s. 148, C. P. Code; *Badal v. Chhattar Singh*, 25 O. C. 74: 66 I. C. 205; *Raja Komal Singh v. Jagannath*, 15 N. L. R. 39: 49 I. C. 840.

Where time has been fixed by a decree of Court for payment of Court-fee, the Court has no jurisdiction to amend the decree so as to enlarge the time for payment. S. 148, C. P. C. is inapplicable to cases where time has been fixed by a decree of Court; *Nawab Khajeh Habib-ulla v. Gola Asmoter Khatun*, 37 C. L. J. 395: 27 C. W. N. 320.

Where an application for execution filed within time which had been returned for amendment of certain formal defects was refiled after the period of limitation had expired and after the time allowed by the Court for the purpose with an explanation explaining the delay and the petition was accepted. Held that the Court had in fact in the exercise of its discretion enlarged the time under s. 148, C. P. Code, though there was no express order to that effect; *Gopal Prasad v. Rajendra Lal*, 20 C. W. N. 615: 35 I. C. 625.

the Legislature. See, *Panchanana Singh v. Dwarka Nath*, 3 C. L. J. 29; *Hukum Chand v. Kamalanand Singh*, 3 C. L. J. 67; 33 C. 927; *Rasik Lal v. Bidhumukhi*, 33 C. 1094; 10 C. W. N. 719; 4 C. L. J. 306; *Gurdeo Singh v. Chandrika Singh*, 5 C. L. J. 611.

The principles which regulate the exercise of inherent powers by a Court have been explained in the case of *Hukum Chand v. Kamalanand*, 33 C. 927; 3 C. L. J. 67. The Code of Civil Procedure binds all Courts so far as it goes; but the Code is not exhaustive, and in matters with which it does not deal, the Court will exercise its inherent power to do that justice between the parties which is warranted under the circumstances and which the necessities of the case require. On any point specifically dealt with by the Code, the Court cannot disregard the letter of the enactment according to its true construction, though, as the Legislature cannot anticipate and make express provision to cover all possible contingencies, it is the duty of a Judge to apply the provisions of the law not only to what appears to be regulated expressly thereby, but also to all cases to which a just application of them may be gathered from it (see 3 C. L. J. 29). But it would be a patent misapplication of the section if it were in the exercise of its inherent power to assume jurisdiction to grant a review where it has been expressly forbidden by the Legislature to entertain such an application. See *Sai Bhusan v. Radhanath*, 20 C. L. J. 433. The inherent powers of the Court are not to be used for the benefit of a litigant, who has his remedy under the Code of Civil Procedure, much less than for one, who having his remedy, has lost it by his own delay. Nor should it be used so as to lead to arbitrary disposals actuated by individual sentiment or the mere disinclination for the exertion involved in the investigation of law; *Muthia Chettiar v. Bava Sahib*, 27 M. L. J. 605. Thus it is clear that the doctrine of inherent powers of a Court which is recognized by s. 151 of the Code, has no application, where there is not only an express provision but an express provision negating the claim of the party. See, *Madhu Suddan v. Rash Mohun*, 21 C. L. J. 614 and *Chaturbhuj v. Raghubar Dayal* 80 A. 254, p. 363; 12 A. L. J. 529. This section does not formulate a new doctrine, but merely furnishes legislative recognition of a well established principle applicable to ordinary Civil Courts; *Rashmoni v. Ganoda* 10 C. W. N. 84; 20 C. L. J. 213. S. 151 makes no law; it merely reminds Judges of what they ought to know already, namely, that if they find the ordinary rules of procedure resulting in injustice in any case, whether by the force of circumstances or through the attempts of a party to get an unfair advantage out of them, those rules can be broken, but the Courts are not bound to break the rules and the power under s. 151 is to be used only when there is no other remedy open; *Sadashio Rao v. Umaji*, 23 N. L. R. 70; A. I. R. 1923 Nag. 212.

With regard to Court's inherent power, the following observations of Peacock, C. J., in the Full Bench case of *Hurro Chunder v. Shooroodhoney* 9 W. R. 402 (406), are very instructive: "Since laws are general rules, they cannot regulate for all time to come so as to make express provision against all the cases that may possibly happen. It is the duty of a law-maker to foresee only the most natural and ordinary events, and to form his disposition in such a manner as that without entering into the detail of singular cases, he may establish rules common to them all; and next it is the duty of the Judges to apply the laws, not only to what appears to be regulated by their express dispositions but to all the cases to which a just application of them may be made, and which appear to be comprehended either within the

The High Court has no power to extend the time allowed to the judgment-debtor by Or. XXI, r. 92 (2) to deposit the decretal amount, etc., to set aside the sale; *Bibi Sharofan v. Md Habibuddin*, 15 C. W. N. 685: 13 C. L. J. 535, p. 543.

An award was made after the time allowed by the Court had expired. On an application for enlarging the time for making such award, held that the Court had no power to grant the application; held, further, that section 148 C. P. Code does not enable the Court to extend the time for the doing of a particular act when in truth and in fact the act has already been done; *Shib Krishna v. Satish Chundra*, 38 C. 522 (13 A. 300 P. C. followed). The correctness of this decision has been doubted in *Sri Lal v. Arjun Das*, 18 C. W. N. 1325, where it has been held that having regard to the change in the law made by the wordings of s. 148 and Sch. II, cls. 8 and 15 of the C. P. Code, 1908, the above Privy Council case, does not seem to have the same binding authority as before.

In a suit for redemption on the date fixed for payment of the money, an application was made for extension of time. Held, that no extension of time could be granted under s. 148, C. P. Code, or Or. XXXIV, r. 8. Section 148 of the C. P. Code applies only to proceedings before decree, and the power to enlarge time by the proviso to r. 8 of Or. XXXIV can be exercised only in cases in which a suit has been brought for redemption and in which both a preliminary and a final decree for redemption have been passed; *Niranjan v. Jagannath*, 18 O. C. 58. In *Het Singh v. Tika Singh*, 34 A. 388: 9 A. L. J. 381, it has been held by the Allahabad High Court that s. 148 applies to cases in which the time fixed by the Code for the doing of some act is extended and not to the extending of time fixed by a mortgage decree for the payment of a prior mortgage. See also *Dharmoraja v. Sreenivasa*, 29 M. L. J. 708: 2 L. W. 1074. In *Mg Aung v. Ma Thein*, 27 I. C. 706, it has been held by the Chief Court of Burma, that s. 148, C. P. Code gives a Court power to enlarge the period of redemption if it thinks fit.

Section 148 relates only to proceedings antecedent to the passing of a decree, and was not intended to enable the Court to extend time in pre-emption or redemption cases; *Batuk Nath v. Munni*, 7 I. C. 36; *Khan Muhammad v. Ahman*, 73 I. C. 891; *Labh Singh v. Ganpat*, 71 I. C. 35.

S. 148, C. P. Code, does not enable a Court to extend time for doing acts allowed by a decree, e.g., the time allowed by a pre-emption decree for payment of the sale price; *Amba Das v. Larman*, 19 N. L. R. 8: 71 I. C. 401: A. I. R. 1923 Nag. 210.

The general provisions of s. 148 relate only to proceedings antecedent to the passing of a final decree; *Narendra v. Ajudhia*, 13 O. C. 28; *Ganga Ratan v. Chandikaprasad*, 74 I. C. 573.

As to the applicability of the present section—see, s. 55 (4), time allowed to judgment-debtor to apply to be declared insolvent; s. 143 for payment of postage stamp; s. 140 for payment of deficit Court-fees; Or. VI, r. 18, for amendment of pleadings; Or. VII, r. 1 (b), requiring plaintiff to correct valuation of suit; Or. VII, r. 11 (c), requiring plaintiff to supply the requisite stamp paper; Or. VIII, r. 9, requiring written statement or additional written-statement; Or. XI, r. 8, to answer interrogatories by affidavit; Or. XI, r. 17, time for inspection when notice



anyone else of the law, and the circumstances that may be involved in the case. The case was decided in 1911, and the court was divided 5-4. The majority opinion was written by Justice Brandeis, and the dissenting opinion was written by Justice Holmes. The majority opinion was based on the fact that the defendant was a member of the law, and the circumstances that may be involved in the case. The dissenting opinion was based on the fact that the defendant was a member of the law, and the circumstances that may be involved in the case.

**History of the Law.**—The history of the law is a long and complex one. It is a history that has been shaped by the needs of the people, and the needs of the government. The law has been a part of our lives since the beginning of time, and it will continue to be a part of our lives for many years to come. The law is a part of our lives, and it is a part of our government.

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**Chief of the Law.**—The Chief of the Law is the head of the law, and he is the one who is responsible for the law. The Chief of the Law is the head of the law, and he is the one who is responsible for the law. The Chief of the Law is the head of the law, and he is the one who is responsible for the law.

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given; Or. XII, r. 4, notice to admit facts; Or. XVI, r. 2, expenses of witness to be paid within a period to be fixed; Or. XXI, r. 17 amendment of application for execution; Or. XXI, r. 33 (2), execution of decrees for restitution of conjugal rights; Or. XLI, r. 22, time for filing cross objections

The above are some examples of the power to grant extension of time; besides these there are other provisions to grant enlargement of time.

**"The Court may in its discretion."**—The discretion conferred by s. 148 of the C. P. Code cannot be arbitrarily exercised in matters to which the rules of limitation apply, and in which, by those rules, the Court can only extend the time after a proper judicial consideration of the cause shown under s. 5 and of the fraud established under s. 18 of the Limitation Act. A Court cannot keep alive a cause of action for an indefinite period by granting, without cause shown and without consideration, indulgence under s. 148 to litigants who are guilty of the grossest laches and who fail to comply with the order of the Court, *Musat, Dukhno v. Munshi Sahu*, 4 Pat. L. J. 428 52 I. C. 439.

**S. 148 and S. 151.**—Where an *ex parte* decree is set aside on the condition of the defendant paying his adversary's costs into Court within a specified time, he had jurisdiction to vary the order subsequently by enlarging the time at its discretion. Such power is vested in Courts by the combined effects of s. 148 and s. 151, C. P. Code; *Chandra Goundan v. Palaniappa Goundan*, 23 M. L. T. 7: (1917) M. W. N. 870

**Appeal.**—An order under s. 148 is neither a decree within the meaning of s. 2 nor is it appealable as an order under s. 104 of the C. P. Code; *Suranjan Singh v. Ram Bahal*, 35 A. 582: 11 A. L. J. 950 (14 A. 520 distinguished); see also, *Dharmaraja v. Sreenivasa*, 29 M. L. J. 708: 2 L. W. 1074; see, however, *Jagarnath v. Kamta Prosad*, 36 A. 77.

**Period of Limitation.**—This section does not empower a Court to extend the period prescribed by the law of limitation; *Dukhno v. Munshi Saha*, 4 Pat. L. J. 428: 52 I. C. 439.

**Other Cases.**—Court may extend time in pauper applications; *Thangathammal v. Iravatheswara*, (1915) M. W. N. 228: 28 I. C. 504.

An *ex parte* decree was set aside on condition of defendant's paying to plaintiff on a certain date a sum of money as damages. The condition was not fulfilled. *Held*, that the Court had power under this section to extend the time for payment of the money; *Jagarnath v. Kamta Prosad*, 36 A. 77 (35 A. 582 distinguished).

The High Court has power to extend the time for the institution of a complaint on sanction, even if the six months mentioned in s. 195 of the C. P. Code have expired; *Secretary of State v. Sankarapandian*, (1914) M. W. N. 347: 23 I. C. 727 (26 M. 190 and 480, followed; 12 C. L. J. 382 not followed).

Section 148 of the C. P. Code has not the effect of making Or. VII, r. 11 applicable to memoranda of appeals so as to make it incumbent on the Court to admit them though out of time when the conditions of that rule are complied with; *Narayana Rao v. Venkata Krishna*, 27 M. L. J. 677: 26 I. C. 33. But see, *Achut Ramchandra v. Nagappa*, 38 B. 41.

The High Court has ample inherent power to make an order with regard to the costs of proceedings taken before it where it is satisfied upon the facts of the case that the proceedings have been an abuse of the process of the Court, *Ketakey Charan v. Sarat Kumari*, 21 C. W. N. 826: 26 C. L. J. 41.

A Court has inherent power to rectify a mistake in a sale certificate of its own motion—*Gobinda Chandra v. Abhoy Charan*, 12 C. W. N. 1027.

Apart from the express provisions of the C. P. Code, there is an inherent jurisdiction in the High Court to stay any suit which is an abuse of the process of the High Court; the jurisdiction existed prior to the Code of 1908, and it is recognised in s. 151 of that Code, *Hindustan Assurance & Mutual Benefit Society v. Rai Mulraj*, 27 M. L. J. 645. See also, *Velchand v. Liston*, 38 B. 639.

The phrase "abuse of the process of the Court" in s. 151 includes "the idle multiplicity of proceedings." While a suit was pending, proceedings were started in another Court against one of the defendants under the Lunacy Act. Plaintiff prayed for adjournment till the proceedings under the Lunacy Act were over, which prayer was, however, refused. Held, that the High Court had inherent power to order stay of proceedings to avoid multiplicity of " " " *Lall v. Chaturbhuj*, v. *Chaturbhuj*, 48 A. 356: 93 I. C. 285.

**Some Illustrations of Cases in which Courts Exercised Inherent Powers.**—The existence of the inherent power to do justice has been recognised from the earliest times; see, 9 W. R. 402, C. L. J. 29, 33 C. 927, 3 C. L. J. 67; various instances will be found mentioned in 33 C. 927 in which the Court exercised its inherent power. The power to amend a petition is inherent in Court; *Kanakammal v. Panchapakesa*, 26 M. L. J. 343: 23 I. C. 82. Amongst obvious cases may be mentioned, (1) consolidation of suits and appeals (17 C. W. N. 526); (2) postponement of the hearing of a suit pending the decision of a selected action; (3) stay of cross suits on the ground of convenience; (4) enquiry as to whether all the proper parties are before the Court; (5) entertaining a defence *in forma pauperis*; (6) deciding one question while reserving another for investigation; (7) remanding a suit which has not been properly tried; (8) staying the drawing up of the Court's own order; (9) suspending the operation of the Court's order; (10) staying proceedings pending an appeal in a guardianship matter and appointing a temporary guardian *ad litem* (19 C. W. N. 84: 20 C. L. J. 213); (11) applying the principle of *res judicata* to execution proceedings for the sake of finality; (12) punishing contempt of Court made when the Court is not sitting; (13) deciding questions of jurisdiction though the Court is ultimately found not to have jurisdiction over the suit; (14) directing a party who has applied for leave to appeal to His Majesty in Council to pay costs on the dismissal of his application (34 C. 860: 11 C. W. N. 856); (15) amending decrees or orders; (16) granting restitution in cases of reversal of execution sales and order in execution proceedings; (17) restraining by injunction a person from proceeding with a suit in the Small Cause Court; (18) staying proceedings pursuant to its own order in view of an intended appeal; (19) treating an application for revision as an appeal, and *vice versa*. In *Nanda Kishore v. Ramgolam*, 40 C. 955: 16 C. L. J. 508, it has been held, that a Court has inherent power to make an order

Section 148 of the C. P. Code, 1908, does not authorise the first Court to modify the decree or extend the time allowed by it for the execution of a *Kabuliyat*, after an appeal has been preferred from that decree. The only Court which can pass such order is the appellate Court; *Mohunt Parmanand v. Kripa Sindhu*, 14 C. W. N. 584: 37 C. 548.

An order for enlargement of time under s. 148, C. P. Code, 1908, cannot be deemed an order for the admission or rejection of a plaint. It is not competent to the Registrar of Small Cause Court to make an order under s. 148 for enlargement of time; *Budhan Sha v. Sitanath*, 13 C. L. J. 78.

The Court has power to enlarge the time originally fixed for payment of Court-fees, in cases where a large amount of mesne profit is assessed than that for which Court-fees were originally paid; *Golabchand v. Bahuria*, 13 C. L. J. 432.

**149.** Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to Court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such Court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance. [NEW.]

Power to make up  
deficiency of Court-  
fees.

## COMMENTARY.

**Scope and Object of the Section.**—S. 149, C. P. Code of 1908, is an enabling section empowering the Court to extend the time for the payment of fees on any and all documents which may be presented to it; but where a particular document is a plaint or memorandum of appeal, then the Court's discretion must be exercised in accordance with the special provisions of Or. VII, r. 11 (c). Thereafter s. 149 would come into play, and would operate to produce this effect that upon the payment of a requisite fee within the time allowed by the Court, the document in respect of which such fee was payable would have the same force and effect as if such fee had been paid in the first instance. S. 149 as it stands is a section which in the new Code was substituted for s. 582-A of the old Code, which was apparently enacted by Act IV of 1892 with a view to remove what was considered to be the hardship caused by certain decisions of the Allahabad High Court, and that section provided for the validation of insufficiently stamped memoranda of appeals and applications for review provided they had been presented within the proper period of limitation, and the insufficiency of the stamp was caused by a mistake on the part of the appellant or the applicant as to the amount of the requisite stamp. Under s. 582-A, therefore the discretion of the Court was fettered by this limitation that the insufficiently stamped memorandum or application could not be validated unless the Judge was satisfied that the insufficiency arose from a mistake on the part of the appellant or applicant. But in s. 149 of the present Code these words

for stay of proceedings in execution of its decree in view of an intended appeal to His Majesty in Council, even though there is no statutory provision in that behalf (5 C. W. N. 781, *refd. to*); see also, *J. C. Galstaun v. F. E. Dinshaw*, 31 C. W. N. 653: 102 I. C. 513: A. I. R. 1927 Cal. 581, in which it has been held that the Court has inherent power to stay or defer the issue or operation of its own processes in cases demanding the exercise of such power in the interest of justice. Or. XXI, rules 21, 26, and 37 do not exhaust all the discretion of the executing Court, nor does r. 11, in the case of a decree for money, limit or restrict any jurisdiction or discretion which an executing Court may have in respect of any decree that is before it for execution.

Where a contingency happens which has not been anticipated by the framer of the C. P. Code, and therefore no express provision has been made in that behalf, the Court has inherent power to adopt such procedure as may do substantial justice and shorten needless litigation; *Rahimunnissa v. Mahadeb Das*, 12 C. L. J. 428 p. 430: 7 I. C. 846.

S. 151 C. P. Code is intended for exceptional cases for which there is no remedy except the use of the Court's inherent powers. It is not intended to evade or ignore the provisions of law which govern procedure. Where after passing a decree, a Court *suo moto* sets aside its own decree on the ground that it had discovered some documentary evidence on the record, the procedure is illegal; *Mahadeo v. Kalloo*, 21 A. L. J. 447: 73 I. C. 494.

The Court has, where the circumstances require it, an inherent power to do that justice for the administration of which alone it exists; and when the legislature has provided no procedure to be followed in cases which must and do arise, the Courts must be taken to have inherent power to decide the question of procedure and, if necessary, to invent a procedure for themselves. This principle has since been embodied in section 151 of the Code. The Transfer of Property Act makes no provision for decrees by consent, and is silent upon the question of procedure to be followed for orders absolute when such a decree has been made; *Bechu Singh v. Becharam Sahu*, 10 C. L. J. 91 (100).

Ordinarily s. 151 does not apply in cases where the aggrieved party has other remedies provided in the Code, *e.g.*, by way of appeal or review, but there is no hard and fast rule limiting its applicability in such cases (26 I. C. 46, 33 C. 926 *refd. to*); *Lala Hanumallal v. Musst. Ram Pears*, 2 Pat. L. T. 251. 60 I. C. 368.

Where there is no express provision in the Code, every Court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject matter of controversy between the parties, *e.g.*, power of Court to frame issue after the arguments had been closed; *Shama Pattra v. Abdul Kadir*, 35 M. 607 P. C. p. 612: 16 C. W. N. 1009: 23 M. L. J. 321: 16 C. L. J. 506: 14 Bom. L. R. 1034: 10 A. L. J. 259.

The Court has inherent power to rehear a matter before the Court's order passed at a previous hearing is perfected; *Padmabati v. Rasik Lal*, 37 C. 259.

The Court has inherent power to do justice between the parties under s. 151 C. P. Code; *Choudhuri Chintamani v. Srimati Manmohini*, Pat. 149: A. I. R. 1922 Pat. 109; *Muthua Chettai v. Ladd Govind Dass*, 41 M. L. J. 316: 44 M. 910 F. B.

of limitation have been omitted, and the inference appears to be that the Legislature by the new provision intended that the Court should have free and unshackled discretion in this matter. See, the observations of Batchelor, J. in *Achut Ramchandra v. Nagappa*, 38 B. 41: 15 Bom. L. R. 902. It is therefore clear that the scope of the present section is wider than that of s. 582 A, as its application is extended to any document chargeable with court fees, under the Court Fees Act, such as pleadings, memoranda of appeals, and cross-objections, applications for review, and written statements pleading a set off or counter-claims. (See the cases noted under Or XXXIII, r 8, and *Thangathammal v. Iravatheswara Iyer*, (1915) M. W. N. 228 28 I. C. 504)

This section is new. It has been enacted to enlarge the discretion of the Courts and to set at rest the several conflicting rulings which hitherto existed on this point. The recent cases of *Hariram v. Akbar Hussain*, 29 A. 749 F. B.: 4 A. L. J. 636, and *Gauaranga Sahu v. Boto Krishna*, 32 M. 305 F. B.: 19 M. L. J. 340. 6 M. L. T. 129 F. B., are in accordance with the law as laid down in this section. In the Madras Full-Bench case all the conflicting rulings have been referred to and discussed in the Order of Reference. See also, *Budhan v. Sita Nath*, 13 C. L. J. 78. In this connection, the Full Bench Case of the Calcutta High Court in *Padmanand v. Anant Lal*, 34 C. 20 F. B.: 11 C. W. N. 38: 4 C. L. J. 421, should also be consulted.

**Discretion of Court to Allow Extension of Time for Payment of Deficit Court-fee.**—S. 149 of the present Code vests a wider discretion in Court; *Harcharan v. Baikuntha Nath*, 21 I. C. 866.

The fact that an appellant has no funds with which to pay the requisite Court-fee is a good ground for admitting the memorandum of appeal, though presented on the last day of limitation, and for extending the time under this section to pay the requisite stamp; *Achut v. Nagappa*, 38 B. 41: 21 I. C. 337. The Patna High Court has held that no time for making good the deficiency in Court-fee should be given if it is found that a litigant has paid an insufficient Court-fee deliberately and to suit his own convenience, but time may be given when it appears that he made an honest attempt to comply with the law or when the amount of the Court-fee payable is really open to doubt; *Ram Sahay v. Kumar Lachmi*, 3 Pat. L. J. 74: 42 I. C. 675; *Amir v. Mohan*, 3 Pat. 337, 80 I. C. 1030: A. I. R. 1924 Pat. 663.

A plaint was filed one day before the prescribed period of limitation on insufficient stamp. The Court granted a week's time to put in deficit fees, which was paid one day too late. An application for extension of a day's time was put in and granted. Held that the suit was in time. The Court was quite competent to extend the time originally fixed, even after such period had elapsed; *Amir Hossain v. Nanak*, 12 C. L. J. 62: 14 C. W. N. 882.

Where a suit was instituted on the last day of limitation on an insufficiently stamped plaint and the balance of court-fee was subsequently paid after the period of limitation had expired, and the court signified acceptance by issuing summons to defendant, held, that the suit was not barred by limitation; *Gaya Loan Office, Ltd. v. Awadh Behari Lal*, 1 Pat. L. J. 420: 3 Pat. L. W. 51: *Pewan Kumar v. Dulari Kuar*, 5 Pat. L. J. 544: 1 Pat. L. T. 544.

The inherent powers of the Court recognised under s. 151 are such as are used to secure the ends of justice; *Sabitri Thakurain v. Sabi*, 48 I. A. 76 (P. C.), 48 C. 481: 33 C. L. J. 307: 10 A. L. J. 281; *Nilkanta v. Swarnamoyee Dassce*, 31 C. L. J. 180: 50 I. C. 726.

The High Court has an inherent jurisdiction to make orders to prevent a miscarriage of justice and this right can be and is expressly recognised by s. 151 C. P. Code, *Ramjan v. Mahadco*, 30 A. 147: 14 A. L. J. 1230.

A Court has inherent power to regulate its procedure in such a manner as may shorten litigation and result in substantial justice to the parties; *Srinath v. Probodhe Chunder*, 11 C. L. J. 580.

An order confirming Court sale in favour of a transferee from the bidder, who himself alleges not to be the actual purchaser is erroneous, as the transferee is not the auction-purchaser. A Court making such an order has inherent power to revoke it at any time; *Ali Mahammad v. Alia Khanam*, 30 I. C. 230.

Where an appellate Court adds a new party, it has inherent power to reverse the decree and remand the case for retrial. This power has not been taken away by Or. XLI, r. 23 of the C. P. Code; *Antoni v. Ramakrishnaya*, 2 L. W. 1031.

An appellate Court has inherent power to restore an appeal and rehear it after adding a co-defendant a party to the appeal; *Durga Charan v. Lakhi Narain*, 47 I. C. 917.

No judicial order can be made to the detriment of a person, till he has been afforded an opportunity by means of notice, to enable him to raise his objection if any. Though the C. P. Code does not contain any specific rule of the type of Or. XLV, r. 6 of the Supreme Court Rules, the Court has got inherent power to regulate its procedure and to prevent prejudice to persons who have no notice of its proceedings. The Court has inherent power to compel a party to bring back money into Court paid to him under an unsustainable order; *Hari Nath v. Hara Das*, 29 I. C. 580.

Where land in possession of a Hindu widow was sold by her without legal necessity, the Court has inherent power under s. 32 of the Land Acquisition Act, to compel the purchaser to bring back the compensation money withdrawn, into Court and to direct its investment in Government or other approved securities; *Mrinalini v. Abinash Chandra*, 11 C. L. J. 533.

If pursuant to an erroneous order under s. 73 of the C. P. Code, money had been paid out to a litigant, the High Court can direct the person to bring back the money into Court. The Court has inherent power to direct such restitution to enable it to do effective and complete justice between the parties; *Gopal Chandra v. Hari Mohan*, 21 C. L. J. 624.

A Court has inherent power to set aside a compromise decree obtained by fraud; *Peari Choudhury v. Sonoo Das*, 19 C. W. N. 419: 27 I. C. 628. See also, *Basangouda v. Churchigirigouda*, 34 B. 408. But if a decree embodies a compromise inaccurately or does not embody the true terms of the compromise, the only remedy is by an independent suit to set aside the decree on the ground of mistake or fraud or some other ground *ejusdem generis* therewith; *Ram Lagan v. Ram Birich*, 4 Pat. L. J. 250: 50 I. C. 497. See also, *Wajit Ali v. Khurshed Assan*, 36 I. C.

Deficiency of Court-fees was made up after several orders for payment of the deficit. *Held* that the payment was in conformity with the provisions of this section and that the discretion which was properly exercised cannot be challenged in appeal; *Priya Nath v. Miajan*, 29 I. C. 571.

An appellate Court has no power to extend or reduce the time fixed by the first Court for payment of court-fee on the amount of mesne profits ascertained by the lower Court. Neither section 11 of the Court Fees Act nor sections 148 or 149 of the C. P. Code give such a power to the appellate Court. Scope of s. 149 considered; *Nathersa v. Md. Rowthan*, 28 I. C. 890.

Where the Court of first instance allowed time to plaintiff to make good deficiency in court-fee, the appellate Court is not justified in interfering with the exercise of that discretion; *Ram Lal v. Khundatunnissa*, 12 A. L. J. 709, *see also*, *Shambha Koar v. Harihar*, 18 C. W. N. 1071, *Suraj Lal v. Utim*, 56 I. C. 47.

Where an appellant filed her memorandum of appeal within time, stamped with a Rs. 2 Court-fee stamp only owing to a *bona fide* mistake on the part of her pleader who, on discovering his mistake, made up the deficiency after expiry of the period allowed for the appeal. *Held*, that the case was one in which the Court might exercise the discretion vested by s. 149 of the C. P. Code; *Musst. Sahibji v. Piru*, 10 P. R. 1919: 49 I. C. 188.

Where the omission to pay proper Court-fee was due not to a *bona fide* mistake but was deliberate, time should not be granted under s. 149, C. P. Code, to make up the deficiency; *Muhammad Majid Ullah Khan, v. Muhammad Hamid Ullah Khan*, 69 I. C. 196; *Ramji Lal v. Sibba*, 75 I. C. 667; A. I. R. 1923 Lah. 309; *Moti Ram v. Bhanu Ram*, A. I. R. 1923 Lah. 629; *Lakhram v. Ramji Das*, 3 Lah. L. J. 370; *Tikkan Ram v. Bosa Ram*, 67 I. C. 106.

In the case of plaints insufficiently stamped under Or. VII, r. 11, C. P. Code the Court is bound to give a few days to pay the correct fee. Delay could be excused if the insufficiency was caused by a mistake as to the amount of the requisite stamp. But under s. 149, C. P. Code, it is now left to the discretion of the Court; *Akkarajee v. Akkarajee*, 27 M. L. J. 677 (38 B. 41 *dissented from*).

The discretion allowed to Courts by s. 149 of the Code for deficiency in court-fee to be permitted to be paid up at any time, in the course of an appeal cannot be exercised in favour of an appellant unless he shows reasonable diligence in the prosecution of his appeal; where the deficiency was made up after a year from the date of filing the appeal, the appeal was held to be barred by limitation; *Dalip Singh v. Umrao Singh*, 55 P. R. 1913: 130 P. L. R. 1913: 19 I. C. 788 (30 B. 330 *followed*); *Wadhawa Singh v. Sundra Singh*, 21 P. W. R. 1921: 59 I. C. 689.

Where the Court in its discretion called upon the plaintiff to pay the deficiency of court-fee within a time fixed by it, but that order was not carried out. *Held*, that s. 149 did not assist the plaintiff, and if the deficiency was paid after the period of limitation, the suit should be dismissed. S. 149, C. P. Code has not brought about any change in the law so as to entitle a plaintiff, who has obtained time under s. 149 and



239 where it was held that the Court has no power to vary or set aside under s. 151, a consent decree made by it when there is no variance between the decree and *solenamah*.

A Court has inherent power to set aside *ex parte* proceedings under Probate and Administration Act, either under s. 151 or on review under s. 114 of the C. P. Code; *Parman v. Bohra Nck*, 13 A. L. J. 441: 37 A. 380.

The Court has inherent power, in fact, it is its duty, to rectify mistakes in judicial orders arising from the ignorance of the Court or of its subordinate Officers: *Moroti Sonar v. Chintaman Sonar*, 69 I. C. 112.

The inherent power of a Court to grant a restitution will be exercised in the ends of justice, that is to say, where this is the only legal method by which the applicant can obtain his dues; *Varada Ramaswami v. Umma Venkataratnam*, 42 M. L. J. 473: 30 M. L. T. 178.

A decree for sale of the mortgaged property described the property as given in the bond. The description of the property was changed in the Revenue Registers before the institution of the suit. *Held*, that the Court had inherent power to amend the decree so as to do justice between the parties; *Mohabir Pershad v. Chandra Sekhar*, 28 I. C. 304.

Where an execution application has been dismissed for non-appearance of the parties, due to a mistake of the Court, it has apart from s. 151 inherent jurisdiction to restore it to the file; *Lalbur v. Choithram*, 8 S. L. R. 327.

Where an application is made under s. 34 of the Probate and Administration Act for the appointment of an administrator *pendente lite*, the Court may grant an injunction either in the exercise of its inherent power or under Or. XXXIX, r. 7 in cases where a temporary order of the kind is required so as not to defeat the ultimate order which the Court is competent to make; *Nirod Barani v. Chamatkarini*, 19, C. W. N. 205: 27 I. C. 617.

A Court has inherent power to set aside an *ex parte* decree or order upon proper cause shown.—*Bibi Tasliman v. Harihar Mahto*, 32 C. 253 F. B. 9 C. W. N. 91; *Abdul Sattar v. Bhusan*, 35 C. 767; *Gobind Singh v. Kalyan Das*, 15 A. L. J. 24; 38 I. C. 673. *Tyeb Beg v. Allibhai* 31 B. 45 (49); *Lala Hanuman Lal v. Musst Rampeari*, 2 Pat. L. T. 251: 60 I. C. 368.

S. 151 of the Code is intended to enlarge the discretion of Courts and to discourage technicalities. The Court has inherent power to set aside an *ex parte* order on an application therefor; *Madhavanand v. Madhu Mahto*, 27 I. C. 812.

Apart from the power to correct clerical or arithmetical errors, or to review a judgment a Court has no inherent power to alter an order passed in Court, *Bisheshwar Pratap Narain v. Asarfi Singh*, 74 I. C. 110.

A Court has power to rectify a clerical error made in the plaint in whatever subsequent record it is repeated by slip or inadvertance or mistake, *Mahaboo Begum v. Lal Begum Sahiba*, 14 L. W. 445: 62 I. C. 652.

has failed to carry out the order of the Court to make up the deficiency of Court-fee on a subsequent day without an order for enlargement of time; *Budhan Shah v. Sita Nath*, 13 C. L. J. 78 (84 C. 20, 4 C. L. J. 421, 11 C. W. N. 38, 27 C. 376, 2 C. W. N. 844 followed).

Under s. 11 of the Court Fees Act and also under s. 149 of the C. P. Code, the Court has power to enlarge the time originally fixed for the payment of Court-fees; *Golab Chand v. Bahuria*, 13 C. L. J. 432.

When an application for leave to sue *in forma pauperis* is dismissed, the plaint still remains and may be validated by payment of Court fees within a time to be fixed by the Court, if the Court is in the exercise of its discretion prepared to grant time; *Balaguru Naidu v. Muthu Ratnam Iyer*, 18 L. W. 451: 33 M. L. T. 18.

Where the Court finds that sufficient court-fee has not been paid, it is bound to stay the suit and to fix a time within which the additional court-fee can be paid without any regard to the fact whether that be a time within or beyond the period of limitation. If the fee is paid within the time fixed, the plaint is as valid as if it had been properly stamped in the first instance when the suit was instituted; *Hari Ram v. Akbar Husain*, 29 A. 749: 4 A. L. J. 636. The principle laid down in the above case has subsequently received legislative approval in s. 149 of the C. P. Code; see, *Bhutnath v. Chandra Benode*, 16 C. L. J. 34, p. 36.

**S. 149 and Or. VII, r. 11.**—Under s. 149, C. P. Code, read with Or. VII, r. 11, the Court has power to allow the plaintiff further time within which to make good the deficiency in Court-fee on the plaint and if the deficiency is made good within the time prescribed, the fact that the period of limitation for institution of the suit has expired would not affect its maintainability; *Ram Dial v. Sher Singh*, 21 A. L. J. 387: 45 A. 518.

Where a plaint is filed in time but with an insufficient court-fee, and the deficiency is made good under Or. VII, r. 11 no question of limitation arises; *Deo Nath Sahai v. Radha Kant Prasad*, 3 Pat. L. T. 142.

**"The Court may in its discretion."**—S. 149 of the C. P. Code gives a Court discretion to extend the time for payment of Court-fees on an insufficiently stamped memorandum of appeal and where the lower Court rejected an appeal simply on the ground that the requisite Court-fee has not been paid without calling upon the appellant to supply the deficiency or exercising any discretion in the matter, *held* that its decision was unsustainable; *Jaisingh Gir v. Sitaram Singh*, 21 A. L. J. 833: A. I. R. 1923 All. 349.

In the absence of a *bona fide* mistake in the filing of an appeal insufficiently stamped, the appellate Court is not justified, in the exercise of its discretion under s. 149 in allowing time to the appellant to pay up deficiency in the court fee; *Musatt. Satto v. Amar Singh*, 62 P. L. R. 1919: 53 I. C. 256; *Ram Sahay Ram Pande v. Lakshmi Narain*, 3 Pat. L. J. 74: 5 Pat. L. W. 18.

The Court will not in its discretion under s. 149 of the C. P. Code allow the deficiency of court-fee to be made up on the day of hearing, unless it is satisfied that some grounds exist for the exercise of the

A Court may apart from the provisions of s. 152, by virtue of its inherent power under s. 151, alter or vary the order and the decree passed by it though the decree is not apparently inconsistent with the order in the judgment; *Harmange v. Ram Gopal*, 20 C. L. J. 18·18 C. W. N. 772. See also, *Brijratan v. Jaynarain*, 37 C. 649, *Bibhuti Bhusan v. Lalit Mohan*, 23 I. C. 906; *Asa Singh v. Jagjit Singh*, 73 I. C. 679, *Mangat Rai v. Alia*, 92 P. R. 1919·52 I. C. 574, *Jhanda Mal v. Sardar Begum*, 168 P. W. R. 1916, *Maharaja Sir Rameshwar v. Jalindra*, 2 Pat. L. W. 205.

A Court exercising powers under the Guardians and Wards Act, has inherent jurisdiction to deal with matters brought before it of which cognizance may be required in the interest of justice; *Rashmoni v. Ganoda*, 19 C. W. N. 84: 20 C. L. J. 218.

Where an order recording satisfaction of a decree was obtained by fraud practised on the Court, the Court has inherent power under s. 151 to vacate the order; *Vilakathala Raman v. Vayalil Pachu*, 27 M. L. J. 172.

Where a sale in execution of a decree is set aside at the instance of the judgment-debtor on the ground of fraud, the Court in the exercise of inherent power under s. 151 of the Code, directs the auction purchaser to make over to the judgment-debtor, the profits he realized from the property; *Amirunnissa v. Karimunnissa*, 18 C. W. N. 1299.

An application to set aside a sale was dismissed and the purchase money was paid over to the decree-holder and the judgment-debtor. On appeal the sale was set aside. Held that the Appellate Court has inherent jurisdiction to make an order for restitution of the purchase money to the auction-purchaser; *Nepalchandra v. Ramendra Nath*, 24 I. C. 384; see, *Ganesh Narayan v. Purusottam*, 11 Bom. L. R. 1812: 34 B. 135.

Under s. 151, a Court has inherent power to restore an application for execution which has been dismissed for default, if the applicant satisfies the Court that such order is necessary in the ends of justice; *Abdul Karim v. Chaudhri Ram Singh*, 69 I. C. 506; *Shankar Rao v. Manik Rao*, A. I. R. 1923 Nag. 18: 68 I. C. 643; *Har Lal v. Narayan*, 64 I. C. 420: 18 N. L. R. 152; *Riti Kuer v. Alakhdev Narain*, (1918) Pat. 265: 5 Pat. L. W. 208: 4 P. L. J. 330. A contrary view was taken in *Ramaraghavareddi v. Raja of Venkatagiri*, A. I. R. 1927 Mad. 355.

The Court has inherent power to undo a wrong done in execution of a decree and to order the restitution of everything that has been improperly taken in such execution.—*Dinesh Prasad v. Sankar Chaudhury*, 2 C. L. J. 537: 9 C. W. N. 381; *Saroda Prasad v. Saudamini*, 3 C. L. J. 181; *Jogendra Chandra v. Wazidunnissa*, 34 C. 860: 11 C. W. N. 856; *Collector of Meerat v. Kalka Prasad*, 28 A. 663; *Shiam Sundar Lal v. Kaisar Zamani Begam*, 29 A. 143: 4 A. L. J. 19. See *Babu Lal v. Pandit Sukh Deo*, 105 P. W. R. 1913: 172 P. L. R. 1913: 19 I. C. 439; *Sukdeo Das v. Rito Singh*, 2 P. L. J. 361; *Dalip Narain v. Baij Nath*, 5 Pat. L. W. 132: *Ananda Mohan v. Atul*, 56 I. C. 753.

When it is brought to the notice of the High Court that its decree is being executed in a manner manifestly at variance with the purport and intention of the decree then the High Court under its inherent powers of supervision which are expressly saved by s. 151 of the Code may take

discretion; of these grounds the principal one is that a *bona fide* mistake was made; *Saidunnessa v. Tejendra*, 44 I. C. 398.

**"At any stage."**—This expression means that the Court may exercise the discretion vested in it by this section during the continuance of that particular proceeding and not after its termination, either by rejection or dismissal. For instance, where an application to appeal in *forma pauperis* was dismissed and the regularly stamped appeal was filed after the prescribed period of limitation, *held* that the appeal was barred by limitation. S. 149 of the C. P. Code is inapplicable when there are no proceedings actually before the Court. When the application for leave to appeal in *forma pauperis* is rejected, the unstamped memorandum of appeal attached to that petition falls to the ground; *Mg. Wa. Tha v. Abdul Gani*, 18 I. C. 518 (13 A. 305 *relied on*).

**Revision.**—An order refusing to give time to a party to make up the deficiency in Court-fee is not capable of revision as such an order does not amount to a decision of a "case" within the meaning of s. 115; *Chhakkan Lal v. Kanhaya Lal*, 45 A. 218; 69 I. C. 921; A. I. R. 1923 All. 118.

**150.** Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred. [New.]

Transfer of business.

## COMMENTARY.

**Object and Scope of the Section.**—This section is new. It has been framed to meet the difficulties which sometimes arise, on account of the abolition of any Court, or the transfer of any local area from the jurisdiction of one Court to that of another in consequence of which the business of one Court is transferred to another Court.

Before the new Code was passed there was a conflict between the decisions of the Calcutta High Court and the decisions of the Madras High Court in respect of the question whether a Court which passed the decree which directed the sale of immoveable property had jurisdiction to order the sale of that property if after the decree and before the application for sale, the said property had been transferred from its jurisdiction to the jurisdiction of another Court. The principal decisions of the Calcutta High Court on the question are, *Latchman Panday v. Madilan Mohan*, 6 C. 513; 7 C. L. R. 521; *Premchand v. Mokhoda Debi*, 17 C. 699 F. B. (15 C. 667 *overruled*); *Kali Pado v. Dino Nath*, 25 C. 315; *Jahar v. Kamini Bibi*, 28 C. 238; 5 C. W. N. 150; *Udit Narain v. Mathura Prasad*, 35 C. 974; 12 C. W. N. 859. The result of the above decisions of the Calcutta High Court was that both the Courts which passed the decree and the Court which had since obtained jurisdiction over the property could entertain an application for execution of the decree. Though both the Courts could entertain the application, the Court which passed the decree had ceased to have jurisdiction to order

such action for the ends of justice as may be necessary to enforce the proper execution of the decree; *Kulada Prasad v. Sadhucharan*, 3 Pat. L. J. 435.

Where a suit was dismissed for non-appearance of the plaintiff and the order of dismissal was set aside when plaintiff was found to have been dead at the time the suit was dismissed. *Held*, that the Court had inherent power to set aside the order of dismissal, notwithstanding that no application was made within 30 days under Or. IX, r. 9, of the C. P. Code; *Debi Baksh v. Habib Shah*, 35 A. 331 P. C.: 17 C. W. N. 829 P. C.: 15 Bom. L. R. 640: 18 C. L. J. 9: 25 M. L. J. 148: 16 O. C. 194.

It is open to the Court in a proper case to make an order re-admitting an appeal or application in the exercise of its inherent powers for the ends of justice; *Sonubai v. Shivaji Rao*, 45 B. 648: 23 Bom. L. R. 110.

The High Court can under s. 151 set aside the order of dismissal, restore an appeal and re-hear it, if the dismissal in the Appellate Court was due to the fact that the appellant had no notice whatever of the date of hearing; *Pamircaddi Sambayya v. Nimmagadda Nagayya*, 9 L. W. 513: 32 I. C. 540.

Nothing in the C. P. Code can limit or otherwise affect the inherent powers under which a Court can restore a suit dismissed for default on grounds other than sufficient cause for non-appearance. Or. IX, r. 9 cannot take away the Court's power to restore the case for any other valid reason than that mentioned in Or. IX, r. 9; *Lalta Prasad v. Ram Karan*, 84 A. 426: 9 A. L. J. 666.

When a suit has been wrongly dismissed for default under Or. IX, r. 8, the Court having failed to adopt the procedure prescribed by law, the High Court has inherent power under s. 151 to set aside the order of dismissal; *Kissen Gopal v. Suklal*, 31 C. W. N. 22: 53 C. 844.

That there is an inherent power in the Court to set aside a dismissal for default has been repeatedly held. The power may be exercised where the claim is a substantial claim and would be barred by limitation, if the suit was not restored; *Ram Narain v. Ramdhan*, 4 Pat. L. T. 617: 72 I. C. 668; *Rameshwar Marwari v. Harmukh Marwari*, 63 I. C. 440.

Where a Court dismissed a suit for default under misrepresentation or by mistake, *held* that it has inherent power to cancel the order, as soon as it is apprised of the fact and to try the suit; *Sri Adwatanand v. Basudeo Nand*, 6 I. C. 208.

The Court has inherent power to strike off the defence and proceed *ex parte* where a suit is adjourned on the condition that the defendant should pay the costs of the adjournment within a prescribed period, but fails to do so; *East Indian Railway Co. v. Jetmal*, 47 A. 538: 86 I. C. 862: A. I. R. 1925 All. 290.

Under s. 151, C. P. Code, it is competent to a Court to remand a case when the original Court has committed any error, omission or irregularity by reason of which there has not been a proper trial or an effectual or complete adjudication of the suit; *Zohra Bibi v. Zoluda Khatun*, 12 C. L. J. 369 (374): 7 I. C. 75. Followed in *Upendra Chandra v. Shaikh Sobhan*, 11 I. C. 183. See also, *In re Nand Kishore*, 32 A. 71: 6 A. L.

the sale of properties, and hence could not itself order a sale, and if the execution application is made to it, it must transfer it to the Court which had now obtained jurisdiction over the properties for passing and executing the order for sale.

Thus the Calcutta High Court decisions made a distinction between the jurisdiction to entertain the execution application and the jurisdiction to order sale of properties in execution and while they gave jurisdiction to both the Courts which originally passed the decree and the Court which has since obtained jurisdiction over the territory, to entertain applications, they gave jurisdiction only to the latter Court to order the sale of the properties.

As regards the Madras High Court, the principal cases are reported in 27 M. 118, 30 M. 537, 32 M. 140, in which it was held that the Court which passed the decree for sale had jurisdiction to entertain an execution application for sale of that property even though the property had been transferred to the jurisdiction of some other Court.

The new section 150 introduced by the new Code seems to imply clearly that the whole business of a Court might be transferred to another Court without any formal order of transfer being passed by a superior Court under s. 24 or any other section of the Code, either as regards the particular case or as regards all the cases pending in a particular Court. The introduction of this new section indicates, that the Calcutta view, which held that by change of *venue* made by a Local Government, the business of a Court which loses jurisdiction over a certain area so far as it relates to cases affecting the lands in the transferred area will be *ipso facto* transferred to the new Court, has been adopted by the Legislature. The word *transfer* in this section is not confined only to transfer made under special provisions of the C. P. Code such as s. 24, but it covers transfers of a local area from the jurisdiction of one Court to another; in other words by the change of *venue* made by a Local Government, the business of a Court, which loses jurisdiction over a certain area will be *ipso facto* transferred to the new Court without any formal order of transfer under the special provisions of the Code. See, *Subbiah Naickar v. Rama Nathan*, 37 M. 462. 26 M. L. J. 189: (1914) M. W. N. 205, where all the Calcutta and the Madras cases have been referred to and considered.

**Effect of Abolition of any Court or Transfer of any Local Area, upon Pending Suits or Appeals etc.**—Where after decision by the Court, the place where the cause of action arose and the suit was instituted, is transferred to the jurisdiction of another Court, the appeal should be made to the latter Court as the transfer of territorial jurisdiction *ipso facto* effected a transfer of venue; *Subbayya v. Rachayya*, 37 M. 477.

Where *venue* was changed by the transfer of the area from one Revenue Division to another, the Collector of the new Revenue Division acquired jurisdiction over all revenue suits then pending in the Courts of the former Revenue Division and that no formal order of transfer was necessary; *Kajana Venkoba v. Sastha Aiyar*, 17 M. L. T. 190: 28 I. C. 269.

The Court of M passed an injunction order under Or. XXXIX, r. 1, C. P. Code. Subsequently the local jurisdiction as well as the suit in which the injunction was ordered were both transferred to the Court of D. There.

J. 979; *Ranchhor Das v. Har Kishen Das*, 19 A. L. J. 553; *Rai Bishun Dutt v. Ramji Prasad*, 56 I. C. 834.

When the Appellate Court thinks it necessary that other parties should be joined as defendants and certain other property should be included in the suit, the only course for it to take is to reverse the decision and to remand the suit for a fresh trial from the commencement, and that can only be done under the inherent jurisdiction of the Court; *Anath Bandhu v. Aisali Namadas*, 43 C. L. J. 601; 97 I. C. 189; A. I. R. 1926 Cal. 1076, *Ghuznavi v. Allahabad Bank Ltd.*, 44 C. 929; 21 C. W. N. 877; 41 I. C. 598.

Section 151 recognises the inherent powers of Courts to make such orders as are necessary for the interests of justice and the inherent power extends to orders for remand outside the scope of Or. XLI, C. P. Code, *Bibi Aziz Fatima v. Syed Shah Khairat Ahmad*, (1920) Pat. 222; 58 I. C. 144; *Brij Mohan v. Deo Bhanjan*, 5 Pat. L. J. 146.

The High Court has jurisdiction in the exercise of its inherent power under s. 151 of the C. P. Code to condone in special cases the misapplication of the special provisions of the Code, if the provisions of the law as regards limitation and Court-fees have been complied with; *Musst Dulhin Sona Kuar v. Jamil Ahmed*, 48 I. C. 779.

An order for consolidation of suits can be made in a proper case under this section; *Kali v. Manodabala*, 17 C. W. N. 526 (528); 16 C. L. J. 591; *Qazi Mahomed Afzal v. Mahkumar Mahton*, 3 Pat. L. T. 584; 67 I. C. 1,000; *Narayan Vithal v. Jankibai Sitaram*, 39 B. 604 F. B. : 17 Bom. L. R. 655; *Har Parshad v. Brij Kishen*, 3 Pat. L. J. 446; (1918) Pat. 259.

The Court has inherent power to stay criminal proceedings started under s. 476 of the Crim. Pro. Code against the defendant in a suit pending an appeal filed by the defendant from the decree; *Harnam Singh v. Atri*, 7 Lah. L. J. 73; 88 I. C. 526; A. I. R. 1925, Lah. 323.

The Court has inherent power to grant temporary injunction independently of the Code; *Nirad Barani v. Chamatkarini*, 19 C. W. N. 205; see also, *E. D. Sassoon & Co. v. Mangal Chand*, 3 S. L. R. 128.

Where an appeal has been preferred against an order refusing the appellant's application to be declared an insolvent, the High Court has inherent power as a Court of appeal to make an *interim* order for protection of the appellant and for the appointment of a receiver of his assets during the pendency of his appeal; *Abdul Razak v. Basiruddin*, 14 C. W. N. 586; 11 C. L. J. 435.

When an application for execution of a decree had been presented by a Muktear who was in fact authorized to file it, but whose name had been omitted by mistake from the *muktearnama*, the Court has inherent power to allow the *muktearnama* to be amended upon discovery of the mistake. The amendment, when made, validates the proceedings, for purposes of limitation, with retrospective effect from their commencement; *Chhayemanness v. Kazi Basirar Rahman*, 11 C. L. J. 285; 87 C. 809; followed in *Nistarini v. Chandi Dassao*, 12 C. L. J. 423. But see, 36 A. 40.

When a decree-holder is resisted by a third person in taking delivery of possession, held, that although the C. P. Code does not make express

upon the applicant applied to the Court of D, for punishing the opposite party for contempt for disobeying the injunction. *Held*, that the Court of D had jurisdiction to entertain the application for punishment for alleged contempt; *Mouna Gurusamy v. Sheikh Mahomedhu*, 46 M. 83: A. I. R. 1923 Mad. 92 (26 C. W. N. 216 *distd.*; 39 M. 907 *foldd.*).

Subsequent to the passing of an *ex parte* decree by the District Munsif's Court, Penukonda, the properties which were the subject-matter of the suit, were under a territorial redistribution of jurisdiction transferred to the jurisdiction of the District Munsif's Court at Anantapur. On an application made thereafter in the District Munsif's Court at Anantapur to set aside the *ex parte* decree, *held* that the Court had jurisdiction to set aside the decree under Or. IX, r. 13 read with s. 150, C. P. Code; *Srinivasa v. Hanumantha Rao*, 42 M. L. J. 344: 46 M. 1: A. I. R. 1922 Mad 10.

A decree was passed by the third Subordinate Judge's Court in respect of a claim, the cause of action whereof arose within certain local limits. Subsequently the business arising within these limits was assigned to the fourth Subordinate Judge's Court by the District Judge under s. 13 (2) of the Bengal and Assam Civil Courts Act (XII of 1887). *Held* that the fourth Subordinate Judge's Court could not entertain an application to execute the decree. An "assignment" of business under s. 13 (2) of Act XII of 1887 is not the same thing as "transfer" of business within the meaning of s. 150 C. P. Code; *Munsi Md. Kazem Ali v. Munshi Niamuddin*, 26 C. W. N. 216.

In a mortgage suit a preliminary decree for nearly Rs. 2,000 was made by a Munsif with power to try suits up to the value of Rs. 2,000. The Munsif being transferred and his successor not being invested with the same power, the final decree was made by the Subordinate Judge. Execution was however taken out in the Court of the Munsif who meanwhile had been empowered to try suits up to Rs. 2,000. *Held*, that the Munsif's Court had jurisdiction to execute the decree under s. 150 C. P. Code though not under ss 37 and 38 of the Code; *Aminuddin v. Atarmani*, 24 C. W. N. 899.

**151.** Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

*Saving of inherent powers of Court.*

[New.]

## COMMENTARY.

**Principles which Regulate the Exercise of Inherent Powers by a Court.**—This section is new. It is intended to safeguard the inherent power of Courts. The Code of Civil Procedure is not exhaustive as to the powers of a Court in matters of procedure. The Courts in this country have in matters of procedure, powers beyond those which are expressly given by the Code of Civil Procedure which binds Courts only in so far as it goes; the powers of the Court are not rigidly circumscribed by the provisions of the Code, and the Court has inherent power to make a particular order which is essential in the interests of justice, even where no section of the Code can be pointed out as a direct authority for it, where its decision is based on sound general principles and is not in conflict with them or the intention of



provision for the case of resistance to delivery of possession to the decree-holder, by a claimant other than the judgment-debtor, yet s. 151 of the C. P. Code completely covers the case, and the Court, in the exercise of its inherent power, can order possession to be delivered to the decree-holder; *Radhika v. Gyan Chandra*, 14 C. W. N. 836; 6 I. C. 120.

The Court has inherent power to issue a writ of attachment for recovery of an amount drawn by a commissioner in excess of what was allowed by the Court as his fees: *Upendra Mohan v. Raja Jyoti Prasad*, 6 I. C. 386.

In the exercise of its inherent powers, the High Court has power to make an order directing the taxing officer to issue the necessary certificates to enable an applicant to apply to the revenue authorities to obtain a refund of an excess Court-fee paid on a memorandum of appeal; *Chandradhari v. Tipan Prasad*, 3 Pat. L. J. 452; (1918) Pat. 273.

Where owing to accident or other cause the records of a Court of justice have been destroyed or lost, the Court has an inherent power to reconstruct its records; *Marakharutti v. Veerankutty*, 46 M. 679 F. B.: 73 I. C. 1050; A. I. R. 1923 Mad 647. See also, 1 L. W. 932; 26 I. C. 244.

In a partition suit, the decree was drawn up by mistake on a Court-fee stamp, held that the Court has inherent power to allow the plaintiff to file a non-judicial stamp of the same value to be attached to the decree already drawn up, and this would be sufficient to validate the decree with retrospective effect; *Rafiuddin v. Latiff Ahmed*, 7 I. C. 94.

In the absence of any express provision to the contrary an Appellate Court has inherent power under s. 151, C. P. Code, to stay execution of a decree during the pendency of a counter case between the parties, although the case is not provided for either by Or. XXI, r. 29 or Or. XLI, r. 5 of the C. P. Code; *Sardarni Bhagwan Kaur v. Rani Harnam Kaur*, 82 P. R. 1910; 149 P. L. R. 1910.

In a partition suit all the parties should be before the Court which has inherent power to add a party at any stage of the suit for the ends of justice; *Lakmichand v. Kachubhai*, 35 B. 393; 13 Bom. L. R. 517.

An application to amend the plaint on the ground that it was based on a wrong view of the law, and that the correct view has been subsequently laid down by the High Court, should be allowed, in spite of the fact that the suit is barred by limitation on the date of the application; *Visvanathier v. Anjavier*, 26 I. C. 383.

In spite of the absence from the Code of Civil Procedure of any provision enabling two cross-appeals from the same decree to be consolidated, the Appellate Court has inherent jurisdiction in such a case in disposing of the two appeals so to mould its decree as to merge the result of the two appeals into one decree representing the final adjustment of the rights of the parties in all the points raised; *Ghansam Singh v. Bhola Singh*, 21 A. I. J. 465; 45 A. 506 F. B.

**Inherent Power of Court to Restore a Suit Dismissed for Default where Application under Or. IX, r. 9 to Set Aside the Dismissal is Itself Dismissed for Default.**—Where an application to set aside dismissal of a suit under Or. IX, r. 9 is itself dismissed for default, no second application lies under Or. IX, r. 9 for setting aside the dismissal of the first ap-

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plication and for its restoration and rehearing, but the second application may be treated as an application to restore the suit itself and not to restore the first application and if it is within time, there can be no bar to its being dealt with as an application under Or. IX, r. 9. If it is not within time, s. 151 may be invoked in proper cases to restore the suit. Where there is no provision in the Code expressly providing for a remedy and none which prohibits a remedy being administered and such remedy is called for in order to do that real and substantial justice for the administration of which it exists, the provision of s. 151 may and should be restored to, *Sarat v. Bisweswar*, 54 C. 405: 89 I. C. 350; A. I. R. 1927 Cal. 534; *Ganesh Prosad v. Bhagelu Ram*, 47 A. 878: 89 I. C. 350; A. I. R. 1927 All. 773; *Bharat Chandra v. Yasin Sarkar*, 21 C. W. N. 769: 41 I. C. 586.

**Illustration of Cases In which the Principle Laid Down in the Section was Held Inapplicable.**—The inherent jurisdiction of the Court cannot be invoked in a matter where there is express provision made in the Code itself; *Chatarbhuj v. Raghubar*, 36 A. 354, *Madhu Sudan v. Rash Mohan*, 21 C. L. J. 614 *Labhuram v. Amir Chand*, 73 P. L. R. 1916: 105 P. W. R. 1916. The section does not authorize a Court to override the express provisions of law; *Rajkumar v. Annoda*, 9 I. C. 509; *Mahadei v. Bahurani*, 6 O. L. J. 55: 50 I. C. 180.

An *ex parte* decree was passed against the defendant, but it was subsequently found that summons was not served on him and the Court cancelled the decree under s. 151. Held that s. 151 cannot be used for such a purpose, because the defendant's remedy in such a case was by an application to set aside the decree; *Amar Singh v. Buta Singh*, 101 I. C. 617: A. I. R. 1927 Lah. 372.

Where there is an inherent incompetency in a Court, no consent can confer upon the Court that jurisdiction which it does not possess. It is a patent misapplication by a court of s. 151 of the C P Code, if the Court in the exercise of its inherent power, assumes jurisdiction by way of review where it was expressly forbidden by the legislature to entertain such an application; *Kanai Lal v. Jatindra*, 45 C. 519: 26 C. L. J. 325: 22 C. W. N. 446 (referred to in *Sadananda v. Rakhal*, 31 C. W. N. 822).

A Court is not justified in applying its powers of inherent jurisdiction to introduce a new form of procedure for which no provision is made by the Indian Law; *Gour Chandra v. Nabādweep Municipality*, A. I. R. 1922 Cal. 1.

An *ex parte* decree was transferred, but no notice under Or. XXI, r. 16 was served either upon the decree-holder or judgment-debtor. The judgment-debtor subsequently got the *ex parte* decree set aside without making the transferee a party. The transferee thereafter applied for execution. Held, that the transferee could not proceed with the execution before the order setting aside the *ex parte* decree, had been set aside, and that the Court could not set aside under s. 151 the order setting aside the *ex parte* decree; *Bonomali v. Joy Kumar*, 29 I. C. 673.

A Court cannot in the exercise of inherent power assume jurisdiction to grant a review where it has been expressly forbidden by the legislature to entertain such application. The inherent power of the Court can be invoked, only for the attainment of the end of substantial justice, for the administration of which alone the Courts exist; *Sasi Bhusan v. Radha*

S. 153 allows the Court to give leave for amendment at any time in any proceeding in a suit and Or. VI, r. 17 says that the Court may allow such amendments at any stage of the proceedings. *Prima facie* this limits the Court to allow amendments in pleadings during the actual pendency of the suit and not after the decree has been actually drawn up and sealed; *Kishen Prasad & Co. Ltd. v. Fullmal Hira Lal*, 25 Bom. L. R. 888.

Where in a suit on a mortgage, the name of the village in which the mortgaged property lay was misdescribed and the mistake is discovered on appeal, it is the duty of the appellate Court to allow an amendment of the plaint and thus rectify a clerical mistake; *Bhagurath v. Chandra Harikar*, 20 A. L. J. 159: 66 I. C. 208.

Under section 153 of the C. P. Code, the Courts have full power to amend the pleadings at any stage so as to advance substantial justice irrespective of whether the other side is or is not deprived of his right to raise technical defences; *Kumar Venkata v. Velauda*, 27 M. L. J. 25: 24 I. C. 195.

Want of verification and signature does not entail the rejection of a plaint, as such verification and signature may be supplied at any stage of the proceeding. The person who has not signed and verified cannot be considered to be a new party to attract the application of s. 22 of the Limitation Act; *Arunachellam v. Preebhayya*, (1912) M. W. N. 1207: 25 M. L. J. 174: 17 I. C. 580.

It is not open to the Court of its own accord, to convert a suit for declaration into one for possession. S. 153, C. P. Code, will not apply to such a case; *Venkatachela v. Narayana*, 24 M. L. J. 455: 19 I. C. 672.

A suit was instituted to declare a certain mortgage invalid; it being found that it was partly valid, plaintiff was allowed to amend the plaint and claim relief for redemption.—*Mani v. Komalan*, 26 I. C. 443.

**154.** Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement. [S. 3, para. 3.]

## COMMENTARY.

This section corresponds to the third para. of s. 3 of the C. P. Code of 1882, with some modifications and alterations as will appear on a comparison of the two sections.

“Any present right of appeal.”—This section only saves a right which had accrued to a party at the commencement of the new Code. The fact that the execution sale took place and the application to set it aside on the ground of fraud was made before the new Code came into operation does not make the order passed on the application after the new Code came into force subject to a second appeal under the provisions of the old Code; *Raj Mohan v. Gobinda Chandra*, 17 C. W. N. 524 and 525 note.

S. 154 of the Code shows that the Legislature considered that the new Code might and would interfere with rights, and the argument that a parti-

*Nath*, 20 C. L. J. 433; 19 C. W. N. 835; see also *Deljan v. Hemanta Kumar*, 19 C. W. N. 758.

Where the judgment of a subordinate Court has not been brought before the High Court on appeal or revision, the High Court has no power to expunge adverse remarks on the character and credibility of a witness from the judgment of the subordinate Court; *Dunn v. Emperor*, 44 A. 401; 20 A. L. J. 261.

The inherent powers of a Court are not to be used to relieve a party from the consequences of his own mistakes or to enable him to evade the law of limitation; *Ganapathi Mudaliar v. Krishnamachari*, 43 M. L. J. 184; (1922) M. W. N. 514.

When according to well-known established principles certain questions, such as caste questions, have been removed from the jurisdiction of the Court they cannot be brought within its jurisdiction on the plea that the Court has inherent jurisdiction to do what justice requires for the parties before it. That plea cannot be urged in order to extend the jurisdiction of the Court; but to meet the objection often raised that in matters within the jurisdiction, the Court can only exercise such powers as are expressly given by the legislature and no others; *Jethabhai v. Chapsey*, 34 B. 467 (484).

An order under section 151 can only be made if it is necessary for the purposes mentioned in the section and not otherwise; *Ganesh v. Purushottam*, 34 B. 135; 11 Bom. L. R. 1312.

Where after the pre-emptor had obtained possession of property in execution of the decree, it was found that he had by mistake, paid one anna less than the pre-emption money, he was made to restore the property to the vendee judgment-debtor and was not allowed to make up the deficiency. S. 151, C. P. Code is not applicable to such a case; *Kanbava Lal v. Md. Shafi*, 3 P. W. R. 1913; 141 P. L. R. 1913; 18 I. C. 600.

Although the Court has inherent power to recall an order which has not been perfected it would not do so, when the adoption of this course would mean a reconsideration of the whole matter in controversy between the parties; *Peari Debi v. Jotindra Nath*, 10 C. L. J. 496.

Where a definite period of limitation has been prescribed by Art. 164 of the Limitation Act for an application to set aside *ex parte* decree, the Court would not be entitled by purporting to act under s. 151 of the Code in effect to extend that period; *Ayodhya Mahton v. Musst. "hul-kuer"*, A. I. R. 1922 Pat. 61; 65 I. C. 341; *Khairati v. Umar Din*, A. I. R. 1912 Lah. 266; 66 I. C. 270; *Musst. Lal Deir v. Amir Nath*, 57 I. C. 15. S. 151 of the C. P. Code does not authorize the Court to exercise its inherent powers so as to break the clear provisions of the Limitation Act; *Bissa Mal v. Kesar Linga*, 2 Lah. L. J. 249.

**Whether Inherent Power of Court can be Exercised in Criminal Cases.**—S. 151 merely recognizes the inherent power of the Court to make such orders as may be necessary for the ends of justice. This inherent power is in no sense restricted to Civil Cases, it is equally applicable to Criminal Cases; *Budhu Lal v. Chattu Gope*, 44 C. 810; 21 C. W. N. 209; 25 C. L. J. 193.

This presumption against retrospective operation however, has no application to enactments which affect only the *procedure* and the practice of the Courts. But the new procedure would presumably not apply where its application would prejudice rights established under the old; *Manjuri Bibi v. Akkel Mamhud*, 17 C. W. N. 889; 17 C. L. J. 316. See also, *Gopeswar v. Jiban*, 41 C. 1125; 18 C. W. N. 804; 19 C. L. J. 549, F. B.

It is now generally settled that in matters of procedure an Amending Act would affect legal proceedings instituted under the repealed provision.—*Rahimuddin v. Jagat Kishore*, 12 C. W. N. 987.

It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions do not affect them. An exception to this general rule is where enactments merely affect procedure, but do not extend to rights of action.—*Vedavali Narasiah v. Mangamma*, 27 M. 538.

No person has any vested right in procedure. Alterations in the procedure are always retrospective unless there be some good reason against it: *Shamsheer Khan v. Gopalchand*, 7 I. C. 11.

**Appeal.**—No appeal lies from an order made under this rule; *Sukdeo v. Kito Singh*, 1 Pat. L. W. 551; 2 Pat. L. J. 361; 39 I. C. 763; *Raghunandan v. Jadunandan*, 3 Pat. L. J. 253. But where an order is made under the provisions of s. 151, but in fact in exercise, by analogy, of the jurisdiction under s. 144, an appeal does lie from the order; *Gnanoda Sundari v. Chandra Kumar*, 31 C. W. N. 290; A. I. R. 1927 Cal. 285 (2 P. L. J. 361, 2 P. L. J. 206, and A. I. R. 1922 P. C. 269 referred to).

Where subordinate Courts wrongly exercise inherent powers, the High Court has power, under s. 107 of the Government of India Act, to correct them; *Brajabhusan v. Srish*, 4 Pat. L. J. 20.

**Limitation.**—An application for restitution either under s. 144 or s. 151 is governed by Art. 181 of the Limitation Act, *Balmukund v. Basanta Kumari*, 3 Pat. 371; 78 I. C. 200.

**152. Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may, at any time, be corrected by the Court either of its own motion or on the application of any of the parties. [S. 206, PARA. 3.]**

## COMMENTARY.

This section to a certain extent corresponds to the third para. of s. 206 of the C. P. Code of 1882 with some modifications. The following proviso, viz., "*Provided that reasonable notice has been given to the parties or their pleaders of the proposed amendment,*" which was contained in the third para. of the old section, has been omitted and the words "*if the decree is found at variance with the judgment,*" which occurred in the old section have been also omitted. The effect of the omission of the above words is that an application to amend or vary a decree, so as to bring it in conformity with the judgment, is covered by the provisions of section 151 of the C. P. Code; that is, the Courts in India have inherent power to amend or vary a decree so as to bring it into accordance with the judgment, after it is signed by the Judge. See *Brijratan v. Jaynarain*, 37 C. 649; *Langat Singh v. Janki Koer*, 39 C. 265; 14 C. L. J. 481, and other cases noted under this section, *post*.

**Clerical or Arithmetical Mistakes, etc.**—A Judge, owing to a clerical error, recorded an order dismissing the suit instead of decreeing it. The decree was passed in accordance therewith. *Held* that the Judge had jurisdiction to correct the error under section 152 of the C. P. Code; *Bhagirathi Noniya v. Sukhdeo*, 29 I. C. 144.

Where in a suit for possession, the property was described as two-annas share, Court-fee was paid thereon and all the evidence and arguments were directed on the two annas share; but owing to an accidental slip, in the relief portion, the property was described as two pie share and a decree was also made for the two pie share. *Held*, that the clerical error was merely a slip and the Court has power under s. 152 of the C. P. Code to amend the error throughout the record, and the High Court directed in revision the amend-





ment refused by the lower Court; *Sheo Blak v. Sukhdco*, 12 A. L. J. 185: 23 I. C. 344. Followed in *Pohalwan Singh v. Ganga Baksh Singh*, 66 I. C. 693.

Arithmetical error made in the lower Court and repeated in the High Court office in drawing up the order of the High Court must and will be corrected; *Venkataratnam v. Sankarayanna*, 24 I. C. 283.

A Court has power to rectify a clerical error made in the plaint in whatever subsequent record it is repeated by slip or inadvertence or mistake; *Mahaboob Begum v. Lal Begum Sahiba*, 14 L. W. 445: 62 I. C. 652.

Where clerical errors have crept into a decree, the Court has got power to amend such clerical errors. It is not a preliminary requisite to the amendment of such decree that the pleadings in which the same errors had formerly crept in should be first amended; *Somasundaram v. Velusami*, 15 M. L. T. 102: (1914) M. W. N. 107: 22 I. C. 774. See also *Gaibi v. Krishnap*, 5 N. L. R. 159; *Asa Singh v. Jagjit Singh* 73 I. C. 679: A. I. R. 1923 L. 147.

Courts have power to amend the decree, even when it is already in conformity with the judgment, *Appasa Rowther v. Mohammad Rowther*, 25 M. L. J. 102. 1927 M. W. N. 38. A. I. R. M. 435.

A clerical error arising out of a discrepancy between the decree and the judgment falls within the scope of s. 152 of the Code *Bikhmal v. Rajmal*, 7 S. L. R. 53. 21 I. C. 540.

Any clerical error or mistakes in judgment, decrees or orders cannot be corrected by a Court executing a decree; it must be corrected in the suit itself. A Court executing a decree must execute the decree as it stands; *Madan Mohan v. Bhukhar Sahu*, 16 C. L. J. 517; *Koralla Buchilingam v. Koralla Satyanarayanamurthi*, 15 L. W. 301; 65 I. C. 710.

Where a decree was corrected by addition of the words "with interest" but the judgment was not corrected, held that unless the judgment was amended, the decree could not be amended so as to include interest; *Ram Ghulam v. Sarjoo Pershad*, 11 I. C. 896.

A plaintiff who has obtained a decree for a specific share is not entitled to more merely because there is an arithmetical error in the decree. If there is such an error, the proper course is to get the mistake rectified by an application under this section; *Mata Badal v. Kablasi*, 9 I. C. 433.

In calculating the amount due on redemption, the office overlooked an order of Court directing the calculation up to date of payment. Held, it was a mere error or mistake under s. 152, C. P. Code and could be corrected at any time; *Bishun Naram v. Mt. Bibi Ramji*, 74 I. C. 842.

An application for amendment of a decree need not be made to the same Judge or Judges, it may be made to the Judges in charge of the Group to which it belongs. Or. XLV, r. 13 of the C. P. Code, does not restrict the operation of s. 152. The High Court may amend the decree, even after leave to appeal to His Majesty in Council is granted; *Aghora Kumar v. Mahomed Musa*, 11 C. L. J. 155.

Where an error has crept into the record of a case owing to the misdescription of the suit property in the plaint, it is incumbent on the court to

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correct the error on an application and under s. 152 of the C. P. Code; *Surjan Singh v. Wazir Singh*, 21 A. L. J. 323: 72 I. C. 483.

**Accidental Slip or Omission.**—In a suit for sale upon a simple mortgage, in which the prior mortgagee was a party, it was found that the property was subject to prior mortgage, but the operative part of the judgment did not specify that the property was to be sold subject to the prior mortgage and an ordinary decree for sale was prepared. No appeal was preferred, but after the time for appealing, the prior mortgagee applied for correction of the decree. *Held* that this was a case of an error arising from an accidental slip or omission within the meaning of section 152 of the C. P. Code, and that the decree should be corrected, *Shahdeo Gir v. Deo Dutt*, 13 A. L. J. 449: 37 A. 323.

It is open to a Court under s. 152 to add a necessary direction in its judgment accidentally omitted after the judgment is signed; *Pramatha Nath v. Ram Kishun*, A. I. R. 1927 Pat. 25

By a mere oversight, the plaint and the decree in a mortgage suit omitted one of the items in a mortgage document, though there was no dispute between the parties as to what was included. *Held*, the error can be corrected under s. 152 C. P. Code; *Maung Chit Hlang v. N. A. R. M. Chetty*, 74 I. C. 1020.

An application to correct a decree in the matter of costs can be made under s. 152 C. P. Code; *Krishnan v. Mahadeo*, 54 I. C. 821.

A Court has ample powers under s. 152 of the C. P. Code, to add an order as to costs in the judgment after it had been pronounced; *Chaudhury Sadho Charan v. Gangeswar*, 57 I. C. 739.

Where in an appeal "the suit was decreed with costs" and the Court intended that the contesting defendant alone will be liable for costs and not the other defendants. *Held*, that the defect in the decree could be amended under s. 152 of the Code even when an appeal is pending in the higher Court and an application for review was not the only remedy of the other defendants; *Barhamdeo v. Harmanoge*, 18 C. W. N. 772: 20 C. L. J. 18.

A suit was decreed in terms of a compromise but certain terms of it were not embodied in the decree owing to the negligence of the Court's officers. *Held* that s. 152 of the C. P. Code authorizes a Court to remedy as far as it can, errors in the formal expression of its orders occasioned by its own indolence; *Muttair Rahman v. Harendranath*, 21 I. C. 115.

The test whether a Court can make an alteration under s. 152 of the C. P. Code is whether the error as it stands represents the intention of the Judge at the time he made it. If it does, then a mistake in it cannot be treated as an accidental slip or omission which may be corrected under this section; *Ashik Husain v. Madhi Husan*, 13 O. C. 114; *Jagmohan v. Sitapatram*, 91 I. C. 29.

**Court's Inherent Power to Amend or Vary a Decree.**—The Courts in India have an inherent power to amend or vary decrees so as to bring them into accordance with the judgment after they are signed by the Judge, even if they do not fall within s. 152 of the Code; *Brijratan v. Joynarain*, 37 C. 649; see, *Langat Singh v. Janki Kocr*, 39 C. 265: 14 C. L. J. 481; *Yognanarayana v. Mukayya*, (1915) M. W. N. 914, followed in *Bibhuti Bhushan v. Lalit Mohan*, 23 I. C. 906.

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*See Cases noted under section 151.*

" May at any time be corrected.—There is no limitation for an application under s. 152 to amend a decree, it being the duty of the Court to amend it whenever it is found to be not in conformity with the judgment. —*Kalu v. Latu*, 21 C. 229. *See also Jivraj v. Pragji*, 10 M. 51; *Shivapa v. Shivapav Langapa*, 11 B. 284 (4 A. 23 dissented from); *Darboo v. Keshobai*, 9 A. 264 (4 A. 23 dissented from; 4 M. 172, and 6 B. 586 *refd. to*). *See, 'Bekhomal v. Rajalmal*, 7 S. L. R. 53: 21 I. C. 540: *Langat Singh v. Janki Koer*, 39 C. 265: 14 C. L. J. 481.

The word " may " in this section does not make it discretionary with the Court to order the amendment, but merely enlarges the power of the Court by providing that such correction may be made at any time; or in other words, the section simply emphasizes that no lapse of time would disentitle the Court to make the correction; *Chandra Kumar v. Sudhansu*, 28 C. W. N. 873: 80 I. C. 55: A. I. R. 1924 Cal. 895.

Where the Judge added a few words to the order, apparently to make it clear what the decree meant, and it appeared that even otherwise the decree was in conformity with the judgment. *Held* that there was no alteration so as to make it a new decree; *Kumar Birendra Nath v. Satis Chandra*, 44 C. L. J. 121: A. I. R. 1926 Cal. 1166.

The exercise of the power of amendment under s. 152 is discretionary, and an application for amendment of a decree should be rejected as too late if the rights of third parties acting in good faith have been intervened; *Narayana Ayyar v. Biyari Bibi*, 32 M. L. T. 98: 69 I. C. 977.

No party can claim correction of clerical or arithmetical errors as a matter of right. It is a matter which is entirely at the discretion of the Court, and the discretion has to be exercised in view of the peculiar facts of each case; *Kishore v. Chhanga*, 47 A. 44: 82 I. C. 1030: A. I. R. 1925 All 187; *Pitani Lal v. Balwant*, 23 A. L. J. 518: 88 I. C. 306: A. I. R. 1925 All. 556.

A decree may be amended at any time although the time for appealing from the decree has expired; *Pydel v. Chathappan*, 14 M. 150. There is no limitation for an application to amend a decree; *Shivapa v. Shivpanch*, 11 B. 284; *Kalu v. Latu*, 21 C. 259; *Jivraj v. Pragji*, 10 M. 51. But no amendment of decree should be allowed by the Court if it is inexpedient or inequitable to do so, in view of the fact that third parties have acquired rights under the decree sought to be amended, without a knowledge of the circumstances which would tend to show that the decree was erroneous; *Pandurang v. Narar*, 27 Bom. L. R. 657: 89 I. C. 569: A. I. R. 1925 Bom. 389; *Narayana v. Biyari*, 43 M. L. J. 559: 69 I. C. 977 A. I. R. 1923 Mad. 57.

**What Court Can Amend a Decree.**—A decree affirmed on appeal can only be amended by the Appellate Court; the lower Court has no jurisdiction to make the amendment.—*Muhammad Sulaiman v. Muhammad Yar Khan*, 11 A. 667, F. B. (4 A. 376, *followed*). *Followed in Aghora Kumar v. Mahomed Musa*, 11 C. L. J. 155; *Rameswar Malia v. Bhaba Sundari*, 11 C. L. J. 8; *Abbas Khan v. Nibarani Dassi*, 11 C. L. J. 169; *Lala Brij Narain v. Kunwar Tejbal Bikram*, 11 C. L. J. 560 P. C.: 14 C. W. N. 667 P. C. *See also, Muhammad Sulaiman v. Fatima*, 11 A. 814; *Pichuvayyengar v. Seshayyengar*, 18 M. 214, F. B.; *Shiv Lal Kalidas v.*

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The proper Court to correct clerical errors in a decree or order is the Court in which the errors were made and not the Court wherein at the time of the prayer for amendment, an appeal from the decree or order is pending; *Muthu Bhattar v. Muthunajaya*, 7 L. W. S. 44 I. C. 248; *Bachan v. Raghunath*, 48 A. 224; 24 A. L. J. 149; A. I. R. 1926 All. 300.

The Court of first instance has no jurisdiction to amend a decree under s. 152 on the application of a non-appealing defendant when the decree has been confirmed on appeal by the other defendants *Sri Gobind Sing v. Gangatu Pershad*, 6 C. L. J. 542.

**Correction of Clerical Mistake by Successor in Office.**—A clerical mistake can be corrected by the successor in office. The word used in s. 152, C. P. Code, is "Court" and not "Judge" and the Court must mean the Court, whoever be the presiding Judge; *Mewa Sahu v. Jhonti Singh*, 2 Pat. L. T. 296; 63 I. C. 840; *Azizur Rahman Khan v. Abdul Hal Khan*, 18 A. L. J. 501; 55 I. C. 963. Where a Judge delivers a judgment and the decree drawn in pursuance thereof is in conformity with the judgment on the face of it, the successor of the Judge has no jurisdiction to amend the decree so as to bring it in conformity with the supposed real intention of the former; *Narendra Nath v. Digendra Nath*, A. I. R. 1920 Cal. 1100; 96 I. C. 195.

**Effect of Amendment of Decree.**—An application under s. 152 does not give a fresh starting point to limitation, and cannot be regarded as an application to a proper Court to take steps in aid of execution.—*Daya Kishann v. Munhi Begam*, 20 A. 301; *Kallu Rai v. Pahiman*, 13 A. 124. See also *Pydel v. Chathappa*, 14 M. 150. But in *Kali Prosanna v. Lal Mohun*, 25 C. 258; 2 C. W. N. 219, it has been held that an order granting an application under s. 206, C. P. Code, 1882 (s. 152), is an order passed upon review of judgment within the meaning of art. 170 of the Limitation Act, 1877; therefore an application for execution of a decree within 3 years from such an order is not barred by limitation (4 A. 137 *referred to*). The same view appears to have been taken in *Muhammed Suleman v. Muhammad Yar Khan*, 17 A. 39 and in *Venkata Jogaya v. Venkata Simhadari*, 24 M. 25.

An order granting an application under s. 206, C. P. Code, 1882 (s. 152), has not the effect of extending the period of limitation for execution of the decree.—*Ahsanullah v. Dakhini Din*, 27 A. 575 (20 A. 301; 8 A. 402 and 13 A. 124, *folld.* 4 A. 137 and 25 C. 258 *dissented from*).

For the purpose of determining whether the appeal was barred by limitation, time must be taken to have run from the date of the decree as origin.



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ally drawn up (14 M. 150; 22 M. 364 and 6 C. 22 *folld*). Every amendment made in a decree under s. 206, C. P. Code, 1882 (s. 152), does not necessarily entitle a party who prefers an appeal against the decree to claim an extension of time under second para. of s. 5 of the Limitation Act; whether there is sufficient cause for such extension must depend upon the circumstances of each individual case. If the amendment has no relation to the ground upon which the validity of the decree is sought to be challenged in appeal, such appeal should not be admitted out of time. On the other hand, if the grounds on which the appeal is based are intimately connected with the amendment of the decree, or if the grounds are directed against the decree only in so far as it has been amended, the Court should exercise, in his favour, the discretion vested in it by para. 2 of s. 5 of the Limitation Act, 1877.—*Brojo Lal v. Tara Prasanna*, 3 C. L. J. 188. See also *Amar Chandra v. Asad Ali Khan*, 32 C. 908.

**Appeal and Revision.**—An order of the High Court, rejecting an application under this section is not appealable to His Majesty in Council.—*Sunder Kocr v. Chandishwar*, 30 C. 679 (10 W. R. 1 F. B.; 6 W. R. Mis. 102 *refrd. to*).

An order under s. 152 amending a decree, is a separate adjudication, and is not merely a part of the original decree, and such an order is not appealable.—*Surtia v. Ganga*, 7 A. 875, F. B.; (7 A. 412, judgment of Oldfield, J., *reversed*; followed in *Raghunath v. Mafakshar Hossain*, 5 C. W. N. 192; *Nalinakshya v. Mafakshar Hossain*, 28 C. 177 (25 C. 258 *discussed*; 6 C. 22, 7 A. 875, 8 A. 377 and 11 A. 314 *refrd. to*). See also, *Raghunath v. Rajkumar*, 7 A. 876, F. B.; *Muhammad Naimullah v. Ishanallah*, 14 A. 226; *Raja Sardar Mahesh Prasad v. Musst. Budhwant*, 54 I. C. 387; *Buta Ram v. Sundar Das*, A. I. R. 1927 Lah. 68; 98 I. C. 883. But see, *Visvanathan v. Ramanathan*, 24 M. 646, where it has been held that an appeal lies.

No appeal lies against an order amending a decree, but if such order has been made without jurisdiction, the High Court can set it aside on revision. An appeal may lie from the decree as amended; *Rameswar Malia v. Bhabasundari*, 11 C. L. J. 81.

An order amending a decree under 206, C. P. Code, 1882 (s. 152), is not subject to revision by the High Court.—*Narayana Sami v. Natesa*, 16 M. 424; *Visvanathan v. Ramanathan*, 24 M. 646. See also, *Dhan Singh v. Basant Singh*, 8 A. 519; *Hosan Shah v. Sheo Prasad*, 15 A. 121; *Surtia v. Ganga*, 7 A. 875, F. B.; *Raghunath Das v. Rajkumar*, 7 A. 876, F. B.; *Balmakund v. Jatan Lal*, 6 A. 125; *Menat Ali v. Anwar Ali*, 9 C. W. N. 605, and *Bai Shri Vaktuba v. Agarsangji*, 31 B. 447; 9 B. L. R. 547.

**Suit to Rectify Mistake in Decree If Maintenable.**—A suit lies in a Civil Court to rectify a mistake in a decree.—*Jogeswar v. Ganga Bishnu*, 8 C. W. N. 473. See also, *Balaprased v. Kanoo*, 8 N. L. R. 18; 14 I. C. 407. See, however, *Chandma v. Asima Banu*, 10 C. W. N. 1024; *Basware Kurmi v. Nakchedi*, 27 A. 174; *Bhondi Singh v. Dowlat Ray*, 14 C. L. J. 675; 17 C. W. N. 85; *Thamballa v. Thamballa*, 7 M. L. T. 266.

**Whether Successive Applications for Amendment of Decree Maintainable.**—*Res Judicata.*—Successive applications for amendment are not barred by *res judicata*. But if an application for amendment has been heard and disposed of on the merits, a subsequent application may not be maintained in the same matter and it may be barred upon general principles of

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law; *Langat Singh v. Janki*, 39 C. 265: 14 C. L. J. 481. See also, *Thamballa v. Thamballa*, 7 M. L. T. 266: 5 I. C. 119.

Where a decree is amended under s. 206, C. P. Code, 1882 (s. 152), the amended decree operates as *res judicata* from the date of the original decree and not from the date of the amendment.—*Pydel v. Cathappan*, 14 M. 150 and *Cathappan v. Pydel*, 15 M. 403.

**Some Cases under Section 206 of the Old Act.**—A clerical error in the decree appealed against was ordered to be rectified at the hearing of the appeal.—*Hirji Jina v. Naran Mulji*, 1 B. 1.

Where a decree is not in conformity with the judgment as to payment of costs to the plaintiffs, it should be amended under this section.—*Sajedur Raj v. Baidya Nath Deb*, 1 C. W. N. 65.

A clerical error in the decree can be amended by the successor of a Judge. The limitation for review does not apply to an application for alteration of a clerical error in a decree.—*Modhoosudan v. Romanath*, 12 W. R. 65. See also, *Dick v. Dick*, 15 A. 169.

A decree should not be amended except in the presence of the parties concerned or after service of notice on them.—*Kishen Dyal v. Sunkur Dutt*, 2 W. R. Mis. 15; *Boloram Das v. Jogendra Nath*, 19 W. R. 349. See also, *Abdul Hayai v. Chunia Kuar*, 8 A. 377.

Where there is a clerical error in the decree, it must be rectified by an application under this section, and not by an application for review of judgment.—*Joykishen Mukerjee v. Atwar Rohoman*, 6 C. 22: 6 C. L. R. 573. See also, *Parameshraya v. Seshgiriappa*, 22 M. 364. But where a decree is in fact in accordance with the judgment, such decree, however erroneous it may be, cannot be altered on an application under this section.—*Lakho Bibi v. Salamat Ali*, 20 A. 337.

Where there is a clerical error in the decree, it must be rectified by an application under this section, and not by an application for review of judgment; *Joykishen v. Atwar Rahman*, 6 C. 22: 6 C. L. R. 573. See also, *Parameshraya v. Seshgiriappa*, 22 M. 364.

Addition to the decree not warranted by the judgment cannot be made under section 206 of the C. P. Code, 1882.—*Bai Shri Vaktuba v. Agar-sangji*, 31 B. 447: 9 Bom. L. R. 547.

If a party wishes to bring a decree in conformity with the judgment, he must take steps under this section, and his neglect to do so does not make him incapable of obtaining the same result by the exercise of the right of appeal.—*Jamaitunnissa v. Lutfunnissa*, 7 A. 60. See also, *Parameshraya v. Seshagiriappa*, 22 M. 364.

Where the Court in its judgment awarded the plaintiffs a specified sum of money, and ordered that the rest of the plaintiffs' claim should stand dismissed. Held, that interest which was not given by the judgment cannot be given by amending the decree under this section.—*Hasan Shah v. Sheo Prasad*, 15 A. 121.

Where a decree is obtained in accordance with an award, the award cannot be amended or modified by the Court, nor can the decree, which is in accordance with it.—*Ahmed Bin v. Essa Bin*, 17 B. 657. Application

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for amendment of consent decree, after 18 years disallowed; *Rameswar Prosad v. Chandreswar*, 7 C. W. N. 880.

In a suit for specific performance of a contract, there was an alternative prayer for damages, but the decree was passed for specific performance only. *Held*, that the plaintiff was entitled to amend the decree by asking to give him a decree for damages in lieu of the former decree, when it became apparent to the plaintiff that it was out of the defendant's power to specifically perform the contract.—*Peari Sundari v. Hari Charan*, 15 C. 211. *See also*, *Pherozsha Pestonji v. Sun Mills*, 22 B. 370.

The judgment adjudged interest to be paid for the period to the institution of the suit only. The decree contained an order for payment of interest from the date of the suit onwards. *Held*, that the additional order contained in the decree involved no variance with the judgment.—*Kolai Ram v. Pali Ram*, 7 A. 755.

Where two of the defendants applied for leave to appeal to the Privy Council, and pending such application the suit was compromised between the plaintiff and one of such defendants, and the High Court amended its decree in terms of the compromise, and dismissed the application for leave to appeal: *Held*, that the High Court had no jurisdiction to amend the decree either under s. 206 (s. 152) or s. 623 (s. 114), C. P. Code, 1882.—*Kotagiri Venkata v. Villanki Venkatarama*, 4 C. W. N. 725, P. C.: 24 M. 1.

**153.** The Court may, at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding. [New.]

## COMMENTARY.

**Scope of the Section.**—The section is new; it corresponds to English Or. XXVIII, r. 12 of the Supreme Court Rules. It gives the Court general power to amend any defect or error in any proceeding in a suit. This section is intended to enlarge the discretionary powers of the Courts to order amendment, at any time of any defect or error in any proceeding in a suit.

Rule 17 of Or. VI empowers the Court to amend pleadings and section 152 empowers the Court to correct mistakes and errors in judgments, decrees or orders. Under this section all proceedings in a suit may be amended.

**"Amend any defect or error."**—A decree-holder should be allowed to amend the prayer of his execution petition by adding an alternative prayer that "if the Court thinks that the decree as it stands awards relief personally against the defendant, the Court will be pleased to order arrest of the defendant and attach the following properties" (to be definitely described). Section 153 of the C. P. Code gives ample power to the Court to allow such amendment; *Periyasami v. Muthia Chettiar*, 33 M. 677: 15 M. L. T. 232.

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be interpreted uninfluenced by any considerations derived from the previous state of the law. But if the meaning is doubtful, resort may be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the Act. *Administrator-General of Bengal v. Prem Lal*, 22 C. 788, P. C.; *Narendra v. Kamalbasini*, 23 C. 562; 23 I. A. 18; *Kondayya v. Narasimhulu*, 20 M. 97, 103; *Lala Suraj Prasad v. Golabchand*, 28 C. 517; *Krishna Ayyangar v. Nallaperumal*, 43 M. 550; 47 I. A. 33.

**Object of Codification.**—The object of codification of a particular branch of law is that on any point specifically dealt with by it, such law should be sought for, in the codified enactment, and ascertained by interpreting the language used; *Narendra v. Kamalbasini*, 23 C. 568, P. C.; 23 I. A. 18; *Suraj Prasad v. Golabchand*, 28 C. 517. Where the law has been codified, it is of little avail to enquire what is the law apart from such codification: the Code itself must be looked to as the guide in the matter; *Burn & Co v Macdonald*, 36 C 354; 13 C. W. N. 355; 9 C. L. J. 190. It is the essence of the Code to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a judge to disregard or go outside the letter of the enactment according to its true construction; *Gokul Mandar v. Pudmanund*, 29 C. 707; followed in *Gangaprosad v. Kuladananda*, 30 C W. N. 465; A. I. R. 1926 C. 568; where, however, there is no specific provision in the Code, the Court has the power and it is its duty to act according to justice, equity and good conscience, *Hukumchand v. Kamalananda*, 337 C. 927, 931-32; 3 C. L. J. 67; *Rasik v. Bidhumukhi*, 33 C. 94; *Abdul Rahman v. Shuhana*, 1 Lah. 339; 58 I. C. 748; *Raghunandan v. Parmeshwer*, (1917) Pat. 137; 2 Pat. L. J. 306; 39 I. C. 779.

**Interpretation of Acts.**—The following are the principal rules for the interpretation of Statutes:—

**Plain and Natural Meaning.**—In interpreting a Statute, the proper course is, in the first instance, to examine the language of the Statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view; *Narendranath v. Kamalbasini*, 23 C. 563, P. C. *Suraj Prasad v. Golabchand*, 28 C. 517; 5 C. W. N. 640; *Bank of England v. Vagliano*, (1891), L. R. App. Cas. 107; *Kondayya v. Narasimhulu*, 20 Mad. 97 p. 103; *Krishna Ayyangar v. Nallaperumal*, 43 M. 550, 559, 565; 47 I. A. 33; 56 I. C. 163. The Court will put a reasonable construction upon Acts of the Legislature and will not allow the strict language of a section to prevent such construction being given. It is the duty of Courts to expound the sections according to the plain sense of the words; *Gurreebullah v. Mohunlal*, 7 Cal. 127; 8 C. L. R. 409.

**Sections and Rules.**—When an Act is divided into Sections and Rules as the new C. P. Code, the proper canon of interpretation is, that the sections lay down general principles and the rules provide the means by which they are to be applied and they cannot be otherwise applied. The result is that the rules restrict the provisions contained in the sections. As for instance, section 107 (1) (b) confers on any Appellate Court a power "to remand a case," and then proceeds to limit the power by Or. XII.

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**Preamble.**—The preamble to a Statute can neither expand nor control the scope and application of the enacting clause, when the latter is clear and explicit; but if the language of the body of the Act is obscure or ambiguous, the preamble may be consulted as an aid in determining the reason of the law and the object of the Legislature and thus arriving at the true construction of the terms employed. Where the words of the enacting clause are more broad and comprehensive than the words of the preamble, the general words in the body of the Statute, if free from ambiguity, are not to be restrained or narrowed down by particular or less comprehensive recitals in the preamble; *Gopi Krishna v. Rajkrishna*, 12 C. L. J. 8.

The rectial or preamble of an Act is a key for opening the meaning and intent of the Act.—*Janki Singh v. Jagannath*, 3 Pat. L. J. 1: 44 I. C. 94 (F. B.).

**Value of English Decisions.**—A Judge should not interpret statutory law, when it provides for a specific procedure, by reference to a decision pronounced under a different system of procedure (*Mookerjee & Fletcher. J. J.*).—*Radhakissen v. Lakhmi Chand*, 31 C. L. J. 283. The express words of an Indian Statute are not to be overridden by reference to equitable principles which may have been adopted in the English Courts, *Karnan Gouda v. Benep Gouda*, 39 B. 472; 17 Bom. L. R. 355; 28 I. C. 946.

**Retrospective Operation.**—It is a general principle of law that every Statute which takes away or impairs vested rights acquired under existing law must be presumed to be intended not to have a retrospective operation.—*Maxwell on the Interpretation of Statutes*, Chap. VIII, Sec. IV. This presumption does not apply to Acts dealing with procedure like the Code of Civil Procedure, because no person is supposed to have a vested right in any course of procedure. The general principle seems to be that alterations in procedure are always retrospective unless there be some good reason against it; *Girish v. Apurba*, 21 C. 940, 955; *Balkrishna v. Bapu*, 19 B. 204, 206; *Shobosundari v. Gopal*, 7 I. C. 11, 14; *Bissessar v. Jasoda*, 40 C. 704; *Bhobosundari v. Rakhal*, 12 C. 583. Civil Courts in this country have, in matters of procedure, powers beyond those which are expressly given by the C. P. Code, which bind the Courts only so far as it goes. The Act does not possess powers previously possessed unless it expressly takes them away, nor does it affect the power and duty of the Courts to act according to justice, equity and good conscience in cases where there is no express provision in the Code; *Hukum Chand v. Kamalanand*, 33 C. 927; *Panchanan v. Dwarka*, 3 C. L. J. 29.

The provision in s 154 of the present Code, which declares that "nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement" clearly contemplates a retrospective effect of the Code; *Bissessar v. Jasoda*, 40 C. 704; *Ramjadub v. Rashmonee*, 8 W. R. 821.

**British India.**—The expression has not been defined in this Act, and in the absence of any definition, the definition given in section 3 (Cl. 17) of the General Clauses Act (X of 1897), is applicable. As defined in that Act it means "all territories and places within His Majesty's dominions which are for the time being governed by His Majesty through the Governor-General in India or through any Governor or other officer subordinate to the Governor-General of India" (S. 3, Cl. 1).

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(2) "Decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or section 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

*Explanation.*—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

*Importance of the Definition of Decree.*—The importance of the definition of the word "decree" rests on the fact that by reference to it, the right of appeal is determined. The Committee have in the main adhered to the existing definition; but they have modified it in two respects, and this has involved a slight recasting of the language. The principal modification aims at permitting an appeal from an adjudication which purports to settle the rights of the parties, though it does not completely dispose of the suit. Such an adjudication the Committee describe as a preliminary decree.

The *Explanation* is intended to make it clear that a decree may be partly final and partly preliminary. Thus, a decree for the recovery of possession of immoveable property and for mesne profits would be of this mixed character.

The word "within" has been substituted for "mentioned or referred to in" with a view to bringing within the definition of decree, orders against sureties (see section 142) and orders as to court-fees in pauper suits (see Order XXXIII, rule 13) and thus providing for appeals therefrom.

The only other modification is for the purpose of excluding a right of appeal from an order of dismissal for default—*Notes on Clauses.*

*Definition of Decree.*—The definition of the word "decree" in the present Code differs from its definition in the old Code. The word "upon any right claimed or defence set up in a civil suit," which occurred in the old Code, have been omitted, and the words "which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit" have been substituted for them. The word "civil," which occurred before the word "court" in the old Code, has been omitted. The word "court" in the present Code means civil courts, exercising all the powers of a civil court, as distinguished from revenue courts, although those courts are also civil courts in the sense that they also decide a limited class of suits of civil nature.

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Unless there is a formal expression of the Court's adjudication on the rights of the parties, there can be no decree from which an appeal would lie. No particular form is necessary, but the decree should embody in a formal manner the adjudication of the right of a party. Where the question sought to be adjudicated is left open, there is no decree and no appeal lies; *Ayappa Mudaliar v. Gopalsamy*, (1912) M. W. N. 1122: 12 M. L. T. 309: 16 I. C. 45; *Pandurang v. Gayabai*, 62 I. C. 467.

**Conclusive Determination of Rights of Parties.**—The expression "conclusive determination" means conclusive decision, as distinguished from interlocutory orders. It means an adjudication which brings the suit to an end. The decision on a particular issue by which the whole suit and not a part of it, is disposed of, if followed by a decree is a conclusive determination of any of the matters in controversy and is therefore a decree. Orders made during the pendency of a suit prior to decree, which do not terminate the suit, but are only so many steps towards its final disposal are called interlocutory orders, and are not decrees. An order to be a decree must conclusively determine the rights of the parties. See *Deoki Nandan v. Bansi Singh*, 14 C. L. J. 35: 16 C. W. N. 124: see however *Krishnaji v. Maruti* 12 Bom. L. R. 762.

**"Rights of parties."**—The word *right* means substantial right arising out of the merits of the case, that is, the right which is asserted or sought to be enforced on one side and denied by the other side. The expression "rights of the parties" referred to in the definition of the word "decree" must, therefore, be taken as rights of the parties *inter se*, i.e., amongst themselves in regard to the subject-matter of the suit and not merely one of procedure, which is ancillary to the enforcement of the substantive right claimed. For instance, an order refusing an application to be made a party; 13 Cal. 100; 21 Cal. 539; order permitting withdrawal of a suit or appeal, 18 Cal. 322, 16 All. 19; 27 Cal. 362; 4 C. W. N. 41; and order of dismissal for non-service of summons, 9 Cal. 627, are not decrees, as all these orders are not upon the right claimed, asserted or denied, but are orders of mere procedure which do not affect the substantial rights of the parties. See *Mir Umar Ali v. Nasibunnessa*, 82 P. R. 1911: 13 I. C. 800.

The words "*rights of the parties with regard to all or any of the matters in controversy*" should be taken to mean the general rights in relation to status, in relation to jurisdiction, in relation to limitation, in relation to the frame of the suit and in relation to liability to account, which, if decided, must have general effect upon the proceedings in the suit. *Narayan v. Gopal*, 38 B. 392, p. 397: 16 Bom. L. R. 206.

**"Matters in controversy in the suit."**—A formal decision which conclusively determines the substantial rights of the parties, is a decree, if it determines all or any of the matters in controversy. For instance, in a partition suit, order declaring the rights of the parties and directing partition; or in account suits, directing accounts to be taken is no doubt partial determination of the matters in controversy, but is still a decree.

The word "*parties*" in section 2 (2) is used in the same sense in which the expression "parties to the suit" is used in section 47 of the Code and includes only those persons who are joined on either side as plaintiffs and defendants. "*The matters in controversy in the suit*" are those matters which from the pleadings appear to be in dispute between

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the Guardians and Wards Act, and several others, are commenced by petitions but the decisions under those Acts were held appealable as decrees under the C. P. Code. A probate proceeding is not a suit; *Nirod Barani v. Chamatkarini*, 19 C. W. N. 205; see also 20 Cal. 888; 25 Cal. 354; 19 All. 458; 28 Bom. 644.

**Division of Decree.**—The decree may be either preliminary or final, or may be partly preliminary and partly final. These terms have been defined in the *Explanation*.

A preliminary as well as a final decree is appealable, under section 96. But when a party aggrieved by a preliminary decree does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree (s. 97, C. P. Code).

A preliminary decree may be passed in the following classes of suits:—

(1) *In suits for possession of immoveable property and for rent or mesne profits (Or. XX, r. 12, Form No. 23, Appendix D., Sch. 1).*

(2) *In suits for partition of revenue-paying estate under section 54. As to form of preliminary decree; see 10 C. L. J. 503.*

(3) *In suits for partition of any other immoveable property or separate possession of a share therein under Or. XX, r. 18. As to form of decree, sec. 10 C. L. J. 503.*

(4) *In suits for partition under Act IV of 1893.*

(5) *In suits for account between principal and agent (Or. XX, r. 16, Form No. 21, Sch. 1, App. D. to be followed mutatis mutandis).*

(6) *In all other suits in which it is necessary to ascertain the amount of money due to one party from another, that an account should be taken. (Or. XX, r. 16).*

(7) *In suits for foreclosure of mortgage (Or. XXXIV, r. 2, Form No. 3, App. D, Sch. 1).*

(8) *In suits for sale of mortgaged property (Or. XXXIV, r. 4, Form No. 4, App. D, Sch. 1).*

(9) *In suits for redemption of a mortgage (Or. XXXIV, r. 7, Form No. 5 App. D. Sch. 1).*

(10) *In suits by creditors or by legatees for administration (Or. XX, r. 13, Form No. 17, Sch. 1).*

(11) *In suits for dissolution of partnership and accounts (Or. XX, r. 15, Form No. 21, App. D. Sch. 1).*

(12) *In suits for pre-emption (Or. XX, r. 14).*

The above list is not exhaustive and there is nothing which can preclude the Courts from passing a preliminary decree in other cases; *Raja Peary Mohan v. Manohar*, 27 C. W. N. 989; 74 I. C. 378; *Dattatroya v. Radhabai*, 45 B. 627; 60 I. C. 885.

**Preliminary Decree.**—A decree may be preliminary or final or it may be partly preliminary and partly final. A decree is preliminary when the adjudication, though it conclusively determines the rights of the parties with regard to some or one of the matters in controversy in the suit, does

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determined the rights of the parties in regard to certain, and those essential matters, involved in the suit. The Code makes no provision for something which is neither a decree nor an order, for anything which is both, neither does it provide that one adjudication by the Court can be resolved into divers elements, some of which are decrees and some orders. The Code has got rid of such doubts as were debated in *Khâdem Hossein v. Emdad Hossein*, 29 Cal. 758 P. C.: *Ahmed Musaji v. Hashim Ibrahim*, 19 C. W. N. 449 P. C.: 21 C. L. J. 419: 17 Bom. L. R. 432: 17 M. L.T. 312: 18 A. L. J. 540.

**Decisions on Preliminary Issues, Not Preliminary Decrees.**—The decision of a Court on a preliminary issue framed on a plea of *res judicata* is not a preliminary decree, and is therefore not appealable. The expression *preliminary decree*, explained; *Ghena v. Khuda Buksh*, 16 P. R. 1918: *Bharma v. Bahamagavda*, 39 B. 421; *Parsotam v. Radhabai*, 10 A. L. J. 78. A decision on a preliminary issue of limitation is not a preliminary decree; *Shib Saran v. Janakinath*, 18 C. L. J. 78: 21 I. C. 387; *Khusi Ram v. Tulsa Ram*, 7 P. R. 1917: 39 I. C. 100; deciding issues in bar against defendant are not preliminary decrees, *Kamini v. Promotho*, 19 C. W. N. 755: 20 C. L. J. 476; decisions as to misjoinder, limitation and jurisdiction in favour of plaintiff are not preliminary decrees; *Channal Swami v. Gangadhar*, 39 B. 339 F. B.; decree in a suit for specific performance of contract, conditional in form, is not a preliminary decree, *Mohendra v. Ram Ratan*, 51 I. C. 442. The finding on a preliminary issue whether a party is an agriculturist is a preliminary decree only when it necessarily involves a conclusive determination of the rights of the parties with regard to matters in controversy; *Municipal Committee of Nasik v. Collector of Nasik*, 39 B. 422: 17 Bom. L. R. 327; *Vamanacharya v. Govind*, 23 Bom. L. R. 826.

**Preliminary Decree is Appealable as well as a Final Decree.**—Under s. 96 of the Code of Civil Procedure, an appeal lies from every decree subject to the limitations therein contained. S. 97 of the C. P. Code provides that if a party aggrieved by a preliminary decree does not appeal therefrom within the period of limitation allowed for appeals, he shall be precluded from disputing its correctness in an appeal from the final decree. The question, therefore, whether a decision amounts to a preliminary decree is one of considerable importance. The Bombay High Court in *Sidhanath v. Ganesh*, 37 B. 60, and *Narayan v. Gopal*, 38 B. 392, 398, once held that a finding on some preliminary issues in a suit relating to misjoinder, limitation and jurisdiction were preliminary decrees; but these decisions have since been overruled by a Full Bench of the same High Court in *Channalswami v. Gangadharappa*, 39 B. 339, F. B.: 16 Bom. L. R. 954: 26 I. C. 885.

**Rejection of Plaint.**—An order rejecting a plaint on the grounds mentioned in clauses (a), (b), (c) and (d) of Or. VII, r. 11, is a decree under s. 2 (2) and is therefore appealable under section 96. But rejection of plaint does not preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action, under Or. VII, r. 13, provided he is not barred by lapse of time. So a plaintiff whose plaint is rejected may either appeal against the order, or can present a fresh plaint, provided he is not barred by lapse of time.

**Order Returning Plaint.**—An order returning a plaint for presentation to proper Court under Or. VII, r. 10, is not a decree, but is appealable as

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sec. 47 of the Code; *Ramchand v. Sham Parshad*, 110 P. R. 1913; 117 P. L. R. 1914: 22 Ind. Cas. 851.

Where in execution of a decree, certain property was attached as belonging to the deceased judgment-debtor, to which his son preferred a claim alleging an independent title of his own; *Held* that the question between the parties fell within s. 47 and its determination was a decree within the meaning of sec. 2 (2) and was therefore appealable; *Ahmad Ali v. Nabinchandra*, 16 I. C. 885.

The determination of any question within section 47 is a decree. The question whether a decree is executable or not is certainly one that comes within this definition; *Lakshmi v. Maru*, 37 M. 29: 21 M. L. J. 1063.

It must be remembered, however, that every order made in execution proceedings is not a decree. The question whether an order is such a decree depends on its nature and contents. An order granting or refusing a process for the examination of witnesses or an order merely determining a point of law arising incidentally or otherwise in the course of execution proceedings and not refusing or granting relief is not a decree and is therefore not appealable; *Datar Kaur v. Ram Rattan*, 56 I. C. 173; *Ram Ratan v. Sardarni Datar Kaur*, 52 I. C. 356.

*See the cases noted under sections 47 and 144.*

**"Any order of adjudication from which an appeal lies as an appeal from an order."**—The definition of "decree" given in this section excludes in express terms from the category of decrees any adjudication from which an appeal lies as an appeal from an order. For instance, Or. XLIII, r. 1, cl. (u) provides that an appeal lies from orders under Rule 23 of Or. XLI, remanding a case, such an order is therefore excluded from the category of decree; *Bajinath v. Sohan Bibi*, 31 A. 545, p. 548.

**"Any order of dismissal for default."**—S. 2, cl. (b) of the present Code, expressly provides that any order of dismissal for default (under Or. IX, r. 8) is not a decree and is therefore not appealable. Under the old Code there were conflicting rulings on this point, that is, whether an order dismissing a suit for default was a decree or an order. In *Gilkinson v. Subramania*, 22 M. 221 it was held by the Madras High Court that such an order was appealable as a decree. But in *Gosto v. Hari Mohan*, 8 C. W. N. 313; *Ram Chandra v. Madhav*, 16 B. 223; *Ablakh v. Bhagirathi*, 9 A. 427, it was held by the other High Courts that such an order was a decree and appealable as such. The above conflicting rulings have been set at rest by the definition of the word "decree" in the present Code. An order dismissing an appeal for default under Or. XLI, r. 17, is under s. 2, cl. (b), not a decree and is therefore not appealable. Under the old Code, it was held by the Calcutta and Bombay High Courts that such an order was appealable; *Radhanath v. Chandi*, 30 C. 660; *Ram Chandra v. Madhav*, 16 B. 23. In *Pohkar v. Gopal*, 14 A. 361, it was held, however, that such a decision was not a decree. Similarly an order under Or. XLI, r. 11 (2) dismissing an appeal for default which under the present section is not appealable as a decree was under the old Code held to be a decree and appealable as such; *Umasundari v. Bindu*, 24 C. 759.

It should however be remembered that the words "dismissal for default" mean default of both the parties; therefore an order for dismissal under Or. IX, r. 3 for default of appearance of both parties is not a decree

# THE CODE OF CIVIL PROCEDURE.

## ACT V OF 1908.

RECEIVED THE G.-G.'s ASSENT ON 21ST MARCH, 1908.

*An Act to Consolidate and Amend the Laws relating to the  
Procedure of the Courts of Civil Judicature.*

WHEREAS it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature; it is hereby enacted as follows :—

### PRELIMINARY.

Short title, commencement and extent.

1. (1) This Act may be cited, as the Code of Civil Procedure, 1908.

(2) It shall come into force on the first day of January, 1909.

(3) This section and sections 155 to 158 extend to the whole of British India : the rest of the Code extends to the whole of British India, except the Scheduled Districts. [S. 1.]

**Previous History.**—Before the passing of the Civil Procedure Code of 1859, there was no codified law in British India, regulating the procedure of the mofussil Courts in the trial of civil suits. The Courts were guided by certain Rules, Regulations and Acts particularly applicable to them. In 1859 the first Code of Civil Procedure (Act VIII of 1859) was passed, and it was repealed by Act X of 1877. This was again repealed by Act XIV of 1882, which was followed by several amending Acts. The present Code (Act V of 1908) has repealed the Code of 1882, as also the amending Acts.

**"Consolidate and amend."**—It will be seen from the preamble that the present Code not only defines and amends but also consolidates the laws relating to the procedure of the Courts of Civil judicature. The object of consolidation is to collect the statutory law bearing upon a particular subject, and to bring it down to date, in order that it may form a useful Code applicable to circumstances existing at the time when the consolidating Act is passed. In construing such an Act, the proper course is, in the first instance, to examine the language of the Act and to ask what is its natural meaning. If the meaning is plain, it is not proper to have recourse to the previous state of the law, and the language of the Act must

whether the adjudication falls within the cases enumerated in section 104 and Or. XLI, r. 1. But where an adjudication does not fall within the appealable orders, then it is to be ascertained whether it falls within the definition of the word decree and contains all the essential elements of it.

**When an Order is a Decree.**—Whether an order is a decree within the meaning of s. 2 of C. P. Code depends upon its nature and contents. An order to be a decree must conclusively determine the rights of the parties; *Deoki Nandan v. Bansi Singh*, 14 C. L. J. 35: 16 C. W. N. 124: 10 I. C. 371. An order cannot be regarded as a decree unless it is formally drawn up as such or, at all events, unless it could be so drawn up; *Kashi Nath v. Nathu Ram*, 115 P. L. R. 1911; 41 P. R. 1911; 179 P. W. N. 1911: 9 I. C. 1019.

It is not every order passed in execution proceedings that is a decree within s. 2. The question whether an order is such a decree depends on its nature and contents, *Ram Rattan v. Sardarni Datar Kaur*, 52 I. C. 356; *Datar Kaur v. Ram Rattan*, 56 I. C. 173.

**Some Illustrations of Orders Appealable as Decrees.**—An order refusing execution of decree simultaneously against person and property is a decree; *Chena Pemaji v. Ghelabai*, 7 B. 301.

An order finally negating the rights of the decree-holder to proceed against the land of the judgment-debtor is a decree and therefore appealable; *Datar Kaur v. Ram Rattan*, 56 I. C. 173.

An order dismissing objections to the execution of a decree for default, is appealable as a decree; *Lal Narain v. Muhamed Rafiuddin*, 28 C. 81.

An order in execution-proceedings fixing the period from which mesne profits are recoverable, is a decree, and therefore appealable.—*Bhup Indar v. Bijai Bahadur*, 23 A. 152, P. C. 5 C. W. N. 52, P. C.

An order rejecting an application to make a preliminary decree in a mortgage suit final on the ground that the suit had abated owing to the death of the sole judgment-debtor is a decree and is open to appeal and second appeal; *Bhutna'h v. Tarachand*, 33 C. L. J. 115: 25 C. W. N. 595: 59 I. C. 177.

Order by Appellate Court remitting a case to original Court to pass decree upon award is a decree.—*Bhugwan Dass v. Nund Lal*, 12 C. 173.

Order confirming an award when the arbitrators failed to carry out terms of reference is a decree.—*Sadik Ali v. Imdad Ali*, 3 All. 286.

An appeal would also lie if the award is shown to be illegal and void *ab initio*.—*Saturjit Pertab v. Dulhin Golab Koer*, 24 C. 469. (17 B. 357, followed). See also *Ibrahim Ali v. Mohsin Ali*, 18 A. 422; *Husananna v. Linganna*, 18 M. 423.

An order refusing to file a private award and setting it aside is a decree.—*Punnusami v. Mandi Sundara*, 27 M. 255.

An appeal lies against a decree passed on the award on the ground that the award was not illegal.—*Venkayya v. Venkatappaya*, 15 M. 348; *Nandram v. Nemchand*, 17 B. 357. See also *Umni Fazl v. Rahimunnissa*, 13 A. 360.

rule 23.—*Nabin Chandra v. Pran Krishna*, 41 C. 108: 18 C. L. J. 618: 20 I. C. 39. The body of the Code is fundamental and is unalterable exceptly the legislature; the rules are concerned with details and machinery and can be more readily altered. The body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised. It follows that the body of the Code is expressed in non-general terms but it has to be read in conjunction with the more particular provisions of the Rules; *Moni Mohan v. Ram Taran*, 48 C. 148: 33 I. C. 229.

**Proceedings of the Legislature.**—Proceedings of the Legislature in passing a Statute are to be excluded from consideration on the judicial construction of Indian as well as of British Statutes; *Administrator-General of Bengal v. Premal*, 25 Cal. 788, P. C. (reversing 21 Cal. 732, where 14 Cal. 721 was referred to.) Followed in *Q.-Empress v. Srichurn*, 22 Cal. 1017, F. B.; *Gopal Krishna v. Sakhojirau*, 18 Bom. 133; *Q.-Empress v. Gangadhar Tilak*, 22 Bom. 112, 126, 127. The proceedings of the Legislature consist of Statements of Objects and Reasons, Reports of Select Committees, Proceedings of Legislative Council, including the speeches and debates; *Q.-Empress v. Tilak*, 22 B. 112.

**Headings Prefixed to Sections.**—The headings prefixed to sections or sets of sections may be used for the purpose of interpreting the meaning, scope, and intention of Statutes. *Per Mullick, J.*—The words of the heading should not be allowed to affect the construction of a section. *Per Roe, J.*—It is only when words are of doubtful meaning that Courts should look to probable intention.—*Janki Singh v. Jagannath Das*, 3 Pat. L. J. I: 44 I. C. 94 (F. B.) (1917) Pat 318: 3 Pat L. W. 105. The heading to a group of sections in a Statute ought not to be passed into a constructive limitation upon the exercise of the powers given by the express words of the Act.—*Narina v. Bombay Municipal Commissioner*, 42 B. 462: 20 Bom. L. R. 937: 23 C. W. N. 110: 8 L. W. 548: 24 M. L. T. 297: (1918) M. W. N. 840: 48 I. C. 63: 45 I. A. 125 (P. C.). See also *Dwarkanath v. Tafazar Ruhman*, 44 C. 267: 20 C. W. N. 1097: 39 I. C. 64, where it was held that the Court could look at the heading of chapter of an Act for the purpose of construing the section.

**Marginal Notes.**—Marginal notes in an Indian Statute cannot be referred to for the purpose of construing it; *Balraj Kunwar v. Jagatpal*, 26 A. 393: 8 C. W. N. 699, P. C. In *Dukhi Malla v. Halmay*, 23 C. 55, it has been held that marginal notes are no part of the enactment. This case has been followed in *Purandeo Narain v. Ram Sarup*, 25 C. 588: 2 C. W. N. 577. See also *Q.-Empress v. Hari*, 21 A. 391.

**Illustrations.**—The illustrations to sections in Acts ought never to be allowed to control the plain meaning of the section itself, particularly when the effect would be to curtail a right, which the section in its ordinary sense would confer; *Kaylash v. Sonatun*, 7 C. 132: 8 C. L. R. 281: *Kamalammal v. Peeru*, 28 M. 481 p. 483. They should never be rejected and it would require a very special case to justify their rejection on the ground of their assumed repugnance to the section; *Mahomed v. Yeoh*, 43 I. A. 256, 263: 39 I. C. 401. So also the Forms given in the Schedule annexed to the Code cannot control the clear words of the Code itself; *Munsa Ali v. Abhay*, 21 C. W. N. 1147: 40 I. C. 816; but if the sections and the schedule of the Code conflict, the provisions of the body of the Code must prevail, *Rahim Manjhi v. Sheikh Ekbeare*, 22 I. C. 690.

An order declaring the abatement of a suit owing to cause of action not surviving is a decree; *Subramania v. Venkataramier*, 31 I. C. 4. See also *Jadu Bansi v. Mahapal Singh*, 38 A. 111: 14 A. L. J. 8: 32 C. 104.

An order purporting to adjudicate that inasmuch as the interest of all the plaintiffs was common and the legal representatives of the deceased plaintiffs had not been brought on the record within time, the whole appeal has abated, is a decree and is appealable, *Udmi v. Hira*, 2 Lah. L. J. 762.

Order rejecting claim of alleged representative of deceased plaintiff, and for abatement of suit, is appealable as decree.—*Subbayya v. Saminadayyar*, 18 Mad. 496, see also *Subramanya v. Venkataramiar*, 31 Ind. Cas. See, however, *Hamida Bibi v. Ali Husen*, 17 All. 172, (10 Bom. 220, dissented from.)

An order of the District Judge to the effect that "the appeal being time-barred is not admitted," amounts to a dismissal of the appeal and is a decree so as to form the subject-matter of second appeal; *Adarpriya v. Ramprotap*, 30 C. W. N. 926: 44 C. L. J. 44: A. I. R. 1926 Cal. 1105

An appeal lies against an order of a District Judge admitting a person as a caveator under section 69 of the Probate and Administration Act (V of 1881).—*Abhiram v. Gopal Das*, 17 Cal. 48.

An order of a District Judge granting or refusing probate, or letters of administration amounts to a decree; *Eva Mountstephens v. Hunter*, 35 A. 448: 22 Ind. Cas. 98; (17 All. 475; 24 C. 30; 8 C. W. N. 748, *reft* to). *Umrao Chand v. Brindaban*, 17 All. 475.

An order granting permission under s. 90 of the Probate and Administration Act, to sell property for satisfying debts is a decree; *Sarat v. Benode Kumari*, 20 C. W. N. 28: I. C. 143.

An order refusing application of the decree-holder under Or. XXI, r. 71, C. P. Code 1882, to realize the difference from the defaulter (first purchaser) is appealable as decree.—*Amir Baksha v. Venkatachala*, 18 Mad. 439.

An order under Or. XXI, r. 71, directing a defaulter to make good the deficiency arising on a re-sale is appealable as decree.—*Kali Kishore v. Guru Prasad*, 25 Cal. 99: 2 C. W. N. 408; *Sitaram v. Jankiram*, 44 A. 266: A. I. R. 1922 A. 200: 20 A. L. J. 105 L. R. 3 A. 117: 65 I. C. 813. See also *Ram Dial v. Ram Das*, 1 A. 181; *Vallabhan v. Pangunni*, 12 Mad. 454; *Rajendra v. Ram Charan*, 2 C. W. N. 411. But see *Deoki Nandan v. Tapersi Lal*, 14 A. 201 (F. B.).

An order directing accounts to be taken is a decree.—*Biswanath v. Banikanta*, 23 Cal. 406.

Amount of security required in granting stay of executing is a question relating to execution, and an order determining that question is appealable as a decree.—*Mahant Ishawargar v. Chudasama*, 12 Bom. 30. See 7 Cal. 733; 8 Cal. 477.

An order dismissing a suit under Or. X, r. 4 (2) is a decree; *Puram Chand v. Mollison*, 13 Bom. L. R. 658.

An order requiring decree-holder to give security for restitution of property before proceeding to execute the decree, is appealable as a decree.—*Luchmipat v. Sitanath*, 8 Cal. 477; 10 C. L. R. 517.

The Civil Station of Wadhwan in Kathiawar is not within British India:—*Emperor v. Chimantal*, 12 Bom. L. R. 877; nor is the Rajkote Civil Station, *Queen-Empress v. Abdul Latip*, 10 B. 156; nor the Kathiawar States, *Hemchand v. Azam Sakarlal*, 33 I. A. 1: 8 B. L. R. 129; nor the Tributary Mahals of Orissa, *Ratan v. Khatoo*, 29 C. 400: 6 C. W. N. 573; nor Singapore, *Strait Settlement Act*, 1866, s. 1; nor the British Cantonment of Secunderabad, *Hossain Ali v. Abid Ali*, 21 C. 177. Aden is within British India.—*Aden Laws Regulation*, 1891, s. 2.

“British India” includes British Burma.—*Aga Mohamed v. Cohen*, 18 C. 221.

The Code how far applicable in Santhal Parganas, see *Maha Prasad v. Ramani Mohan*, 42 C. 116 P. C.: 20 C. L. J. 231: 18 C. W. N. 991: 27 M. L. J. 459: 16 Bom. L. R. 824.

**Scheduled Districts.**—The expression is defined in Act XIV of 1874. A list of Scheduled Districts is given in Schedule I of the Act. Section I and Sections 155—158 extend to the whole of British India including the Scheduled Districts: the rest of the Code extends to the whole of British India, except the Scheduled Districts. Section 5 of the Scheduled Districts Act empowers the Local Government with the sanction of the Governor-General in Council to extend to any of the Scheduled Districts, any enactment in force in British India and accordingly the Code has been extended to several of the Scheduled Districts including Sindh, Ajmir, Merwara; *Kashi Mohan v. Bishnoo*, 15 C 365; followed in *Prabhu v. Saligram*, 34 C. 576, 11 C. W. N. 222. 6 C L. J. 30.

2. In this Act, unless there is anything repugnant in the  
Definitions. subject or context— [S. 2.]

(1) “Code” includes rules.

**The Code is Not Exhaustive.**—The Code of Civil Procedure binds all Courts so far as it goes. It is not however exhaustive and does not affect previously existing powers, unless it takes them away; in matters with which it does not deal, the Court will exercise an inherent jurisdiction to do that justice between the parties which is warranted under the circumstances and which the necessities of the case require.—*Hukumchand v. Kamalanand*, 33 Cal: 927: 3 C. L. J. 67.

It is not necessary in every case to have the support of a section of the C. P. Code to empower a Court to pass an order not expressly or impliedly forbidden and which is essential in the interests of justice, inasmuch as the provisions of the C. P. Code are by no means exhaustive; *Abdul Rahman v. Shahana*, 1 Lah. L. J. 188: 1 Lah. 339: 58 I. C. 748 (*Hukum Chand v. Kamalanand*, 33 C. 927 referred to); *Harnandan v. Prannath*, (1921) Pat. 205. 61 I. C. 922 See also *Rasik Lal v. Bidhumukhi*, 33 Cal. 1094: 10 C. W. N. 719 4 C. L. J. 806 (8 C. L. J. 29 referred to) and *Gurdeo Singh v. Chandrika Singh*, 86 Cal. 193: 5 C. L. J. 611; *Jogendra v. Wazidunissa*, 34 Cal. 860; 11 C. W. N. 856; *Chhayemannessa v. Basirar*, 37 Cal. 899, p. 404; *Lakshya v. Umakanta*, 14 C. W. N. 256, and *Srinath v. Probodh*, 11 C. L. J. 580, p. 586. But see *Royzuddi Shaik v. Kati Nath*, 33 Cal 985: 4 C. L. J. 219, where it has been held that equity will not contravene the positive enactments or requirements of law.



An appeal lies from an order refusing to grant a certificate of heirship.—*Rangubai v. Abaji*, 19 Bom. 399. (17 Bom. 203; 18 Bom. 748, followed).

An order rejecting a plaint for non-payment of extra court-fee demanded is a decree and is therefore appealable.—*Musi Sada Kaur v. Buta Singh*, 80 P. R. (1914): 265 P. L. R. 1914: 25 Ind. Cas. 566.

An order refusing to appoint a receiver is appealable as a decree.—*Venkatasami v. Stridavamma*, 10 Mad. 179. (6 Mad. 355, overruled). See also *Gossain Dulmir v. Tekait Hetnarain*, 6 C. L. R. 467: An order refusing to remove a receiver is also appealable.—*Mathibai v. Limji Nowroji*, 5 Bom. 45.

An order dismissing an application under (Or. XXI, r. 2) praying that adjustment of decree be recorded as certified, is a decree.—*Jamna Prasad v. Mathura Prasad*, 16 All. 129. See *Guruvayya v. Yudayappa*, 18 Mad. 28.

An order rejecting a claim preferred under (Or. XXI, r. 97) is appealable as a decree.—*Gopala v. Fernandes*, 16 Mad. 127.

An order rejecting an appeal on the ground that it was not duly presented by the vakil is appealable as a decree.—*Ayyanna v. Nagabhooanam*, 16 Mad. 285.

An order of a District Judge refusing to execute an award under Act I of 1894, (Land Acquisition) is appealable as a decree.—*Zemindars of Dhar v. Rama*, 53 P. R. 1906: 103 P. L. R. 1906.

An order by an Appellate Court rejecting an appeal before it has been admitted, on the ground that it was presented out of time, is a decree and a second appeal lies therefrom.—*Rakha Chandra v. Ashutosh*, 17 C. W. N. 807: 19 I. C. 931.

An order of the Appellate Court remanding a case under Or. 41, r. 23 of C. P. Code, is appealable to the High Court.—*Veeraswamy v. Manager, Pittapur Estate*, 26 Mad. 518.

A decree upon a compromise extending beyond the scope of the suit is appealable. A decree under Or. XXIII, r. 3 is only final so far as it relates to so much of the subject-matter of the suit as is dealt with in the compromise.—*Venkatappa v. Thimma*, 18 Mad. 410.

An order refusing an application made by the plaintiff for adjournment and dismissing the suit in consequence of the plaintiffs' failure to produce evidence is a decree: *Pramotha Nath v. Sashimukhi*, 45 I. C. 200.

An order dismissing a suit under Or. XI, r. 21 of the C. P. Code is appealable as a decree.—*Mansingji v. Metha*, 19 Bom. 307.

An adjudication upon the claims of defendants in an inter-pleader suit is a decree and is therefore appealable.—*Maharaj Singh v. Chittar Mal*, 30 All. 22. See also *Orr v. Chidambaram*, 33 Mad. 220, p. 222.

Order directing payment of costs upon withdrawal of a suit is appealable as decree.—*Indoor Subbarami v. Nilatur*, 18 M. L. T. 400: (1915) M. W. N. 1021: 31 I. C. 312.

The definition of the word *decree* has been altered since the case in 29 Cal. 167 P. C. and an essential part of the definition is that the decision must have received formal expression as a decree, see *Seumal v. Mulomal*, 8 S. L. R. 260: 28 I. C. 60.

The definition of decree is not intended to include an interlocutory decision in ordinary suit upon each and every point in controversy between the parties, even in those cases, where the decision upon any such question is embodied in a separate and distinct order passed during the pendency of the proceedings; *Kashinath v. Nathu Ram*, 115 P. L. R. 1911: 41 P. R. 1911: 9 I. C. 1019; *Mir Emar Ali v. Nassibunissa*, 82 P. R. 1911; *Shib Saran v. Janaki Nath*, 18 C. L. J. 78: 21 I. C. 887.

**Important Elements of Decree.**—In order to determine whether an adjudication amounts to decree or not, the following points are to be considered:—(1) There must be a formal expression of adjudication; (2) there must be conclusive determination of the rights of the parties; (3) the determination must be with regard to all or any other matters in controversy; (4) the expression of an adjudication must be in the suit.

**Adjudication.**—The word “adjudication” means, judicial determination of a cause after hearing, comparing facts, ideas or propositions and perceiving their agreement and disagreement. For instance, where a case is heard and decided *ex parte*, the Court has to express its opinion judicially after considering the facts before it, hence such decisions are decrees; but where a case is dismissed for default of the parties, there is no judicial determination of the cause, hence any order of dismissal for default is not a decree. See *Dakshinamoorthy v. Municipal Council, Trichinopoly*, 31 Mad. 157, p. 159.

The adjudication referred in the definition of a decree in s. 2 (2) of the C. P. Code is an adjudication granting or refusing any of the reliefs claimed in the plaint and embodied in a formal declaration; *Nga Mik v. Nga Gyi*, 40 I. C. 677: 11 Bur. L. T. 95: (1917) 3 U. B. R. 1.

**“Formal expression of adjudication.”**—The expression means the decision of the Court must be expressed in the form of a decree; mere recording a finding in the judgment without drawing up of a decree in the prescribed form, or a finding on a particular issue without embodying it in the decree, is not a decree. In the old as well as in the new Code the word “formal” in the definition of the word decree is very important and cannot be ignored. Therefore, mere expression of the Court’s adjudication without embodying it in the form of a decree, given in the Schedule D of the C. P. Code, is not a decree. A decree is something different from the judgment. See section 33 and rr. 6 and 7 of Or. XX. See *Dulhin Golab Koer v. Radha Dulare*, 19 Cal. 452, p. 467; *Khadem Hossein v. Emdad Hossein*, 29 Cal. 758, p. 760; *Bai Divali v. Shah Vishnav*, 34 Bom. 182; 11 Bom. L. R. 1826; *Mulla Abdul Hai v. Khatija Begam*, 10 Bom. L. R. 514; *Ayappa Mudaliar v. Gopalasamy*, 12 M. L. T. 309; (1912) M. W. N. 1112: 16 I. C. 45; *Kashinath v. Nathuram*, 115 P. L. R. 1911: 41 P. R. 1911: 9 I. C. 1019. Thus it is clear that an adjudication cannot be regarded as a decree, unless it is formally drawn up as such, or at all events can be so drawn up; therefore an omission of Court to embody its decision in a formal expression, does not affect the right of a party to prefer an appeal; *Kamini Debi v. Promothonath*, C. L. J. 476.

"District" includes Original Side of High Court; *Hindustan Assurance v. Rai Mulraj*, 27 M. L. J. 645; 27 I. C. 455.

**District Court.**—Though the word "District" in the C. P. Code does include the local limits of a High Court in its Ordinary Original Civil Jurisdiction, still it is not legitimate to construe the words "District Court" wherever they appear to mean and include a High Court in its Ordinary Original Civil Jurisdiction.—*Hyat Mahomed v. Shaikh Mannu*, A. I. R. 1927 Cal. 290; 45 C. L. J. 71; 100 I. C. 331 (12 C. W. N. 446 dissented from).

The Court of the Judicial Commissioner, and not that of a Deputy Commissioner, is the "District Court" in Chota Nagpur under sections 2 and 344, C. P. Code, 1882.—*Joynarayan v. Mudhoo Sudan*, 16 Cal. 13.

A decree of a Small Cause Court can be executed by it at any place within the local limits of the District Court to which it is subordinate as defined by section 2, without having recourse to the procedure under section 648, C. P. C., 1882.—*Badan Babajee v. Kala Chand*, 4 Cal. 823.

A Sub-Judge in temporary charge, under section 10 of the Bengal Civil Courts Act (XII of 1887), of the office of the District Judge, is competent to decide Revenue Court appeals pending in the file of the District Judge.—*Rahmat Ali v. Abdullah*, 23 A. 455.

(5) "Foreign Court" means a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor-General in Council.

**Foreign Court.**—The Judicial Committee of the Privy Council is not a Foreign Court, and although it is situated beyond the limits of British India, it has authority in it. The words "has no authority in British India," exclude the Judicial Committee from the definition; See *Bowels v. Bowels*, 8 Bom. 571, p. 574.

The King's Bench Division and the Chancery Division of the High Court of Justice in England are Foreign Courts; *Deep Narain v. Dieterl* 31 C. 274; *London Bank v. Hormusjee*, 8 B. H. C. R. 200.

The definition of foreign Court in section 2 (5) of the Code, is for the purposes of that Code only, and does not apply to extend the jurisdiction of the High Court for the purpose of restraining suits pending in Courts outside its jurisdiction under the Charter. *The Vulcan Iron Works Co. v. Bishumbher*, 36 Cal. 233; 13 C. W. N. 346.

The English Court is a foreign Court within the meaning of section 2 of the C. P. Code, and the judgment is a foreign judgment.—*Moazzim Hossein v. Raphael Robinson*, 28 Cal. 641; 5 C. W. N. 741. The Supreme Court of Mauritius is a foreign Court.—*Hadjee Kaseem v. Hadjee Isup*, 29 Cal. 509; 6 C. W. N. 829. So also are the Courts of Native States; *Veeraraghav v. Muga*, 14 M. L. J. 96; (1913) M. W. N. 609; and the Court, *Shaik Atham v. Davud*, 32 M. 469.

(6) "Foreign Judgment" means the judgment of a foreign Court.

the parties ranged on one side as plaintiffs and on the other as defendants; not matters which form the subject of any dispute between a person, who is already a plaintiff in the case, and other persons who are seeking to be made plaintiffs in place of another plaintiff who is deceased. Therefore, where one of two plaintiffs dies, the dispute between the surviving plaintiff and a third person, each of whom claims to be the legal representative of the deceased plaintiff is not a "matter in controversy in the suit" within the meaning of section 2 (2), and consequently, an order substituting one of them in place of the deceased plaintiff is not an appealable order either under s. 104, or under Or. XLIII, r. 1, of the Code; *Brij Mohan v. Ram Milan*, 16 O. C. 350: 20 I. C. 898.

The expression "matters in controversy in the suit" refers to the subject-matter of litigation; otherwise, if the decision of the Court upon each of the points in issue is deemed a preliminary decree, there must be a number of preliminary decrees in the suit. The intention of the legislature appears to have been that there should be one preliminary decree followed by one final decree; every question in dispute between the parties in the course of litigation does not fall within the expression. For instance, whether a plaintiff is competent to maintain a suit, is not a matter in controversy in a suit. The expression should not be understood in its widest possible sense; *Kamini Debi v. Promotho*, 19 C. W. N. 755; 20 C. L. J. 476: 27 I. C. 317 (37 Bom. 60 dissented from).

The term "Matters in controversy" in s. 2 (2) C. P. Code, must not be understood as relating solely to the merits of a case. It would cover any question relating to the character and status of the party suing, to the jurisdiction of the Court, to the maintainability of the suit and to other matters preliminary, which necessitate an adjudication before a suit is enquired into; in fact, all questions concerning a pending suit. It does not include an order passed on an application preliminary to the institution of the suit itself; such as an application for leave to sue and proceedings passed in execution in regard to such orders as well as orders granting day costs are not appealable as they do not come within the scope of s. 47, C. P. Code, although such orders can be executed under s. 36 of the Code; *Venkata Reddi v. Venkata Reddi*, 17 M. L. T. 447; 2 L. W. 519: 29 I. C. 393 (38 B. 393 not followed; 21 A. 133; 34 C. 584 followed).

"In the suit."—The formal adjudication must be expressed in a suit; where there is no suit, there can be no decree; *Minakshi v. Subramanaya*, 11 M. 26 P. C. Thus, a decision under section 5 of the Court Fees Act, is not a decision in the suit; 12 A. 129 F. B., p. 156; an order rejecting an application to sue in *forma pauperis* is not a decree, 21 A. 183; 1 All. 745. An order passed in Municipal election petition is not an order passed in a suit and does not therefore amount to a decree; *Kunnial v. Raghunandan*, 35 All. 450: 11 A. L. J. 659 (followed in *Nandram v. Chotey Lal*, 35 All. 578 F. B., 11 A. L. J. 945); *Sunder Lal v. Muhammad Farg*, 16 O. C. 36: 18 Ind. Cas. 122. Under section 26 and Or. I, r. 1 of the C. P. Code, a suit must be instituted by presenting a plaint; therefore, the proceedings that are not commenced by a plaint, but by motion only, are not suits. There are, however, several enactments relating to special subjects under which proceedings are commenced. For instance, proceedings under the Insolvency Act, 1907, and Administration Act, under the Succession Certificate Act, 1904,

The shorthand notes dictated by the Judge hearing the case, which have not been approved by the Judge, can not be considered as part of his actual judgment:—*Matheran Steam Light Ry. v. Lang*, A. I. R. 1927 Bom. 113.

For the form and contents of judgment, see notes under Or. XX, r. 4; for appellate judgment, see Or. XLI, r. 31.

(10) "Judgment-debtor" means any person against whom a decree has been passed or an order capable of execution has been made.

**Judgment-debtor.**—The word "judgment-debtor" in s. 73, of the Code does not include the legal representative of a deceased judgment-debtor.—*Govind Abaji v. Mohoniraj*, 25 Bom. 494. See, however, *Panduranga v. Vithilinga*, 30 Mad. 537. See also *Thiruvengadam v. Doodla Subbiah*, where it was held that the definition of "judgment-debtor" does not include the assignee of the judgment-debtor.

(11) "Legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character; the person on whom the estate devolves on the death of the party so suing or sued.

**Legal Representative.**—The Special Committee in Notes on Clauses observed:—"We have inserted a definition of 'legal' representative"—an expression which has been variously interpreted by the High Courts as would appear from the reported cases which are not easily reconcilable with one another. See 8 C. W. N. 843, in which almost all the earlier cases are reviewed.

"The Committee trust, that the definition which has been added by them will set at rest what, owing to the absence of any such definition from the present Code, is a somewhat debatable point."

Where a person is in possession of the estate of a deceased person after the latter's death, he is the legal representative within s. 2 (11), C. P. Code and execution taken against him is quite legal; *Kusum Bandhu v. Ram Dayal*, 69 I. C. 179; *Muddala Madhayara v. Tankala*, 31 M. L. J. 222; 35 I. C. 124.

An executor *de son tort* is a "legal representative" within s. 2 (11), C. P. Code and is to be brought on the record under that section on the death of the defendant; *Ramlal v. Musst. Champabai*, 50 I. C. 951. But an executor *de son tort* need not be impleaded as a party where a legal representative is in existence; *Satya Ranjan v. Sarat*, 30 C. W. N. 565; A. I. R. 1926 Cal. 825.

Where a suit is instituted or defended by a Hindu Widow in her representative capacity, the reversioners, though they do not claim through her, but as heirs of her husband, have yet been held to be her legal representatives in respect of the estate held by her as such Hindu widow; *Ramaswami v. Puramsetti*, 39 M. 382, 17 M. L. T. 186 and 28 M. L. J. 335, P. C.; *Ribhal Rai v. Shco Pujan*, 33 All. 15; 7 A. L. J. 960; 7 I. C.

not completely dispose of the suit. It is *final* when such adjudication completely disposes of the suit; *Khusi Ram v. Tulsa Ram*, 7 P. R. (1917) 25: 39 I. C. 100.

The decision of a Court upon every one of the points in dispute between the parties in the course of litigation, is not a preliminary decree. If the decision of the Court on each of the points in dispute be deemed a preliminary decree, then there must be a number of preliminary decrees in a suit. But the intention of the Legislature is that there should be one preliminary decree in a suit to be followed by one final decree. The cases, where the Legislature contemplated the preparation of a preliminary decree, are specified in Rules 12-18 of Order XX of the C. P. Code. The preliminary decree ascertains what is to be done, while the final decree states the result achieved by means of the preliminary decree. *Kamini Devi v. Promothonath*, 20 C. L. J. 476: 19 C. W. N. 755: 27 I. C. 317 (85 All. 159: 7 W. R. 222, referred to; 37 Bom. 60, dissented from). Where in a suit for accounts, the Court after passing a preliminary decree for accounts, passed a further order fixing the mode of taking accounts and the period for which it should be done, the latter is also a preliminary decree and hence an appeal lies therefrom. The Legislature contemplated ordinarily only one preliminary decree in a case but there is nothing illegal in passing more than one in appropriate cases; *Raja Peary Mohan v. Manohar Mookerjee*, 27 C. W. N. 989: 38 C. L. J. 255. In a suit for possession and mesne profits, the decree for possession is a preliminary decree and the mesne profits are as ascertainable in the final decree; *Kumud v. Ramani*, 19 C. L. J. 346.

Preliminary decrees are passed, when, after the decision of the suit, the Court has to stay its hand in order to mark out the consequences on which the complete disposal of the suit depends. These consequences may be arithmetical as in an account suit, ministerial as in a partition suit, or contingent as in a mortgage suit. It is only on such preliminary decrees that a right of appeal is given. No doubt the decision of a single issue may, in certain cases, lead to a decree, e.g., when the whole suit, and not a part of it, is dismissed as time-barred. But an interlocutory decision on each and every point in issue between the parties, is not a "decree" within the meaning of section 2 (2); *Udharam v. Secretary of State*, 6 S. L. R. 287: 19 Ind. Cas. 922. See *Narayan v. Gopal*, 38 Bom. 392; 16 Bom. L. R. 206.

The word "matter" in the definition of a "preliminary decree" means the actual subject-matter of the suit with reference to which some relief is sought, and the word "right" means substantive rights of the parties which directly affect the relief to be granted or which relate to all or any other matters in controversy; *Municipal Committee of Nasik v. Collector of Nasik*, 39 Bom. 422.

A "preliminary decree" properly understood is passed only in those cases in which the Court has first to adjudicate upon the rights of the parties and has then to stay its hand for the time being until it is in a position to pass a final decree in the suit; *Kashi Nath v. Nathuram*, 115 P. L. R. 1011: 41 P. R. 1911: 179 P. W. R. 1911: 9 Ind. Cas. 1019.

In a suit for partnership accounts, a decree which is passed declaring partnership dissolved and directing accounts to be taken by referee, is a preliminary decree and is appealable under s. 97. The order conclusively

cannot at present claim compensation from the rightful owner either by way of mitigation of damages or otherwise."—NOTES ON CLAUSES.

The words "but shall not include profits due to improvements made by the person in wrongful possession" have been added.

### Principles upon which Assessment of Mesne Profits should be Made.—

Mesne profits are in the nature of damages which the Court may mould according to the justice of the case; *Shambu v. Satish*, 25 C. W. N. 369. There is no hard and fast rule for determining the amount of mesne profits and in every case it should be fixed by a proper exercise of judicial discretion.—*Girish v. Shoshi*, 27 C. 951; 4 C. W. N. 631.

In assessing mesne profits, the Court should consider what the defendant gained and not merely what the plaintiff lost by being deprived of possession; *Anukul Chandra v. Nobin Chandra*, 15 I. C. 1. See *Dalgleish v. Babu Nandan*, 1 Pat. L. W. 421; (1917) Pat. 146; 39 I. C. 516; *Bireshur v. Baroda*, 15 C. W. N. 85; 11 I. C. 804; *Kumar v. Krishna Chandra*, 16 C. L. J. 93; 10 I. C. 312; *Maharaja of Vizianagram v. Alam Sahai Khan*, 9 A. L. J. 774; 16 I. C. 126; *Surya Rao v. Subbayamma*, 21 M. L. J. 965; 10 M. L. T. 295; (1911) 2 M. W. N. 308; 12 I. C. 385 in which the principle of assessment has been discussed. See also *Chhaganlal v. Sardar*, 69 I. C. 560.

In calculating mesne profits, payments of revenue and cesses made by the defendant should be deducted; *Dakhina v. Sarada*, 21 C. 142; 20 I. A. 60; *Kachar v. Oghadhbui*, 17 B. 35; *Venkata v. Raja Raru*, 2 M. W. N. 308. Costs of collecting rents and profits incurred by the defendant should be allowed but when the trespass is of a very aggravated character, the Court in the exercise of its discretion should refuse such expenses; *Dungar v. Jairam*, 24 A. 376; *Abdul Ghafur v. Rajaram*, 23 A. 252.

For other cases on the subject, see Or. XX, r. 22, under heading "Mode of assessment and calculation of mesne profits."

**Mesne Profits Include Interest.**—The very definition of mesne profits includes not merely the profits of immoveable property but also interest on such profits; *Chhabar Singh v. Radhu Ram*, 4 Lah. L. J. 333; 68 I. C. 807; *Maharaj Bahadur Singh v. Raja Bhupendra Narayan*, 44 C. L. J. 182; A. I. R. 1926 Cal. 1233.

For other cases on the subject, see under heading "Interest on mesne profits," Or. XX, r. 22.

**Wrongful Possession.**—A person who was put in possession in execution of a decree which is afterwards set aside, is not in wrongful possession; *Holway v. Gunesbur*, 19 C. 267.

**Appeal from Order Disallowing Claim for Mesne Profits.**—An order of Court finally deciding that a particular defendant was not liable for mesne profits is a decree and is appealable; *Naimuddin v. Imani*, 67 I. C. 93 (35 A. 159; 20 C. L. J. 478 (480) referred to.)

(13) "Moveable property" includes growing crops. [NEW]

**Moveable Property.**—This definition which includes growing crops is confined to the limited purposes of this Code; *Murlidhar v. Molu*, 27 I. C. 935.

order, under Or. XLIII r. 1, cl. (a). An order returning a plaint for amendment under Or. VI, r. 17 was appealable under the Code of 1882 but it is no longer appealable under this Code; *Gurdas v. Bhag*, 11 I. C. 231.

**Order Rejecting a Memorandum of Appeal.**—Under s. 108 of the C. P. Code, the provisions of this and other sections relating to suits apply to appeals so far as such provisions are applicable. S. 2 (2) provides that a decision rejecting a plaint is a decree. Hence a decision rejecting a memorandum of appeal on the ground that it is barred by limitation or that it is insufficiently stamped or that it was not duly presented, is appealable as a decree; *Gulab Rai v. Mangli*, 7. A. 42; *Raghunath v. Nilu*, 9 B. 452; *Ganga v. Ramjoy*, 12 C. 30; *Rupsing v. Mukhrat*, 7 A. 887; *Ayyanna v. Nagabhoosanam*, 16 M. 285.

**Determination of Any Question within Sections 47 and 144.**—Determination of any question under section 47 by a Court executing decree, and determination of any question under section 144, are decrees, and orders passed under those sections are therefore appealable. The word "within" has been substituted for the words "mentioned or referred to in" which occurred in the old Code, in order to bring within the definition of "decree," orders against sureties (s. 145, cl. c), and orders as to Court fees in pauper suits (Or. XXXIII, r. 18) and thus providing appeals from those orders. Section 144 of the Code deals with applications for restitution made under circumstances mentioned in the section and from its wording when contrasted with the language of s. 583 of the Code of 1882, it is clear that the applications which fall within its purview, are not applications for execution of a decree, but stand altogether on a separate footing. The expression "determination of a question within section 144" means the determination of a question directly concerned by the section, and not one incidentally connected with or collateral to the decision of any such question. From the language of section 144 it is clear that the decision of a question within the section must be a decision on the merits of the application for restitution; and the orders contemplated by the section are, generally speaking, those, the nature of which is indicated in the latter part of the section. The question of limitation is one collateral to the merits of the application for restitution, and is not therefore a question within section 144, the determination of which would amount to "a decree" as defined in s. 2 (2). A comparison of the language of sec. 47 of the Code with that of sec. 144, strengthens the view that a question of limitation is not a question within section 144.

The words "the decree shall be deemed to include the determination of any question within s. 47, C. P. C.," in this section must be limited by the words which immediately precede and unless the decision appealed from is one which in some way determines the rights of the parties with regard to all or any of the matters in controversy in the suit, it cannot be included within the definition of decree; *Surendranath v. Mritunjoy*, 5 Pat. L. J. 270; 1 P. L. T. 645; (1920) Pat. 227 (30 C. 617; 27 M. 259; 16 C. W. N. 124; 18 C. 469 reld. to).

The decision of a question of limitation which may arise in execution proceedings is the decision of the question within the purview of section 47 and is therefore a "decree"; the same, however, cannot be said of a question of limitation arising in connection with an application for restitution under sec. 144, of which the language is very different from that of



Order permitting withdrawal of a suit or appeal with liberty to bring a fresh suit on the same cause of action is not appealable as decree.—*Jogodindra v. Sarat Sundari*, 18 Cal. 322 (Referred to in *Santram v. Mt. Sahib Kaur*, (1922) Lah. 267: 65, I. C. 719. Followed in *Jagdish v. Tulsi*, 16 All. 19 and in *Sayed Abdul Hassain v. Kashi*, 27 Cal. 362; 4 C. W. N. 41. See also *Dick v. Dick*, 15 All. 169; *Genda Mal v. Pirbhu Lal*, 17 All. 97; *Pattoji Bin v. Ganu Bin*, 15 Bom. 370; *Chunda-sama v. Iswargur*, 16 Bom. 243; *Pindi Dayal v. Kishun Kunwar*, 57 P. W. R. 1019: 51 I. C. 766.

Or. . . . . under Or. I, r. 10, to be made a party is not . . . . . *Misri Lal*, 2 All. 904; *Abirunnisa v. Komur* . . . . . in *Khetramoni v. Shyama Charan*, 21 Cal. 539. But an appeal lies against an order that a plaintiff be made a defendant.—*Lakshmana v. Parama Siva*, 12 Mad. 489.

An order striking out the name of one of the defendants and dismissing the suit as against him on the ground that the plaint disclosed no cause of action, is a decree and is appealable as such; *Sri Raja v. Sri Raja*, 42 M. 219: 36 M. L. J. 169: 25 M. L. T. 184: 9 L. W. 329: 49 I. C. 835.

An order under s. 73 dismissing decree-holder's application to share in the assets realized in another decree against the same judgment-debtor is not a decree.—*Kashiram v. Maniram*, 14 All. 210. An order under s. 73, C. P. Code, is not an order under s. 47 and being consequently not a decree within the meaning of s. 2 (2) is not appealable; *Mt. Harmoozi v. Mt. Ayesha*, 1 P. L. T. 296: 5 Pat. L. J. 415: 57 I. C. 421 (42 C. I. fold.; 36 C. 130, *resd. to*).

No appeal lies from an order refusing leave to decree-holder to bid at a sale; *Ko Tha Hnyin v. Ma Huin*, 38 Cal. 717 P. C.: 15 C. W. N. 862: 14 C. L. J. 241: 13 Bom. L. R. 694: 8 A. L. J. 1117.

An order disallowing interrogatories is not a decree and therefore not appealable; *Firm of Yusuf Ally Alibhoy v. Firm of Haji Mahomed Haji Abdullah*, 58 I. C. 721.

An order directing a suit to be re-admitted and registered is not a decree.—*Hirdhamun v. Jhingoor*, 5 Cal. 711.

Order refusing an application for leave to appeal to Privy Council is is not a decree.—*Manley v. Patterson*, 7 Cal. 930; referred to in *Lutfali v. Ashgur Reza*, 17 Cal. 455. See also *Chandi Datt v. Padmanand*, 22 Cal. 928.

An order dismissing a suit under Or. IX, r. 2, for plaintiff's failure to deposit costs for service of summons on defendant is not a decree.—*Lucky Churan v. Budurunnissa*, 9 Cal. 627; 12 C. L. R. 484; *Lachmi Narain v. Darhari Lal*, 38 A. 357: 14 A. L. J. 347: 33 I. C. 737 (9 C. 627, 20 I. C. 1, followed).

An order staying or refusing to stay execution is not a decree and not appealable.—*Rajendra v. Mathura*, 25 C. W. N. 555.

An order in execution that no warrant shall issue before a certain date for attachment of the judgment-debtor's properties is not a decree and is not open to appeal.—*Hazoor Singh v. Maya*, 101 P. L. R. 1911. 64 P. L. R. 1911: 9 I. C. 823.

and is therefore not appealable; but a decree under Or. IX, r. 8, of the Code, when the defendant only appears and admits the claim, is not an order of dismissal for default within the meaning of s. 2 (2), see *Maharaja of Burdwan v. Rakhal*, 16 C. L. J. 559.

The expression "order of dismissal for default" refers not only to dismissal of suit for default but also to an order of the execution Court dismissing the objection for default.—*Hiralla v. Tikam Singh*, A. I. R. 1926 All. 401.

Where appellant prayed for adjournment on the ground of illness but the Court refused and the next day passed orders refusing adjournment and dismissing suit, held that the order is not an order of dismissal for default within the meaning of s. 2 (b) and is appealable; *Ma Chan v. Maung Mynit*, 6 Bur. L. J. 77: A. I. R. 1927 Bur. 148: 101 I. C. 618.

An order of dismissal for default of an application to set aside a Court-sale is not a decree within s. 2 (2) and so no appeal lies; *Basaratulla v. Reajuddin*, 53 C. 679: 30 C. W. N. 570: A. I. R. 1926 Cal. 773.

**Distinction between Decree and Order.**—Under the old Code of 1882, no adjudication unless it decided the suit came within the scope of the word decree; but under the present Code, an adjudication which "conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit" is a decree. When further proceedings have to be taken before the suit can be completely disposed of, the decree is called *preliminary* as distinguished from *final*. The definition of decree has been made wider in the present Code inasmuch as preliminary decrees are included within its scope. The object of widening the scope is to permit appeals from preliminary decrees.

The definition of the word "decree" clearly lays down that the word "decree" shall not include any adjudication from which an appeal lies as an appeal from an order; in other words, the above expression excludes from the definition of the word "decree" all adjudications from which an appeal lies as an appeal from an order under the special provisions of section 104 and Or. XLIII, r. 1. Thus, an adjudication which is not a decree is not a general rule, appealable, except in the cases specified in section 104 and Or. XLIII, r. 1. But an adjudication which amounts to a decree is, as a general rule, appealable under section 96, unless the right of appeal is barred by the provisions of the Code or by the express provisions of any other enactment for the time being in force. In the former case the non-appealability is the general rule, and appealability is an exception; whereas in the latter, appealability is the general rule and non-appealability is the exception.

*The principal points of distinction between a Decree and Order are:* (1) that an adjudication which amounts to a decree is generally appealable, but an order is not so, and is appealable only in exceptional cases; (2) that a second appeal lies from the decree of the Appellate Court under section 100, subject to the exceptions contained in sections 101 and 102; but in the case of orders second appeal is barred by the express provisions of subsection (2) of section 104.

In practice, much difficulty arises in determining whether an adjudication amounts to a decree or an appealable order, and the only mode of determining it, is to refer to section 104 and Or. XLI, r. 1, and to see

appealable as decree. Every order passed in relation to execution need not be appealable as decree. Every order passed in relation to execution need not necessarily be deemed to come within the scope of section 2 (2) read with s. 47; *Saraswati v. Moti*, 17 C. W. N. 1240: 41 Cal. 160.

An order declaring that an appeal has abated is not a decree and is therefore not appealable.—*Walayat Hussain v. Ram Lal*, 12 A. L. J. 1113; 25 I. C. 643 (13 A. 575, followed); *Mahomed Ismail v. Manohar Das*, 20 A. L. J. 214: A. I. R. 1922 All. 113: 64 I. C. 838.

An order determining the question as to who is the legal representative of deceased party is not appealable under the new Code, though it was appealable under the old Code.—*Sital Prasad v. Bajrangi*, 13 Ind. Cas. 70. See also *Brij Mohan v. Ram Milan*, 16 O. C. 350: 20 Ind. Cas. 898.

An order by executing Court under Or. XXI, r. 66 determining the value of immoveable properties attached, is not appealable as a decree.—*Deoki Nandan v. Bansai*, 16 C. W. N. 124: 14 C. L. J. 85, followed in *Panch Duar v. Mani Raut*, 16 C. W. N. 970. See also *Sakhi Chand v. Kulanand*, 14 C. L. J. 607; *Raja Braja Sundara v. Sivaranjana*, 1 Pat. L. T. 647: 59 I. C. 282.

An order refusing a decree-holder to withdraw his bid which he had himself made and upon which the hammer had fallen, does not adjudicate any rights. It is not a decree and no second appeal lies; *Rajendra v. Upendra*, 21 C. L. J. 174: 19 C. W. N. 633: 27 I. C. 805.

An order dismissing an application to be brought upon the record as a plaintiff is not a decree, and is not therefore appealable.—*Duni Chand v. Arja Nanda*, 13 A. L. J. 174; 37 A. 272: 28 I. C. 687.

An order under section 148, C. P. Code, enlarging time is not appealable as decree.—*Suranjan v. Rambhal*, 35 All. 582 F. B.: 11 A. L. J. 950.

No appeal lies from an order of dismissal for default of an appeal under Or. XLI, r. 17, as it is not a decree under s. 2, nor is it specified in the Code as an appealable order.—*Rukminimoyi v. Paran*, 39 C. 341: 15 C. L. J. 334: 14 I. C. 823; *Surajdeo v. Partap Rai*, 4 Pat. L. T. 405: (1923) Pat. 218.

An order of dismissal of a suit or appeal for default is not a decree.—*Parbati v. Toolshi*, 18 C. W. N. 604; *Gosto Behari v. Hari Mohun*, 8 C. W. N. 313; *Karanyal v. Bhima Mal*, 32 All. 373 and *Zohra v. Mangu Lal*, 28 All. 753; *Refaquat Hussain v. Bibi Tawaff*, 39 A. 393: 15 A. L. J. 286: 39 I. C. 519. But where it was not a case of dismissal for default (one of the plaintiffs being present) but really one of dismissal for want of prosecution an appeal lay; *Jugeswar v. Railal*, 4 Pat. L. W. 366; 45 I. C. 189.

An order passed on an election petition is not an order passed in a suit and does not amount to a decree and no appeal lies therefrom; *Kunni Lal v. Raghunandan*, 35 All. 450: 11 A. L. J. 659.

An order on an application to set aside a sale on deposit under Or. XXI, r. 89, C. P. Code is not a decree, and a second appeal is therefore barred by s. 104 (2); *Asimaddi v. Sundari*, 15 C. W. N. 844: 38 Cal. 339: 14 C. L. J. 224.

An order for security for stay of execution though one relating to the execution of a decree is not one which determines the rights of the parties in

Order refusing an application to file a private award in Court, is appealable as decree.—*Janji v. Gayan*, 3 A. 427. But see *Bhola v. Gobind*, 6 A. 186 and *Kunji Lal v. Durga*, 32 A. 481, p. 488.

An order granting or refusing an application for order absolute is a decree and is appealable; *Shamuldhun v. Lakhimoni*, 13 C. L. J. 459: 6 I. C. 923.

An order refusing to make a decree under Or. XXXIV, r. 6, C. P. Code, is a decree; *Illifat Husain v. Alimunnissa*, 16 A. L. J. 437: 40 A. 551; 47 I. C. 562.

Order rejecting memorandum of appeal as barred by limitation is a decree.—*Gulab v. Mangli*, 7 A. 42. See also *Raghunath v. Nilu*, 9 B. 452; *Gunga Das v. Ramjay*, 12 C. 30; *Rakkhal v. Ashutosh*, 17 C. W. N. 807.

Order directing the release of judgment-debtor arrested in execution is appealable.—*Abdul Rahiman v. M. Kassim*, 21 M. 29.

A decision on the question whether an arrest of the judgment-debtor by a court officer is legal or otherwise is a decree within the meaning of s. 2 (2) and s. 47, C. P. C., and is appealable; *Subbarama v. Arunachatham*, 3 L. 85: 32 I. C. 731 (20 M. L. J. 136 followed).

Order dismissing a suit or rejecting a plaint for insufficient Court-fees in plaint is a decree.—*M. Sadik v. M. Jan*, 11 A. 91. Referred to in *Dadu v. Nagesh*, 23 B. 486; *Mt. Sada Kaur v. Buta Singh*, 265 P. L. R. 1914: 80 P. R. 1914: 167 P. W. R. 1914: 25 I. C. 565; *Mt. Gumani v. Banwari*, 22 O. C. 289; 54 I. C. 733. See also *Prokash v. Bishambhar*, 14 C. W. N. 343; *Rup Singh v. Mukhraj*, 7 All. 887. See however, *Venkatarayadu v. Rangayya Appa*, 21 Mad. 151.

An order dismissing an appeal for deficiency in court-fee should be treated as on the same footing with the rejection of a plaint and hence an appeal lies against the appellate order; *Gabba v. Kanchhedilal*, 18 N. L. R. A. I. R. 1922 Nag. 62; 67: I. C. 225; *Sheikh Mahomed v. Mahomed Yusuf*, 51 I. C. 114.

An adjudication by the Court determining the right of one party to an account for certain years and dismissing the claim for certain other years comes within the definition of a decree and as such an appeal lies against it; *Nandkumar v. Bilas Ram*, 1 Pat. L. W. 781: 3 P. L. J. 67: 40 I. C. 579.

An order refusing to bring on record the legal representative of a deceased plaintiff is a decree and therefore appealable; *Ayya Mudali v. Veeraraju*, 48 M. 812: 39 M. L. J. 218: 12 L. W. 18: 1920 M. W. N. 467: 58 I. C. 408 (42 M. 219 appld.; 31 M. 481 distd.).

An order declaring that the suit has abated by reason of more than 6 months having elapsed from the date of the defendant's death without his legal representatives having been brought on record is a decree and is appealable; *Suppunayakan v. Perumal*, 30 M. L. J. 486: 19 M. L. T. 364: 34 I. C. 372. See also *Ram Sarup v. Moti Ram*, 57 I. C. 137: 1 Lah. 403: 2 Lah. L. J. 738; *Niranjan v. Afzal Hussain*, 111 P. W. R. 1916: 34 I. C. 822: 128 P. R. 1916: 146 P. L. R. 1916: (30 M. L. J. 486; 12 A. L. J. 1113; 31 I. C. 4 *refd. to*).

I. C. 746; *Secretary of State v. Sibaprosad*, 27 C. L. J. 447; 45 I. C. 983. See also *Krishnaji v. Rajmal*, 24 Bom. 360; and *Narayan v. Venkatacharya*, 28 Bom. 408.

Omission of a counsel either to argue a question of law, or his abandoning a question of law is not sufficient to disentitle Court to go into the question.—*Ramsaran v. Thalhan Singh*, 11 C. W. N. 340; *Beni Pershad v. Dudhnath*, 27 C. 156.

Greatest caution should be exercised by the Courts before acting upon statements out of the ordinary scope of vakil's authority.—*Venkata-ramanna v. Charula*, 6 Mad. 127.

Verbal admissions made by a pleader must be received with caution, must be taken as a whole, and must not be unduly pressed.—*Natha Singh v. Jodha Singh*, 6 All. 406.

A distinct admission of liability by a vakil, whose authority was not questioned, was held binding upon his client.—*Dasseo v. Petambur*, 21 W. R. 322.

An admission by an attorney unless explained away, furnishes cogent evidence against the client.—*Ketokey Churn v. Sreemutty Sarat Kumari*, 20 C. W. N. 995.

**Consent and Compromise by Pleader.**—It is not competent to a pleader to enter into a compromise on behalf of his client without his express authority to do so.—*Jagapati v. Ekambara*, 21 Mad. 274; *Thenal v. Sakkammal*, 41 M. 233; *Tewary v. Tapeswar*, 45 I. C. 321; *Basangouda v. Churchigirigouda*, 34 Bom. 408; 12 Bom. L. R. 223. But a counsel has, by virtue of his retainer, and without further authority, to compromise a case on behalf of his client.—*Jang Bahadur v. Sankur v. Rai*, 13 A. 272 (F. B.); *Carrison v. Rodrigues*, 13 C. 115.

The authority of counsel and solicitor to compromise a suit is limited to the issues in the suit; a compromise therefore will not be binding on the client if it extends to matters outside the scope of the particular case in which the counsel or solicitor is retained; *Nundo Lal v. Nistarini*, 27 C. 428; 4 C. W. N. 169.

A vakil in India is both the solicitor who acts and the counsel who pleads. Where the Vakalatnama given to the vakil in a case empowered him to compromise the suit, no second or special Vakalatnama is necessary to empower him to compromise it; *Venkamma, In re*, 23 M. L. J. 381; 12 M. L. T. 348; 17 I. C. 391.

A compromise effected out of Court is not binding on the client; *Askaran v. E. I. Ry.*, 52 C. 386; A. I. R. 1925 Cal. 696.

A compromise can be set aside at the instance of the client if it has been made by the counsel or solicitor under a misrepresentation or mistake in the same way and to the same extent as any other agreement entered into by the client under similar circumstances; *Bibee Solomon v. Abdool Azeez*, 6 C. 697, 706; *Kyone Hoe Tau v. Kyon Soon Sun*, A. I. R. 1925 Rang. 261.

The Court has the discretionary power to set aside a compromise when in the particular circumstances of the case grave injustice would accrue

An order setting aside a sale on the ground of fraud practised by judgment-creditor on the judgment-debtor in connection with the sale is a decree.—*Ballodeb v. Anadi*, 10 C. 410. See also *Hiralal v. Chundra Kunt*, 26 Cal. 539.

An order disallowing objections raised by the judgment-debtor to execution being taken out by a transferee is a decree.—*Muralidhar v. Purasotam*, 2 All 91.

An order of an executing court determining whether an alleged transferee from a decree-holder or from his legal representative is or is not the representative of the decree-holder within the meaning of s. 47 of the C. P. Code 1908 is a decree, and therefore appealable. *Ganga Das v. Yakub Ali* 27 Cal. 670.

An order allowing a purchaser of decree to execute it is a decree.—*Afzal v. Ramumar*, 12 Cal. 610; *Gulzari Lal v. Dyaram*, 9 All. 46. See also *Badri Narain v. Jai Kishen*, 16 All. 483.

An order staying execution of a decree is appealable as a decree.—*O. Steel & Co. v. Ichamoye*, 13 Cal. 111. An order refusing to stay execution is also appealable as decree.—*Musaji v. Damodar Das*, 12 Bom. 270.

An order under Or. XXI, r. 66, settling valuation to be published in the sale proclamation is appealable.—*Dahpati Koer v. Haraho Singh*, 6 M. L. T. 252.

An order dismissing an application to stay sale in execution-proceedings on the ground that in the sale-proclamation the property had been undervalued is appealable as decree.—*Sivasami v. Ratnasami*, 23 Mad. 568.

Rejection of plaint on the ground that the suit was instituted by persons who were established in evidence to be minors is a decree.—*Beneram v. Ram Lal*, 13 Cal. 189.

Order striking out certain defendants from the record on the ground that the plaintiff made out no cause of action against them, is appealable as decree.—*Idan Khan v. Mendi Lal*, 8 Ind. Cas. 409.

In a suit for partition, an order declaring the rights of parties to a partition suit in certain specific shares before actual partition is made is a decree.—*Dulhin Golab Koer v. Radha Dulari*, 19 Cal. 463. Followed in *Baloram v. Ram Chundra*, 23 C. 279. See also *Krishnasami v. Raja Gopala*, 18 Mad. 73.

An order refusing application for appointment of a Commissioner to effect division of property by metes and bounds, is appealable as decree.—*Latchmanan v. Ramanath*, 28 Mad. 127.

An order directing commission of partition to issue is a decree.—*Bepth v. Lalmohan*, 12 C. 209.

An order that partition be effected in execution proceedings is a decree.—*Bholanath v. Sonamoni*, 12 C. 273.

An order granting a certificate under Act VII of 1889, conditional upon giving security, is appealable.—*Radha Rani v. Brindaban*, 25 Cal. 320; 2 C. W. N. 59. See also *Ariya Pillai v. Thangammal*, 20 Mad. 442. But see *Bai Drekoer v. Lalchand*, 19 Bom. 790, and 13 All. 214.

press.—*Venkata v. Bhaskarlu*, 25 M. 367, 377 (P. C.); *Surajpal v. Devi Baksh*, 3 O. L. J. 156: 34 I. C. 390. Unauthorized relinquishment of any portion of a claim by a pleader is not binding upon his client; *Gour v. Sookdeb*, 12 W. R. 279; *Abdul Sobhan v. Shibkrishna*, 3 B. L. R. (App.) 15.

**Duty of Pleader to Client and Court.**—When, owing to the failure of the pleader to appear, the case is dismissed for default, the vakil is bound to explain fully the true state of affairs to the Court and to his client. The pleader is responsible for false statement made to the client by his clerk.—*In re a Vakil*, 22 M. L. J. 276: 11 M. L. T. 296: 14 Ind. Cas. 278.

A pleader employed by a party is bound faithfully and exclusively to serve that party throughout the whole proceeding. A pleader must not accept *vakalatnama* when he knows that he cannot act for his client throughout the proceeding.—*The Government Pleader, Bhagubhai*, 36 Bom. 606: 14 Bom. L. R. 700.

No pleader can be permitted to completely abandon to his clerks the discharge of his duties to his clients, and in any event the pleader must bear the full responsibility for the acts and faults of his clerks. In the eye of the law at least, he is responsible for the fraud perpetrated by his clerks on his clients.—*Muruga Chetti v. Rajasami*, 22 M. L. J. 284: (1912) M. W. N. 332: 11 M. L. T. 280: 14 I. C. 823.

While the relation of pleader and client continues, the pleader cannot, as against his client, acquire absolutely a beneficial interest in or title to the subject-matter of the litigation antagonistic to that of his client; if the pleader gains a pecuniary advantage, he must hold it for the benefit of his client.—*Nagendra Bala v. Debendra Nath*, 22 C. W. N. 491: 27 C. L. J. 388: 44 I. C. 13.

**Duty of Counsel in Ex parte Case.**—Where an appeal is heard *ex parte*, it is the duty of Counsel to bring to the notice of the Court adverse as well as favourable authorities (*Jenkins, C. J.*): 44 C. 573: 21 C. W. N. 473: 25 C. L. J. 259: 1 Pat. L. W. 294: 15 A. L. J. 154: 19 Bom. L. R. 410: 32 M. L. J. 206: (1917) M. W. N. 255: 21 M. L. T. 240: 5 L. W. 526: 39 I. C. 346: 44 I. A. 30 (P. C.); *Iswar Chandra v. Kapali*, 45 I. C. 725.

**Professional Misconduct of Pleaders.**—The Legal Practitioners' Act aims at dealing with cases of misconduct of legal practitioners not only in relation to their professional duties but also in relation to misconduct other than professional misconduct.—*In re Syed Wajid Hossain*, 6 C. W. N. 556, F. B.; 29 Cal 890, F. B. (5 C. W. N. 48, disapproved; 27 Cal. 1023, 4 C. W. N. 389, approved); *In the matter of a Pleader*, 26 Mad. 448. See also *In re Muhammad Abdul Hai*, 29 All. 61.

Wilful neglect by a pleader to appear without any justification whatever after receipt of full fees or portion thereof is unprofessional conduct for which the pleader could be punished under s. 13 of the Legal Practitioners Act (XVIII of 1879); *Muni Reddi v. Venkata Row*, 37 Mad. 238, F. B.: 23 M. L. J. 447: 12 M. L. T. 615.

A pleader is not bound to accept a brief offered to him, nor to state his reason for refusing to accept it.—*In the matter of Nobin Chunder*, 12 C. W. N. 381: 35 Cal. 317.

An order directing distribution of sale-proceeds between several mortgagees is a decree and is therefore appealable.—*Benode Lal v. Srikrishna*, 15 C. W. N. 783.

An order of Court finally deciding that a particular defendant was not liable for mesne profits is a decree and is appealable.—*Naimuddin v. Imani*, 67 I. C. 93 (35 A. 159); 20 C. L. J. 476 (480), referred to.

Order under section 47 directing certain mortgaged property to be sold first and the other properties to be sold afterwards is appealable as decree.—*Tara Prasanna v. Nilmoni*, 41 Cal. 418; 25 Ind. Cas. 11.

(3) "Decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made.

"Decree-holder."—The words "and includes any person to whom such decree or order is transferred" which occurred in the old section, have been omitted. The reason for the omission seems to be that the above words in the former definition were too general to include oral assignment; but an assignee under an oral assignment has no *locus standi* at all, (see Or. XXI, r. 16).

A decree-holder within the meaning of this section is a person in whose favour the "decree" was made, or some person whom the Court has by order recognised as the decree-holder from the original plaintiff or his representatives.—*Puapayya v. Narasunnah*, 2 Mad. 216.

A decree-holder, as defined in the Code of 1882 includes any person to whom the decree is transferred.—*Dwar Buz v. Fatik Jali*, 3 C. W. N. 222. See also *Chatahath Kunhi v. Saidindauide*, 26 M. 258; *Abboy Naidu v. Muthukrishna*, 2 M. L. T. 93.

The term "decree-holder" in Or. XXI, r. 90 includes a decree-holder who is entitled to come in and share in the sale-proceeds under s. 73 of the Code.—*Ajudhia Prasad v. Nand Lal*, 15 All. 318. See also *Chattrapat v. Jadukul Prasad*, 20 C. 673. (12 C. 294, and 10 M. 57, referred to).

The term "decree-holder" in Or. XXI, r. 89, means that person alone for satisfaction of whose decree the sale has been ordered, and does not include other persons who would have a right to claim rateable distribution out of the sale proceeds under s. 73 of the C. P. Code; *Ganesh v. Vithal*, 37 Bom. 387; 15 Bom. L. R. 244. (1 C. W. N. 105; 30 Cal. 262 followed).

A decree for specific performance of an agreement for the sale of immoveable property is capable of execution either by the plaintiff or the defendant, either party being a decree-holder in such a case; *Bai Karima Bibi v. Abde Rahman*, 46 B. 990; 67 I. C. 667; A. I. R. 1923 Bom. 26.

(4) "District" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court.

"District."—Meaning of the word "district" as defined in this section.—See *Kali Prasad v. Meher*, 4 C. 222; *Ram Ratan v. Lalla Prasa* 17 A. 483.



A pleader cannot be prosecuted for filing a suspicious document, unless he knew or had reason to believe that it was concocted.—*In the matter of Ranchhoddas*, 22 Bom. 317.

Conviction of a pleader of criminal offence does not necessarily prove that he is unfit to be allowed to practise.—*In re Durgacharan*, 7 All. 290; *In re Rajendranath*, 18 All. 174.

Conviction of a pleader under section 471, Indian Penal Code, disqualifies him for his profession.—*In re Rajendranath*, 22 All. 49.

A legal practitioner would not be chargeable with professional misconduct if he allowed his clients to enter into a compromise in derogation of their legal rights unless he himself was aware of those rights and of the fact that his clients did not know them and did not intelligently and deliberately realise them.—*In re Lubeck*, 33 Cal. 151, P. C.: 10 C. W. N. 57; 2 C. L. J. 421.

It is highly improper and grossly unprofessional conduct, on the part of an Advocate or of a Vakil, to enter into an agreement with a client, to furnish him with funds for a litigation, in consideration of his assigning over a part of the property in litigation, if recovered, to such Advocate or Vakil.—*In the matter of an Advocate, a Vakil, a Pleader, a Muktear*, 4 C. L. J. 262. See also *In the matter of an Advocate*, 4 C. L. J. 259.

It is essential to the proper administration of justice, that unwarrantable attacks should not be made with impunity upon Judges in the public capacity, and in a case in which contempt of court is committed by an advocate in a matter concerning himself personally in his professional character, and the contempt of which he is found guilty is committed in the attempt to vindicate his professional conduct in a publication for which he is solely responsible, such publication constitutes "reasonable cause" for the suspension of an advocate from practice under the power conferred by the Letters Patent.—*In the matter of the Appeal of S. B. Sarbadhikary*, 5 C. L. J. 180, P. C.: 29 All. 95, P. C.: 11 C. W. N. 273, P. C.

Advocate—Dismissal of advocate from his office for professional misconduct—Charge of advising client to bribe a witness.—*In re Bomanjee Cowasjee*, 34 Cal. 129, P. C.: 11 C. W. N. 370, P. C.: 5 C. L. J. 123, P. C.

An advocate of the High Court made an arrangement to do professional work for his client, without the intervention of a solicitor, at a fee of half the usual charge, and on another occasion he wrote to the same client to the effect that he had an offer to work professionally against her (the client) in a case the plaint of which was settled by him for her, and unless she paid him ten gold mohurs (five times the usual fee) for refusing the brief offered, he would take up the case against her.—*Held*, that the advocate was guilty of highly unprofessional conduct.—*In re S. K. H. an advocate*, 34 Cal. 729; 6 C. L. J. 55.

A pleader who was himself party to a suit wrote a threatening letter to the Judge to sue him for his unwarrantable act; *held* that the pleader was not guilty of unprofessional conduct, as what he did was in his personal capacity as a suitor and it had no connection with his professional character; *In re Purna Chandra*, 23 C. L. J. 237.

Pleader Engaging in Trade or Business.—A pleader ought not to be engaged in a trade or other business without the permission of the Court,

See the cases noted under sections 13 and 14.

(7) "Government Pleader" includes any officer appointed by the Local Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader.

The words "and also any pleader, etc." in the last part of the definition have been added to enable the Government Pleader, to appoint another pleader as his assistant to conduct the case. As regards the duties and functions of the Government Pleader under the Code, *see*, Or. XXVII, rr. 4, 5, 6 & 8 (Government suits) and Or. XXXIII, rr. 6 & 9 (Pauper suits).

(8) "Judge" means the presiding officer of a Civil Court.

**Registering Officer is Not a Court.**—A Registering Officer is not a Court.—*Q. v. Tulja*, 12 Bom 36; *Q. v. Subba*, 11 Mad. 3; and *Q. v. Ram Lal*, 15 A. 141; 12 Mad. 201, and *Manavala Goundan v. Kumarappa* 30 Mad. 326; 23 M. L. J. 50. But see *Atchayya v. Gangayya*, 15 Mad. 188 (F. B.). See also *Kristo Nath v. Brown*, 14 Cal. 176.

Judges should not try cases in which they have any personal interest; *Kunja v. Dinabandhu*, 15 C. L. J. 162; neither can a Judge act in matter in which he has any pecuniary interest or any interest sufficient to create a real bias; *Alu v. Gagubha*, 19 B. 608.

**Disqualification of a Judge to try cases in which he is personally interested.**—See the cases noted under section 24.

As to non-liability of Judges for acts done in good faith in discharge of their judicial functions, *see* cases noted under sections 9 and 80.

(9) "Judgment" means the statement given by the Judge of the grounds of a decree or order.

A written order deciding one of several issues in a case is a judgment within the meaning of this section; *Narpat Rai v. Devi Das*, 14 I. C. 371; 13 P. W. R. 1911.

The decision of the trial Court on a preliminary issue is a judgment within the meaning of the Code.—*Abdullah v. Beharilal*, 8 Lah. L. J. 361; A. I. R. 1926: Lah. 638; 97 I. C. 780.

A defendant did not file his written statement on the date on which he was ordered to file it, nor on the date fixed for hearing. The Munsif thereupon declared the claim of plaintiff under Or. VIII, r. 10, without going into the merits of the case or without stating the grounds of his order decreeing the claim; *Held* that the Munsif's order was not a judgment. *Held*, also that the Munsif acted with material irregularity and his decision was set aside; *Nanhe v. Tassaduq Husain*, 15 I. C. 212; 15 O. C. 78.

An order of remand by a single Judge of the High Court is a judgment and an appeal lies from such an order, *Gopinath v. Moheshwar*, 35 Cal. 1006; 13 C. W. N. 105.

tion of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

(g) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue-process, or to investigate, or to report on, any matter affecting the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government; and

(h) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty :

**Cl. (c)—“ Every commissioned or gazetted officer,” etc.**—A British officer in the Indian Army is “ a public officer ” within the meaning of s. 2 (17) and his pay is liable to be attached under s. 60 (1) (i) and Or. XXI, r. 48, C. P. Code, as amended by the Amending Act of 1914; *Kering Rupchand and Co. v. G. B. Murray*, 43 B. 716; 21 Bom. L. R. 143; 50 I. C. 683 (39 A. 308, followed; 21 Bom. L. R. 187, distinguished; 33 A. 529, 38 B. 667, overruled).

**“ Serving under Government.”**—Means serving actively under the Government, whether in the civil or military employ of the Government. Officers holding commissioned rank in the Indian Subordinate Medical Service are public officers; *Prins v. Murray & Co.*, 17 O. C. 99; 23 Ind. Cas. 935.

**Cl. (d)—“ Every officer of a Court of Justice,” etc.**—A Common Manager appointed under s. 95 of the Bengal Tenancy Act is a “ public officer ” within the meaning of s. 2 (17) (d) of the C. P. Code and he may rightly be regarded as an officer of a Court of justice to perform the proscribed orders; *Beni Madhab v. Upendra*, 24 C. W. N. 188; 30 C. L. J. 279; 53 I. C. 747; see also *Nabakishore v. Atul*, 40 C. 150; 17 C. W. N. 856. 16 I. C. 193.

A receiver appointed under the Provincial Insolvency Act is a “ public officer ” within the meaning of s. 2 (17) of the C. P. Code; *De Silva v. Govind*, 22 Bom. L. R. 987; 58 I. C. 411.

**Cl. (g)—“ Every officer whose duty it is ” etc., etc.**—A peon in the service and pay of Government and attached to the office of Superintendent of the Salt Department is a public servant. (7 Mad. 17 referred to). A manager of an estate under the Court of Wards is not a public servant.—*Nazamuddin v. Q. Empress*, 28 Cal. 344 (21 All. 127 dissented from); *Nanda Lal v. Ashutosh*, 55 I. C. 515.

A Cantonment Committee constituted under the Indian Cantonments Act (XIII of 1889) is a public officer; *Gray v. Cantonment Committee of Poona*, 34 Bom. 583; 12 Bom. L. R. 615.

97; *Kusum Bandhu v. Ramdayal*, 60 I. C. 179; *Dinamani v. Elahadut*, 8 C. W. N. 843; *Premmoyi v. Preonath*, 23 C. 636.

The devolution referred to in Or. XXII, r. 10 is not of the same character as is referred to in the definition of the legal representatives in section 2 (11) of the C. P. Code, and only means the devolution of the interest of the person who instituted the suit; *Lakshmi Achi v. Subbarama Aiyar*, 28 M. L. J. 491: 17 M. L. T. 385: 39 M. 488: (1915) M. W. N. 327: 2 L. W. 403: 29 I. C. 142.

A suit by a presumptive reversioner to set aside an adoption is brought by him in his representative capacity and on behalf of all the reversioners and on the death therefore of the presumptive reversioner, the next presumable reversioner is his legal representative, and is entitled to continue the action begun by the deceased plaintiff; *Venkata Narayana v. Subbammal*, 38 Mad. 406, P. C.: 28 M. L. J. 535: 22 C. L. J. 515: 19 C. W. N. 641: 17 Bom. L. R. 468; Refd. to in *Jadbansi Kuer v. Mahapal Singh*, 14 A. L. J. 8; See also *Mahadeo v. Sheokaran*, 35 A. 481.

Where one P sued to recover possession of the suit properties as the heir of her father B, and she died pending suit and B's brother's grandsons were brought on the record as legal representatives,—*Held*, that the suit did not abate on the death of P and the right to sue survived to B's brother's grandsons and they were therefore rightly added as her legal representatives; *Ramaswami v. Pedamunayya*, 39 M. 382: 17 M. L. T. 186: 27 I. C. 1001 also 28 M. L. J. 335 (P. C.).

“Intermeddles with the estate.”—Under the Hindu law and under the British Indian Law any one who intermeddles with the property of a deceased person renders himself liable for the debts of the deceased to the extent of the property left by him; *Sheo Saran Lal v. Kesho Prasad Singh*, 3 Pat. L. W. 302: 42 I. C. 122: (1918) Pat. 86.

A person who intermeddles with even a portion of the estate of a deceased person is a legal representative of the deceased under s. 2 (11) and is liable to the extent of the value of the property taken: *Mt. Daropdi v. Mt. Sada Kaur*, 39 P. L. R. 1914: 22 Ind. Cas. 242: 115 P. R. 1913. He need not necessarily be the beneficial owner of the estate; *Paramaswamy v. Alamu*, 42 M. 76: 35 M. L. J. 632: 49 I. C. 11. See also *Lalsa Rai v. Udit Rai*, 75 I. C. 114 and *Ram Singh v. Waryan Singh*, A. I. R. 1923 Lah. 251: 5 Lah. L. J. 459. See also the cases noted under sections, 50, 52 and Or. XXII, r. 3.

(12) “Mesne profits” of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession. [S. 211, Explanation.]

**Mesne Profits.**—Compare this definition with the explanation clause of sec. 211 of Act XIV of 1882.

“The Committee have altered the definition of ‘mesne profits’ so as to exclude from the calculation any increased rents and profits due to improvements made by the person in wrongful possession for which he

3. For the purpose of the Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court. [PART OF S. 2.]

### COMMENTARY.

**Subordinate Courts Bound to Follow Decisions of High Courts.**—A Judge is bound to follow the rulings of that High Court to which he is subordinate; *Kabban Ali v. Sharada*, 10 Cal. 82, p. 84; *Puttu Lal v. Must. Parbati*, 10 C. W. N. 841, P. C.: 37 All. 359; 22 C. L. J. 190; 29 M. L. J. 63; 29 Ind. Cas. 617; *Resal Singh v. Balmant Singh*, 13 A. L. J. 594. See also *Swami Ran v. Kashinath*, 15 Bom. 419; followed in *Balaji v. Sakharan*, 17 Bom. 555, and *Mahomed Hady v. Sweet Cheang*, 25 Cal. 488; 1 C. W. N. 172. A Subordinate Court must have respect for the rulings of the High Court; *Prasanna v. Sheikh Rutton*, 3 Cal. 696, p. 701. A Judge can distinguish but cannot disregard an unreported ruling of the High Court; *Empress v. Goncs*, 1 C. W. N. 1.

A decision of the Privy Council is binding on the Courts of India though delivered in an appeal not coming from an Indian Court; *Kariadan Kumber v. B. I. Steam Navigation Co.*, 38 Mad. 941; 25 M. L. J. 162; 14 M. L. T. 137; 20 Ind. Cas. 546.

Section 3 of the Indian Law Reports Act (XXVII of 1875) does not prevent a High Court Judge from looking at an unreported judgment of other judges of the same Court, although it cannot be treated as binding authority; *Mahomed Ali v. Nazur Ali*, 28 Cal. 289; 5 C. W. N. 326 (4 C. W. N. 732, dissented from).

Reports of cases can be referred to as precedents, but if an order is meant to be operative in a particular case, that order must be produced and filed in the record of the case; *Sourindra v. Siromani*, 28 Cal. 171; 5 C. W. N. 397.

An application was made to a Munsif to stay execution proceedings, which was supported by an affidavit and vakil's letter, stating that the High Court had already stayed proceedings. The Munsif rejected the petition. Held that the act of the Munsif amounted to insubordination and contempt of the authority of the High Court and he was liable to be censured; *Satinath v. Ratan Mani*, 15 C. L. J. 335.

The enumeration of Courts subordinate to the High Court in section 3 is not exhaustive. A Mamlatdar's Court is subordinate to the High Court; *Puroshottam v. Mahadu*, 37 Bom. 114; 14 Bom. L. R. 947.

For the meaning of 'District Court,' see notes under section 2, subsection 4.

4. (1) In the absence of any specific provision to the contrary, nothing in the Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

Savings.

This definition of moveable property does not govern Limitation Act, *Devarasetti v. Devarasetti*, 18 M. L. T. 532: 31 I. C. 796.

For determining what is and what is not moveable property, see notes under sec. 16 and under Order XXI, rule 43.

(14) "Order" means the formal expression of any decision of a Civil Court which is not a decree.

**Order.**—The formal expression of any decision of a Civil Court, which is not a decree, is defined to be "Order." Orders may be divided into two classes, viz:—(1) Appealable orders; (2) Non-Appealable orders. As a general rule orders are not appealable like decrees; but those orders only that fall within the category of section 104 and of Or. XLIII, r. 1, are appealable. Again there is no second appeal from any order passed in appeal from; see Section 104 (2).

As to indirect appeals from non-appealable orders, see notes under section 105.

**Some Illustrations of Orders Not Appealable as Decrees.**—Order returning a plaint or memorandum of appeal for presentation to the proper Court is not a decree.—*Abdul Samad v. Rajendro*, 2 All. 357. See also *Chinnasami v. Karuppa*, 21 M. 234; *Raghunath v. Shamo Keorai*, 31 Cal. 344; *Mohabir Singh v. Behari Lal*, 13 All. 320; *Gurdas v. Bhag*, 11 I. C. 231: 96 P. R. 1911: 143 P. W. 1911: 216 P. L. R. 1911.

Order refusing to file in Court an agreement to refer to arbitration is not a decree.—*Dayanand v. Bakhtawar Singh*, 5 All. 333. (3 All. 427, referred to).

Order refusing to set aside an award, is not appealable as decree; *Narpat v. Devi*, 9 I. C. 385: 1 P. L. R. 1911: 12 P. W. R. 1911.

Order merely directing a private award to be filed (but not giving judgment according to it) is not appealable as decree.—*Ramadin v. Mahesh*, 2 All. 471; *Hussaini Bibi v. Mohsin*, 1 All. 156. See also *Radhan v. Karan Singh*, 18 All. 414.

Where the first Court has decided the suit on all the issues and the Appellate Court reversed the decision and remanded the suit, the order of remand is not a decree; *Permanand v. Bhou Lohar*, 7 Pat. L. T. 535: A. I. R. 1926: Pat. 457.

No appeal lies from an order amending a decree inasmuch as such an order is not covered by s. 47 of the C. P. Code; *Aziz Baksh v. Sultan Singh*, 43 P. R. 1918; 46 I. C. 9.

No appeal lies against an order setting aside an award made on a reference filed in Court under para. 17 of schedule II, C. P. Code; *Seumal v. Mulomal*, 8 S. L. R. 260: 28 Ind. Cas. 60; *Narpat v. Debi Das*, 1 P. L. R. 1911: 12 P. W. R. 1911. 9 I. C. 385.

An order rejecting an appeal under Or. XLI, r. 10, is not appealable, either as an order, or as a decree.—*Lekha v. Bhauna*, 18 All. 101 (F.B.).

An order sanctioning the withdrawal of a defendant from a suit and allowing him costs is not a decree and is therefore not appealable; *Sant Singh v. H. W. M. Ives*, 11 I. C. 830: 150 P. W. R. 1911: 248 P. L. R. 1911.

provisions of the Civil Procedure Code are generally applicable to those Courts.—*Kassam Saheb v. Maruti Bin*, 13 Bom. 552; *See also Khaniso v. Rasa*, 6 S. L. R. 67; 16 I. C. 675.

The provisions of the Civil Procedure Code apply to the Vice-Admiralty jurisdiction of the High Court.—*In the matter of Ship "Champion,"* 17 Cal. 66. Referred to in 17 Cal. 837.

Sections 4 and 100 of Act V of 1908 show that special appeal contemplated by Regulation XIII of 1830 is synonymous with the second appeal under the present Code; *Ramchandra v. Nandu*, 38 Bom. 340; 16 Bom. L. R. 75.

5. (1) Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure upon which any special enactment applicable to them is silent, the Local Government, with the previous sanction of the Governor-General in Council, may, by notification in the local official Gazette, declare that any portions of those provisions which are not expressly made applicable by this Code shall not apply to those Courts, or shall only apply to them with such modifications as the Local Government, with the sanction aforesaid, may prescribe.

(2) "Revenue Court" in sub-section (1) means a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature.

## COMMENTARY.

This section was first added to the Code of 1882, as section 4A, by section 3 of Act VII of 1888; and the object of the addition as stated in the Report of the Select Committee was to preserve the summary character of rent litigation under local laws; and it is justified on the ground that holding the provisions of the C. P. Code to be applicable to the proceedings of the Rent and the Revenue Courts, in all points which are not provided for in the special Acts governing those Courts, may be the source of considerable embarrassment to the administration.

The section is intended to save local laws prescribing a special procedure for suits between landlords and tenants and empowers the Local Government to extend any portions of the Code to Rent and Revenue Courts, with or without any modifications to those matters of procedure upon which any special enactment applicable to them is silent.

**Revenue Court.**—With regard to the applicability of the provisions of the C. P. Code to Rent and Revenue Courts there is considerable divergence of judicial opinion but in the majority of cases it has been held,

An . . . . . execution by a transfer of a decree  
is not 3 Cal. 708 and 708; *Ram Baksh*  
v. *Han* v. *Aminuddi*, 20 All. 539; *Mahabir*  
v. *Rambhagwan*, 11 Cal. 150; and *Samba Siva v. Srinibasa*, 12 Mad. 511.

An order overruling preliminary objection that suit is not maintainable and directing suit to proceed is not a decree and is not appealable.—*Ma-Gun v. Moniandy Survey*; 9 Bur. L. T. 195; 8 L. B. R. 213; 33 I. C. 664.

The decision of a Court on a preliminary issue framed on a plea of *res judicata* is not a preliminary decree and is therefore not appealable.—*Ghena v. Khuda Buksh*, 191 P. L. R. 1912; see also *Parsotam v. Radha Bai*, 10 A. L. J. 78; 15 I. C. 566.

Where several issues were raised and two of them were first taken up and decided in favour of the plaintiff, the other issues being left to be proceeded afterwards. *Held*, that the decision was not a decree and therefore not appealable; *Shib Sharan v. Janaki Nath*, 18 C. L. J. 78.

Decision of a single issue may, in certain cases, lead to a decree, i.e., when the whole suit and not a part of it is dismissed. But an interlocutory decision on each and every point in issue between the parties is not appealable as a decree.—*Udharam v. Secretary of State*, 6 S. L. R. 287; 19 Ind. Cas. 922, see also *Ayappa v. Gopalaswami*, 12 M. L. T. 309; (1912) M. W. N. 1122.

An order appointing commission to effect partition after preliminary decree is not appealable.—*Jogodeshury v. Kailash Chandra*, 24 Cal. 725 (F. B.); 1 C. W. N. 374.

No appeal lies under the Guardians and Wards Act (VIII of 1890) from an order of a District Judge refusing to remove a guardian.—*Pakhmani v. Indra Narain*, 27 Cal. 201. (19 Cal. 487, followed). See also *Imtiazunissa v. Anwarullah*, 20 All. 433, and *In re Bai Harkha*, 20 Bom. 667.

No appeal lies against an order made by a District Judge as to security for the grant of a certificate of administration.—*Lucas v. Lucas*, 20 Cal. 245. See also *Altasundari v. Srinath*, 20 Cal. 641; *Rama Reddi v. Papi Reddi*, 19 Mad. 199.

An order disallowing the application of a person under Or. XXII, r. 10, is not a decree and therefore not appealable.—*Lolit v. Shebak Chand*, 4 C. W. N. 403. Followed in *Jamna Bibi v. Shek Jhan*, 24 All. 532 (F. B.). See also *Tej Singh v. Chabili Ram*, 24 All. 342 and *Duni Chand v. Arja Nanda*, 37 All. 272; 13 A. L. J. 391.

No appeal lies from an order under Or. XVII, r. 2, read with Or. IX, r. 13, setting aside an *ex parte* decree in default of appearance of the defendant on a day to which the hearing had been adjourned.—*Bhaytan v. Hira*, 19 A. 355. See however, *Shrimana Saganirao v. Smith*, 20 Bom. 726.

Pending special appeal, the High Court ordered that a certain attachment should be removed on judgment-debtor's furnishing security. Accordingly the Lower Court accepted security tendered by the judgment-debtor. *Held*, that the Lower Court's order accepting security is not



does not exceed Rs. 1,000. The jurisdiction of a District Munsif in Madras extends to all original suits of which the value does not exceed Rs. 2,500. (See s. 15, notes under heading "court of the lowest grade"). It has been held by the High Courts of Calcutta, Allahabad, Madras and Patna that where a suit is properly brought in the Court of a Munsif for recovery of possession of land and mesne profits prior to the date of the suit and mesne profits *pendente lite* are claimed or assessed at a sum beyond the pecuniary jurisdiction of the Munsif, the Munsif has jurisdiction to fix such mesne profits (*pendente lite*) and pass a decree for a sum beyond his pecuniary jurisdiction: The value of such a suit for purposes of jurisdiction is the value of the immoveable property plus mesne profits up to the date of the suit. *Per Walmesley, J.*—Mesne profits *pendente lite* are not to be considered in determining the value of the suit for purposes of jurisdiction; *Bidyadhar v. Manindra*, 29 C. W. N. 669. A. I. R. 25 Cal. 1076 (*Rameswar v. Dilu*, 21 C. 550 and *Panchuram v. Kinoo*, 40 C. 56, approved; *Bhupendra v. Purna*, 43 C. 650 and *Balkuntha v. Mohananda*, 24 C. W. N. 342, overruled); *Putta Kannya v. Rudra Bhatta*, 40 M. L., *Arogya v. Appachi*, 25 M. 513; *Sudarshan v. Ram Prasad* 33 A. 97; *Dinanath v. Musst. Mayawati*, 6 Pat. L. J. 54; 60 I. C. 346; *Shiekh Mohammad v. Mahtab*, 2 Pat. L. J. 394; 41 I. C. 231.

This section prevents a Court to execute a decree sent to it for that purpose under ss. 38, 39 of the Code where the decree has been passed in a suit, the value of which exceeds the pecuniary limits of its jurisdiction.—*Gokul Kristo v. Akhil Chunder*, 16 Cal. 457. Followed in *Durga Charan v. Umatarra*, 16 Cal. 465. Referred to in *Kelu v. Vikrisha*, 15 Mad. 345. See also *Shamsundar v. Anath Bandhu*, 14 C. W. N. 662; 37 Cal. 574; *Rama Nath v. Narain*, 57 I. C. 722.

7. The following provisions shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say,—

Provincial Small Cause Court.

(a) so much of the body of the Code as relates to—

- (i) suits excepted from the cognizance of a Court of Small Causes;
- (ii) the execution of decrees in such suits;
- (iii) the execution of decrees against immoveable property; and

(b) the following sections, that is to say,—

section 9,

sections 91 and 92,

sections 94 and 95 so far as they authorize or relate to—

- (i) Orders for the attachment of immoveable property,

controversy in the suit and does not come within the meaning of decree in s. 2 (2), C. P. C.; *Saraswati v. Golap Das*, 41 C. 160; 17 C. W. N. 1240; 20 I. C. 72. Order rejecting appeal under Or. XLI, r. 10, C. P. C. for failure to furnish security for costs is not a decree and not appealable; *Ramesh Chandra v. Sarada*, 62 I. C. 751.

An interlocutory order which does not conclusively determine the rights of the parties in controversy in the execution proceedings is not a decree; *Srinivas v. Kesho Prasad*, 14 C. L. J. 489.

A decision on a question as to the valuation to be inserted in a sale proclamation is merely an interlocutory order and although the Court acts judicially in coming to its conclusion, that does not in itself make the decision a decree and therefore it is not appealable; *Surendra v. Mritunjay*, 5 Pat. L. J. 270; (1920) Pat. 227; 1 Pat. L. T. 645; 56 I. C. 452 (30 C. 617; 27 M. 259; 18 C. 469, approved).

(15) "Pleader" means any person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court.

"Pleader."—The term "pleader" as used here is not confined to its ordinary signification but designates all persons who are entitled to plead for another in Court; *Pleader of the High Court; In re*, 8 B. 145.

When one pleader states his inability to go on with a case, the Court is not bound to send for another pleader.—*Brojo Sunduree v. Gilmore*, 7 W. R. 336. But an innocent client should not be made to suffer for neglect of his pleader if the Court can mitigate the result by exercise of a little indulgence.—*Achumbit v. Jewan*, 11 C. L. R. 11. A pleader can hand over his brief to another pleader to appear in his place.—*Matadin v. Gangabai*, 9 All. 613. Followed in *In re Shidappa*, 22 Bom. 654. See, however, *Shiv Doyal v. Khetu*, 20 Bom. 293.

The senior pleader present has the control of a case in the High Court.—*Greenibash v. Umbica*, 12 W. R. 375. But where a senior pleader was absent when the appeal was opened, he was allowed to follow his junior.—*Dods v. Stuart*, 8 B. L. R. 340; 17 W. R. 49.

A pleader of a High Court cannot be admitted as agent to practise in the Privy Council.—*In re Twiddle*, 16 Cal. 636; L. R. 16 I. A. 163.

Admission by Pleaders.—A client is bound by the admission of his counsel, solicitor or pleader when the admission is one of fact and such admission is made during the actual progress of litigation and not in mere conversation; *Kowar Narain v. Greenath*, 9 W. R. 485; *Rajunder v. Bijai*, 2 M. I. A. 243; *Hingallal v. Mansa Ram*, 18 A. 384; *Venkata v. Pashyalaru*, 22 M. 538; *Jahadali v. Ajimannessa*, 44 I. C. 18.

A pleader can bind his client by admissions on a question of fact, provided that such question falls within the scope of the suit in which he has been retained; *Digbijoy v. Ata Rahaman*, 17 C. W. N. 155; 15 I. C. 136.

An erroneous admission of the pleader of a party on a point of law does not bind the client.—*Dwarbur v. Fatick Jali*, 3 C. W. N. 222; *Gunee v. Gourmonce*, 9 W. R. 375; *Beni Perlad v. Dattatreya*, (P. C.); 4 C. W. N. 274; *Ram Iyengar v. Katimand*, 20 M. 271.

8. Save as provided in sections 24, 38 to 41, 75, clauses (a) **Presidency Small Cause Courts.** (b) and (c), 76, 77 and 155 to 158, and by the Presidency Small Cause Courts Act, 1882, the provisions in the body of this Code do not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay.  
Provided that—

(1) *The High Courts of Judicature at Fort William, Madras and Bombay, as the case may be, may from time to time, by notifications in the local Official Gazette, direct that any such provisions not inconsistent with the express provisions of the Presidency Small Cause Courts Act, 1882, and with such modifications and adaptations, as may be specified in the notification, shall extend to suits or proceedings or any class of suits or proceedings in such Court.*

(2) *All rules heretofore made by any of the said High Courts under section 9 of the Presidency Small Cause Courts Act, 1882, shall be deemed to have been validly made.*

## COMMENTARY.

**Presidency Small Cause Courts.**—The provisos (1) and (2) in this section were added by C. P. Code Amendment Act I of 1914. Proviso (1) empowers the High Courts of Calcutta, Madras and Bombay, to extend by notification such provisions of the C. P. Code to Presidency Small Cause Courts, as are not inconsistent with the express provisions of the Presidency Small Cause Courts Act, with such modifications and adaptations as may be specified in such notifications. The proviso revives the second para. of section 8 of the Old Code (Act X of 1877) which was repealed by section 2 of the Presidency Small Cause Courts Act (XV of 1882).

Proviso (2) gives validity to the rules heretofore framed by the said High Courts under section 9 of the Presidency S. C. Courts Act.

**Insolvency.**—The insolvency jurisdiction of the Madras Small Cause Court conferred by the notification of the Local Government under section 8, para. 2, of the C. P. Code (Act X of 1877) does not subsist, since that paragraph has been repealed by section 2 of the Presidency Small Cause Courts Act (XV of 1882); *In re Walter*, 6 M. 430.

**Review.**—Section 114 of the C. P. Code relating to powers of review is not extended to the Presidency Small Cause Courts, such Courts do not therefore possess the jurisdiction to review their own decisions; *Framroz v. Dalsukhbhai*, 45 B. 972.

by allowing the compromise to stand; *Shepherd v. Robinson*, I. K. B. (1919) 474; *Tarubala v. Surendra*, 41 C. L. J. 218; A. I. R. 1925 Cal. 866.

Parties are bound by what their counsels do in the exercise of their discretion acting within the scope of their authority. (*Per Walsh, J.*)—The Bar have privileges of audience and a good deal more than audience, which involve correlative obligations, and matters like admissions, contents, withdrawals by counsel in the conduct of their cases made in open Court are, unless they have been induced or misled by some circumstances to make a statement under a mistake, final and binding upon the parties; *Brijbhukan v. Mahadco*, 35 I. C. 205.

Consent of a vakil to matters beyond the scope of the suit can neither be binding on the party, nor acted upon by the Court.—*Atul Khadar v. Andhu Set*, 2 Mad. 423.

Unauthorised relinquishment of any portion of a claim by a pleader is not binding upon his client—*Gour Pershad v. Sookdeb*, 12 W. R. 279; and *Abdul Sobhan v. Shib Kristo*, 3 B. L. R. (Ap). 15. But a pleader has power to abandon an issue which, in his discretion, he thinks it inadvisable to press—*Venkata Narasimha v. Bhashyakarlu*, 25 Mad. 867, P. C.: 6 C. W. N. 641, P. C.

Consent given by a pleader cannot be withdrawn after the hearing has begun, and the suit was proceeded with on the footing of such consent.—*Rup Chand v. Balvant*, 11 Bom 591.

A pleader has no authority to terminate a suit by an offer to be bound by the oath of the opposite party—*Sadasiv v. Maruti*, 14 Bom. 455.

The opinion expressed by a vakil in the course of argument adversely to a claim which he undertook to advocate is not binding on his client.—*Krishnasami v. Raja Gopal*, 18 Mad. 73 (p. 83).

Acknowledgment of debts by the pleader in a petition or memorandum of appeal filed on behalf of his client, amounts to an acknowledgment within the meaning of section 19 of the Limitation Act; *Norendra v. Bhupendra*, 23 Cal. 374; *Hingan v. Mansa*, 18 All. 384.

**Authority to Refer to Arbitration.**—A pleader unless specially authorised has no power to make application for reference to arbitration; *Sheo Das v. Nandan*, 7 C. W. N. 343; *Ram Jiwan v. Kali Charan*, 29 All. 429; 4 A. L. J. 342; *Shib Lal v. Chaturbhuj*, 31 All. 450; 6 A. L. J. 496; *Tevary v. Tapeswar*, 45 I. C. 321; *Thakur Prasad v. Kalka*, 6 N. W. P. H. C. R. 210.

A vakil duly appointed to act for a party has authority to make an application for a reference to arbitration. If he does so and against the wishes of the client, he is responsible to his client, but the client is nevertheless bound; *Sri Kishen v. Relumal*, 9 S. L. R. 183; 34 I. C. 845.

**Authority to Withdraw.**—A pleader has no authority to withdraw a suit unless expressly empowered by his client in that behalf; *Ramcoomer v. Collector of Beerbhoom*, 5 W. R. 80. But when a *rakalatnama* authorised the pleader to do all necessary acts in connection with the suit that would be beneficial to his client, the authority was sufficient to apply for withdrawal.—*Kailash v. Haradhan*, 16 C. W. N. 932; 15 C. L. J. 692.

A pleader's general powers in the conduct of a suit include the power to abandon an issue which, in his discretion, he thinks it inadvisable to

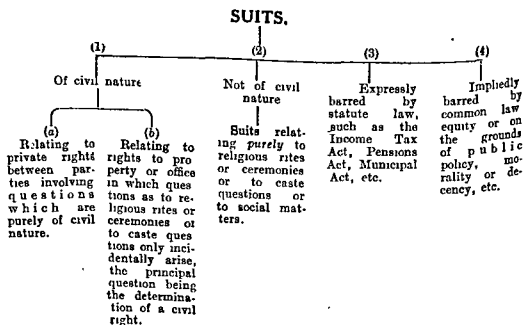
jurisdiction merely because there was an assertion in the plaint that the act objected to was *ultra vires*. The plaint must make distinct allegations of fact or of law, how the act was *ultra vires*: *Municipal Committee, Malkapur v. Amrit Waman*, A. I. R. 1922 Nag. 10: 18 N. L. R. 121; 5 N. L. J. 214: 65 I. C. 532.

**"Sult."**—The word "suit" has not been defined in the Code. The following definition of the word is to be found in *Bhupendra Narayan v. Baroda Prosad*, 18 Cal. 500: "The word 'suit' has not the narrow significance attached to the word 'action' in English Law: but it embraces all contentious proceedings of an ordinary civil kind, whether they arise in a suit or miscellaneous proceedings." The definition is not however consistent with the provisions of the Code. Section 26 and Or. IV, r. 1 of the Code provide that every suit shall be instituted by presenting a plaint and that every plaint shall comply with the Rules contained in Orders VI and VII; and shall contain the particulars mentioned in Rules 1—8 of Order VII. It therefore follows that proceedings commenced by petitions are not suits within the meaning of the C. P. Code.

A "suit" is the process of recovering or enforcing a substantive right or claim by the procedure laid down in the C. P. Code. An application to file a reference under para. 17 (1) of Sch. II of the Code, which merely asks for assistance to prosecute a claim before a private tribunal cannot be converted into a suit, by the mere process of numbering it as a suit; *Seumal v. Mulomul*, 8 S. L. R. 260.

**Suits of a Civil Nature.**—Suits may be classified under two heads, viz., (1) Suits of a Civil Nature, and (2) suits which are not of a civil nature. Civil Courts in India have jurisdiction under this section to try all suits of a civil nature with the exception of those of which the cognizance by Civil Courts is either expressly barred, that is, barred by any enactment for the time being in force or impliedly barred that is, barred by general principles of law.

The following table shows the several important elements which have to be considered under this section:—



Omission of a pleader to examine record before making application to stay execution was held not to amount to grossly improper conduct.—*In re Sreenath Roy*, 17 W. R. 405.

A legal practitioner by paying or offering to pay money to a witness to speak the truth or to prevent giving false evidence is not guilty of any offence. But in pressing his client for payment of money to a witness to induce him to keep back unfavourable evidence is guilty of grossly improper conduct.—*In re Nritya Gopal Sen*, 5 C. W. N. 45.

Offer to give a gratification, contrary to section 36 of the Legal Practitioners' Act (XVIII of 1879), amounts to misconduct of a vakil.—*In re Parbati Charan*, 17 All. 498 (P. C.).

A pleader paying commission to a muktear is guilty of fraudulent and grossly improper conduct.—*In re Peary Mohun*, 11 B. L. R. 312.

A pleader appropriating his client's money is guilty of grossly improper conduct in the discharge of his professional duties.—*In re Purna Chunder Dutt*, 7 C. W. N. 373: 31 Cal. 44.

A pleader refusing to argue a case after signing memorandum of appeal on the ground of unpreparedness is liable to be dealt with for neglect of duty.—*Baldeo Misser v. Ahmed Hussain*, 15 W. R. 148.

Omission to examine the original record before certifying an appeal does not amount to improper conduct.—*In re Noor Ahmed*, 17 W. R. 388.

The mere fact that a legal practitioner has filed a petition containing grounds legally untenable does not amount to grossly improper conduct.—*In re Sarat Chandra*, 4 C. W. N. 663.

A pleader or muktear practising in contravention of the provisions of section 10 of Act XVIII of 1879 is punishable under section 92 of that Act only by the Court before which he has so practised.—*In the matter of Ganga Dayal*, 4 All. 375.

A pleader using police papers delivered by the client, however improperly they might have been obtained by the client is not guilty of misconduct.—*In re Kristo Lal Nag*, 10 Cal. 258.

A pleader making unauthorized statements on his own motion without instructions from his client is guilty of improper conduct.—*Ganga Ram v. Panchcowree*, 25 W. R. 866.

A pleader engaged by a client in one case should not by changing side in another case relating to the same subject matter make use of and disclose informations obtained by him as a pleader in a former case.—*Damodar v. Bhabanishanker*, 26 Bom. 423, F. B.

The High Court declined to strike a pleader off the rolls for using improper expressions during the argument of a case.—*In re Cruise*, 14 W. R. (Cr.) 53. It is improper in argument to endeavour to influence a Court by reference to the view which the Appellate Court might take of its proceeding, or even to refer to the likelihood of an appeal.—*Juggernath v. Mahomed Hossein*, 15 W. R. 173.

Where a pleader's correspondence with his client showed grave improprieties, he was suspended for misconduct.—*In re Quarry*, 13 All. 93 (P. C.).

mere question of religious rites or ceremonies nor will it pronounce on any religious doctrine unless it is necessary to do so in order to determine rights to property; *The Advocate-General of Bombay v. Yusufalli Ebrahim*, 24 Bom. L. R. 1060.

**Suit to Establish Right to Worship is a Suit of a Civil Nature.**—A suit to establish the right to worship a deity in a temple according to one's own choice and to carry processions accompanied with music through public streets is a suit of a civil nature; *Waman v. Balu*, 44 Bom. 410; 22 Bom. L. R. 307; 56 I. C. 419.

A right to worship in a temple is a civil right and a suit will lie for a declaration of that right; *Kadirvelu v. Nanjundayar*, 3 L. W. 512; 35 I. C. 88.

A right to an act of worship in a particular manner and with particular incidents attached to it is a right of a civil nature and the Civil Court must adjudicate upon any incidents connected with the exercise of such right; *Thirumalai v. Srinivasa*, 31 M. L. J. 758; (1910) 2 M. W. N. 327.

A suit by certain members of a religious fraternity for establishment of their right to enter into, and perform their prayers and other rights in a prayer hall, from which they have been expelled by other members, and for re-admission into fraternity, is a suit of civil nature; *Anand Rao v. Shankar*, 7 B 323; *Krishnasami v. Krishnama*, 5 M. 313; so also is a suit by some members of a caste for a declaration of their exclusive right to worship an idol in a temple and for an injunction restraining interference by defendants; *Jagannath v. Akali*, 21 C. 463.

The right of burial is a civil right and an interference with the rights of the relatives of a deceased Mahomedan to recite prayers over his body before burial at a particular spot in a mosque is an invasion of a civil right which can be enforced by suit—*Kooni Meera v. Mahomed*, 30 M. 15; *Ram Rao v. Rustum Khan*, 26 B. 198.

A dancing girl's offerings to the idol having been rejected by the priest of a temple, she brought a suit for disturbance of right of public worship—*Held*, that the suit was maintainable—*Vengmuthu v. Pandaveswara*, 6 Mad. 151. Referred to in 33 Cal. 789; 10 C. W. N. 581; and in 19 M. L. J. 743.

A suit by a temple committee against temple servants, for declaration as to their right to have the services performed by others, is a suit of civil nature; *Trimbak Gopal v. Krishnarav*, 33 Bom. 387; 11 Bom. L. R. 389.

A suit for a declaration of a right to recite *stotrams* on certain occasions in a temple and for an injunction, is cognisable by a Civil Court; *Bashiakar v. Venkata*, 20 M. L. J. 530; 8 M. L. T. 137; so also is a suit for injunction restraining defendants from obstructing the plaintiff in worshipping a deity, in doing every other business in connection with the deity and in appropriating the voluntary offerings at the temple; *Laxman v. Viakram* 76 I. C. 629.

A suit by worshippers to restrain a superintendent of Mosque from using it for purposes other than those for which it was intended to be used, is maintainable.—*Abdul Rahaman v. Yar Muhammad*, 3 All. 636.

if his doing so is inconsistent with the profession of a pleader; *Muni Reddi v. Venkatta Row*, 23 M. L. J. 447: (1912) M. W. N. 1029: 12 M. L. T. 615: 37 Mad. 238, F. B.

**Purchase by Pleaders at Court-Sales.**—Duty of pleader purchasing at Court-sales on behalf of their clients pointed out.—*Subbarayadu v. Kotaya*, 15 Mad. 389; *Aghorenath v. Ramcharan*, 23 Cal. 805.

An actionable claim should not be purchased by a pleader; *Muni Reddi v. Venkatta*, 23 M. L. J. 447: 12 M. L. T. 615: 37 Mad. 238, (F. B.).

It is not expedient that pleaders should, by purchase, become the persons entitled to execute decrees in suits in which they have been engaged.—*Goshain Jugroop v. Chingun Lal*, 2 N. W. 46; *Roy Nandipat v. Urquhart*, 4 B. L. R. 181: 13 W. R. 209; *Wajed Hossein v. Ahmed Reza*, 17 W. R. 480.

Pleaders are not officers of Court within the meaning of s. 292, C. P. Code, 1882 (Or. XXI, r. 73).—*Alagirisami v. Ramanathan*, 10 Mad. 111.

(16) "Prescribed" means prescribed by rules.

"Prescribed" means prescribed by rules contained in or made under this Code.

(17) "Public officer" means a person falling under any of the following descriptions, namely:—

- (a) every judge;
- (b) every member of the Indian Civil Service;
- (c) every commissioned or gazetted officer in the military or naval forces of His Majesty, including His Majesty's Indian Marine Service, while serving under the Government;
- (d) every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order, in the Court, and every person especially authorized by a Court of Justice to perform any of such duties;
- (e) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;
- (f) every officer of the Government whose duty it is, as such officer, to prevent offences, to give in



Depriving a member of a caste of man-pan invitation or invitation to dinner or to *munj* or other ceremonies for alleged violation of caste rule does not give the member so deprived any remedy in law; because all that he has been deprived of is a social privilege and not a legal right and the caste is the only tribunal to which he can resort for a remedy. A Civil Court has no power to compel the members of a caste to invite a caste man to dinner or to any other ceremony; *Raghunath v. Janardhan*, 15 B. 599; *Sudharam v. Sudharam*, 3 B. L. R. A. J. 91: 11 W. R. 457; *Mayashankar v. Harishankar*, 10 B. 661.

A suit for a declaration that, pursuant to a usage of his caste, the plaintiff is entitled to assistance of the defendants, who are fellow members of his caste, in removing his child's dead body and performing caste ceremonies incidental thereto, is not maintainable; *Kanji v. Arjun*, 18 B. 115. Similarly, a Civil Court has no power to compel barbers belonging to a his caste, in removing his child's dead body and performing caste ceremonies, aggrieved may allege that he would lose caste by the loss of service at the hands of the barbers; *Raj Kristo v. Nobace*, 1 W. R. 351.

An arrangement between members of a caste that every member of the caste would contribute to the caste funds a certain sum of money on the occasion of a marriage in his family is a caste question and a suit to enforce the terms of the agreement against any defaulting member will not lie; *Abdul Kadir v. Dharma*, 20 B. 190.

A suit for damages for withholding a customary present from a member of a caste will not lie.—*Mayashankar v. Harishankar*, 10 Bom. 661.

A suit for specific performance and for damages for breach of a contract entered into between different *samajes* of the same caste to intermarry and eat with each other is not maintainable as such a contract has reference to religious and social customs; *Huronath v. Nitto Paramanik*, 22 W. R. 517; similarly, a suit will not lie to enforce a penalty for breach of an agreement by which the defendant contracted to join a certain *samaj*, of which the plaintiffs were members; *Nitai v. Shubal*, 2 B. L. R. (S. N.) 4: 10 W. R. 849.

A claim to a caste-office, and to be entitled to perform the honorary duties of that office or to enjoy privileges and honours at the hands of the members of the caste by virtue of that office, is a caste-question and not cognizable by a Civil Court—*Murari v. Suba*, 6 Bom. 725. See also *Gadigeya v. Basaya*, 34 Bom. 455: 12 Bom. L. R. 358; *Ganapati v. Bharatiswami*, 17 Mad. 222. Distinguished in *Gursangaya v. Tamana*, 16 Bom. 281.

A suit for damages for price of food unconsumed for not attending a feast after accepting the invitation is not maintainable; *Kalai Halder v. Kyamuddi*, 23 W. R. 417. Civil Courts cannot compel Hindus against their will to ask other Hindus to their houses for their entertainments; *Joy Chunder v. Ram Churn*, 6 W. R. 323. See also *Coopasami v. Durasami*, (1912) M. W. N. 1220: 33 M. 67.

The decision of the head of a caste, who, acting in good faith, and according to the custom of the caste, excommunicates the plaintiff on account of her bad conduct, cannot be interfered with in an action in a Civil Court.—*Keshab Lal v. Bai Girja*, 24 Bom. 13. See also *Nath Velji v. Keshauji*, 26 Bom. 174.

A peon acting under delegation by Nazir to execute warrant of arrest is a public servant.—*Shco Proqash v. Bhoop Narain*, 22 Cal. 759.

A clerk appointed by a Sub-Registrar and paid out of an allowance given to the Sub-Registrar is not a public officer.—*Bhagwati Sahai v. Emperor*, 32 Cal. 664.

See the cases noted under Section 80.

**Government.**—Under the Indian Council Act, 1861, a Provincial Council has, subject to the same restrictions as those imposed by the Act on the Governor-General's Council, power to affect the prerogative of the Crown by legislation; *Bell v. The Municipal Commissioners for the City of Madras*, 25 Mad. 457; see the cases referred to and discussed in this case. In *Empress v. Burah*, 3 Cal. 63; 1, C. L. R. 161, on appeal to the Privy Council, 4 Cal. 172, P. C.; 3 C. L. R. 197, P. C., in which the power of the Indian Legislature has been fully discussed and explained.

(18) "Rules" means rules and forms contained in the First Schedule or made under section 122 or section 125. [New.]

For distinction between sections and rules, see 41 Cal. 108, p. 111 noted under section 2. In the case of conflict between the Code and the schedule, the Code must prevail: *Rahim Manjhi v. Sheik Ekbar*, 22 Ind. Cas. 690.

(19) "Share in a corporation" shall be deemed to include stock, debenture stock, debentures or bonds; and [New.]

(20) "Signed" save in the case of a judgment or decree, includes stamped.

**Signed.**—Meaning of the expressions "signed," "stamped," and "person referred to," in the section (section 2)—*Maharaja of Benares v. Debi Doyal*, 3 All. 575.

"Signed" does not include initial.—*Abdul Gafur v. Q.-E.*, 23 Cal. 896; *Kubra Bibi v. Wajid Khan*, 16 All. 59; *Madhopershad v. Gajadhar*, 11 Cal. 111, P. C. But see *Q.-E. v. Janaki Prasad*, 8 All. 293, and *Bhagwat v. Baldeo*, 29 All. 145 in which it has been held that "signed" includes initials.

The meaning of the word "signing," within the meaning of section 19 of the Limitation Act explained.—*Gangadharrao v. Shidramapa*, 18 B. 586. See also *Santishwar v. Lakhikanto*, 35 C. 813; 13 C. W. N. 177.

Under section 50 of the Indian Succession Act (X of 1865), the word "signature" means actual signing, and does not include mark.—*Nitye Gopal v. Nagendra*, 11 Cal. 429 (3 Bom. 382 and 6 Cal. 17, referred to).

Under section 59 of the T. P. Act (IV of 1882) and section 69 of the Evidence Act (I of 1872), a signature includes mark.—*Prankrishna v. Jadunath*, 2 C. W. N. 603 (p. 605).

The meaning of the word "signed" explained, see *Nirmal Chandra v. Saratmoni*, 2 C. W. N. 642, p. 648.

**Suits for Inspection of Accounts of Caste Property.**—A suit for a declaration that the plaintiff is entitled to inspect and take copies of all the books and documents relating to caste property is not maintainable in a Civil Court, inasmuch as such a suit relates purely to a caste question; *Jethabhai v. Chapsey*, 84 B. 467; 11 Bom. L. R. 1014.

**Suits for Religious Office, and for Fees Attached to It are Suits of a Civil Nature.**—A suit for a religious office to which fees are attached is a suit of a civil nature and is cognizable in a Civil Court.—*Muhammad v. Sayed Ahmad*, 1 Bom. H. C. R. App. XVIII; *Ghelabhai v. Hargovan*, 36 B. 94; 13 Bom. L. R. 1171; *Kali Kanta v. Gouri*, 17 C. 906; *Binonath v. Protap*, 27 C. 30; 4 C. W. N. 79; *Lamba v. Rama*, 13 B. 548; *Girja Shanker v. Murlidhar*, 45 B. 234; 22 Bom. L. R. 1202.

A suit for an injunction to prevent defendant from interfering with the plaintiff's right to present to certain persons, at a certain festival in a certain temple, a crown and water, is cognizable by a Civil Court.—*Srinivasha v. Tiruvengada*, 11 Mud. 450; followed in *Kadirvelu v. Nanjundayyar*, 2 L. W. 512; 35 I. C. 88.

A village priest is entitled by hereditary right to perform certain ceremonies in the families of a particular caste and to receive fees in connection therewith and if a member of the caste employs another person to perform the ceremonies, the village priest is entitled to recover from the eastman the fees which would have been payable to him if he had been employed to perform the ceremonies.—*Dinanath v. Sadashiv*, 3 B. 9; *Kali Kanta v. Gouri*, 17 C. 906; *Ghelabhai v. Hargovan*, 36 B. 94.

A suit for a definite amount due to plaintiff as a co-sharer in the offerings of a temple (*birt*) realised by the defendant is maintainable in the Civil Court; *Ganga Pershad v. Megh Raj*, 26 P. R. 1919; 70 P. L. R. 1919; 51 I. C. 236 (26 C. 356; 15 W. R. 531, distd.). Where the property in suit consists of a share in the offerings at a certain temple, a suit by the plaintiff with regard to the share of the offering that she should be allowed to take a turn at the worship in the temple so that her full share in the offerings might be secured to her is cognizable by the Civil Court; *Kunj Behari v. Musat. Naraini*, 45 A. 437.

A and B were the owners of a zemindari within which was an idol X. According to an immemorial custom, the flesh of the first goat offered to X by the *shebait*s was taken by the zemindars. Upon the death of A, the *shebait*s refused to allow his representative C to have a share of the goat. C sued for declaration of right to share in the flesh of the sacrificial goat. Held, that the suit was maintainable.—*Durga Charan v. Rajabala*, 4 C. L. J. 469.

There is nothing to prevent Civil Courts from determining questions such as these raised in the present case, (whether a condition in any agreement that a *Pujari* should forfeit office upon misconduct or neglect to be found by a tribunal of private persons is valid, etc.) and from holding that a *Pujari* has been removed from his office on valid grounds; *Nafar v. Kailas*, 25 C. W. N. 201; 62 I. C. 510.

A village *Joshi*, who is entitled by a hereditary right to perform religious ceremonies at his *yajman*'s house, can recover his fees if the ceremonies are performed, no matter by whom they may be performed.—*Waman Jagannath v. Balaji Kusaji*, 14 Bom. 167. See also *Raja Valad*

(2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the procedure of such land. [S. 4.]

## COMMENTARY.

This section saves the provisions of the special or local laws, by providing that the Code of Civil Procedure shall not affect the provisions of any local or special law or special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law for the time being in force, unless there is any specific provision in those Acts inconsistent with or contrary to the provisions of the C. P. Code, in which case, the specific provisions of those Acts will prevail; for instance, the Madras Rent Recovery Act (VIII of 1865) expressly provides that the decision of the Collector is not open to revision; therefore, section 632 of the old Code (now s. 115) does not apply. See *Velli Periya v. Moidin Padsha*, 9 Mad. 232; *Appandai v. Suhari*, 16 Mad. 451; *Venkatanarasimha v. Suranna*, 17 Mad. 298. Again Partition Act IV of 1893 is a special Act and the procedure prescribed by the Act is not affected by the Code.

"The clause as drafted will, it is believed, effect all the savings covered by section 4 of the Code. The concluding paragraph of that section is believed to be obsolete and has accordingly not been reproduced."—NOTES ON CLAUSES.

"Any special form of procedure."—It was held in *Duckworth v. Duckworth*, 43 B. 368: 21 Bom. L. R. 137: 50 I. C. 427 that the terms of s. 4 of the C. P. Code gave authority to the Court to apply the rule of procedure provided by s. 145 of the Army Act in preference to the general provisions of the Code.

The special form of procedure contained in Cl. 36 of the Letters Patent according to which, if the judges hearing an application from the Original side of the High Court are equally divided, the opinion of the senior Judge prevails, is not controlled by s. 98 of the Code of Civil Procedure which provides for a reference of the dispute in such a case to one or more other Judges; *Bhai Das v. Bai Gulab*, 45 B. 718: 60 I. C. 822: 25 C. W. N. 605; *Suraj Mull v. Horniman*, 20 Bom. L. R. 185: 47 I. C. 449: *Emperor v. Protab*, 51 C. 504.

In a suit for recovery of arrears of rent, in a district in which the provisions of Act I of 1879, B. C. apply, a second appeal does not lie to the High Court.—*Khedon Mahato v. Budhun Mahato*, 27 Cal. 508, F. B.; 4 C. W. N. 333, F. B. (11 C. L. R. 480; 10 Cal. 89, and 24 Cal. 249, overruled). Distinguished in *Sadai Naik v. Serai Naik*, 28 Cal. 532: 5 C. W. N. 279.

The provisions of the C. P. Code, 1908 are inapplicable to village Munsifs' Courts; *Augustus Bros. v. Fernandez*, 29 M. L. J. 474: 2 L. W. 890: 18 M. L. T. 377: (1915) M. W. N. 765: 31 I. C. 59.

Though the Bombay Mamlatdar's Courts are Civil Courts, subject to the revisional jurisdiction of the High Court, it does not follow that

the meaning of the proviso to s. 9.—*Tholappala v. Venkata*, 19 M. 62; *Subbaraya v. Vedanta Chariar*, 28 M. 29.

The Bombay High Court decisions are not unanimous on this point. It has been held in some cases that a suit for a religious office though no fees are appurtenant to it will lie, *Lima v. Rama*, 13 B. 548; *Gursangaya v. Tamana*, 16 B. 281; but if the office be personal in character, no suit will lie if there are no fees attached to it; *Shankara v. Hanma*, 2 B. 470; *Murari v. Suba*, 6 B. 725, *Gadigeya v. Basaya*, 34 B. 455; but in *Sayad Hashim v. Huseinsha*, 13 B. 429, where the office was a personal one and no fees were attached to it, it was held that a suit would lie.

The Allahabad High Court has held that a mere right to perform a religious pageant, such as *Ram Lila*, when not connected with any shrine or temple or sacred spot and does not carry any emoluments with it can not be enforced in a Civil Court.—*Chunnu Dal v. Babu Nandan*, 82 A. 527.

The Patna High Court has also taken the same view as the Allahabad High Court and held that a suit for a declaration that the plaintiff has by custom a right to officiate at all funeral ceremonies performed upon the banks of the Ganges does not lie, *Hira v. Bachu* 1 Pat. L. J. 381; *Luten v. Prayag*, 4 Pat. L. J. 53.

**Suits for Recovery of Gratuities or Voluntary Offerings Attached to a Religious Office are Not Suits of a Civil Nature.**—It is settled law that if a person usurps an office to which another person is entitled and receives the fees of the office, he is bound to account to the rightful owner for them, and the rightful owner may sue the usurper to recover the fees payable to him. But when the payments are only voluntary, no suit will lie to recover voluntary gratuities received by the usurper.—*Raja Valad v. Krishnabhat*, 3 B. 232; *Sitaram Bhat v. Sitaram Ganesh*, 6 Bom. H. C. R. 250; *Hira v. Bachu*, 1 Pat. L. J. 381; 35 I. C. 345; *Kashi v. Kailash*, 26 C. 356. But a suit by a sharer in a religious office against his co-sharer for recovery of his share of the voluntary offerings will lie when the basis of the claim is an agreement, expressed or implied that all the sharers should have a share in the gratuities.—*Dinonath v. Protap*, 27 C. 30; *Bheema v. Kothakota*, 17 M. L. J. 493.

A suit for interference with a mere dignity, for recovery of voluntary offerings which may have been received by another preacher or for an injunction to restrain the receipts of such offerings in future is not maintainable.—*Madhusudan v. Shri Shankara*, 35 B. 278; 11 Bom. L. R. 58; so also is a suit for the recovery of voluntary offerings if that suit is based on custom; *Hira v. Bachu*, 1 Pat. L. J. 381; 2 Pat. L. W. 390.

A suit to establish right to receive fees from pilgrims resorting to shrine is not maintainable in the absence of contract or proof of long uninterrupted usage.—*Krishna Aiyar v. Anantarama*, 2 Mad. H. C. 330.

A suit to establish an exclusive right to fees paid to priests by pilgrims resorting to a temple and to recover the same from the person who had received would not lie in the absence of some agreement between the parties, unless there was any such proof of long and uninterrupted usage as in the absence of a documentary title would suffice to establish a prescriptive right.—*Ramasawamy v. Venkatachari*, 9 M. I. A. 344; 2 W. R. 21, P. C. In the following cases, it was held that there was prescriptive right to receive offerings at a temple.—*Mahamaya v. Haridas*, 42 C. 455; 19 C. W. N. 208; 20 C. L. J. 183; *Badni v. Mulloo*, 8 O. C. 339.

following the Privy Council Case in 9 C. 295, that in those matters of procedure in which the Rent Acts are silent the provisions of the C. P. Code shall apply. See *Chaitan Patgosi v. Kunja Behari*, 38 C. 832: 15 C. W. N. 863: 14 C. L. J. 284, where all the cases on the point are reviewed.

This section contemplates that Revenue Courts are to be governed by the provisions of the Civil Procedure Code.—*Veerasamy v. Manager, Pittapur Estate*, 26 M. 518.

Revenue Courts are Courts of Civil jurisdiction within the meaning of the C. P. Code, in that, their decrees when transferred in the regular course are to be treated in all respects as if they were passed by a Court of Civil Judicature; *Ram Lochan v. Newaz Prosad*, 36 C. 252: 9 C. L. J. 125; 13 C. W. N. 791 (16 All. 496 dissented from; 9 C. 295, P. C., 5 All. 406, referred to). Except upon points expressly provided for by Bengal Act X of 1859, the procedure of the Revenue Courts must be governed by the C. P. Code; in the case of sale held under s. 310-A (Or. XXI, r. 89) the Code applies; *Chaitan v. Kunja Behari*, 38 C. 832: 15 C. W. N. 863. 14 C. L. J. 284 (all cases on the point reviewed).

The Revenue Courts in the N. W. P. in those matters of procedure upon which the Rent Act is silent, are governed by the provisions of the Civil Procedure Code.—*Madho Prakash v. Murlu Manohar*, 5 A. 406, (9 C. 295, followed).

Decrees for rent made by the Collector under Act X of 1859 can be executed by the Civil Court to which they may be transferred under the provisions of the C. P. Code.—*Nilmoni Singh v. Taranath*, 9 C. 295, P. C.

As to the applicability of the provisions of the C. P. Code to suits and proceedings under Act X of 1859, see *Hara Krishna v. Bishnu*, 35 Cal. 709.

Held that the procedure prescribed by s. 63 of the C. P. Code, 1908, although it might be applicable as between Courts of Revenue of different grades, could not be applied where the conflict was between Courts of Revenue and a Civil Court—*Raghubar Dayal v. Banke Lal*, 22 A. 182.

The provisions of the C. P. Code do not apply *en bloc* to proceedings in Courts constituted under the Land Revenue Act; *Harpal Singh v. Sukhrani*, 21 O. C. 220: 48 I. C. 119.

The provisions of the C. P. Code do not apply to proceedings under the Madras Rent Recovery Act and the orders passed by a Collector under that Act are not open to revision; *Velli Pruja v. Moidin*, 9 M. 332; *Venkata Narasinha v. Suranna*, 17 A. 298.

6. Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction.

[S. 6, last para.]

## COMMENTARY.

**Pecuniary Jurisdiction.**—The jurisdiction of a Munsif in Bengal, U. P., Assam, Punjab and C. P. extend to all original suits of which the value

religious observances in accordance with the ritual or conventional practices of their race or sect is, in the absence of express legal recognition and provision, an imperfect obligation of a moral and not a civil nature; *Striman Sadagopa v. Kristna*, 1 M. H. C. R. 301. For the same reason, it has been held that suits by holders of religious offices to precedence in worship and for precedence at religious festivals, such as a claim to be the first to worship the deity and to receive gifts of rice, cocoanut, etc., on certain religious ceremonies will not lie; *Narayan v. Krishnaji*, 10 B. 233, *Sangapa v. Gangapa*, 2 B. 476; *Karuppa v. Kolanthayan*, 7 M. 91; *Madhusudan v. Madhav*, 33 B. 278; *Babu Pujari v. Thakura Gurikara*, 41 M. L. J. 287; (1921) M. W. N. 395; 63 I. C. 115. To decide disputes as to precedence or privilege between purely religious functionaries is also not within the province of Civil Courts; *Madhusudan v. Shankaracharya*, 33 B. 278.

**Suits to Conduct Religious Processions.**—Members of a religious body have the right to conduct religious processions along a public highway in a lawful manner and a suit will lie in a Civil Court against those who prevent the plaintiffs from conducting such processions:—*Sadagopachariar v. Rama Rao*, 26 M. 376; *Mahomed Abdul Hafiz v. Latif Hosien*, 24 C. 524; *Basalingappa v. Dharmappa*, 34 B. 571; *Waman v. Balu*, 44 B. 410; 56 I. C. 419; *Manzur Hosan v. Muhammad Zaman*, 47 A. 151; 86 I. C. 236; A. I. R. 1925 P. C. 36.

**Suits concerning Idols and Charitable Trusts.**—Hindu idols being property, the right to deal with such property is a right cognizable by Civil Courts.—*Subbaraya v. Chellapa*, 4 Mad. 315; *refd. to in 30 Mad. 158*, and 21 M. L. J. 1027.

When a plaintiff and defendant are jointly entitled to the profits from an idol in the defendant's temple, a suit will lie for a declaration that the plaintiff is entitled to have the idol removed to his own house during the period he is entitled to the profits of it.—*Dwarkanath v. Jannobee*, 4 W. R. 79.

A refusal to deliver up an idol whereby the person demanding it was prevented from performing his turn of worship on a specified date gives the party aggrieved a right to sue for damages.—*Debendra Nath v. Odita Churn*, 3 C. 390; *refd. to in 21 C. 463*; 13 Bom. 548.

**"Suits expressly barred."**—"Expressly barred" means barred by the provisions of an express enactment for the time being in force. The suits that are barred by the provisions of an express enactment can be easily ascertained by reference to the provisions of the enactments themselves, such as the Income-Tax Act, Pensions Act, Municipal Act, etc.

For instance, it is provided by the Income-Tax Act (XI of 1922), s. 67, that "no suit shall be brought in any Civil Court to set aside or modify any assessment made under this Act." It is, similarly, provided by s. 4 of the Pensions Act (XXIII of 1871) that except as provided by that Act, a Civil Court is debarred from taking cognizance of any suit which relates to any pension or grant of money or land-revenue conferred or made by the British Government or any former Government, (*Balkrishna v. Dattatraya*, 42 B. 257; 45 I. C. 580. B. 257). It should be remembered, however, that in order to exclude an ordinary Civil Court from taking cognizance of a suit of a civil nature, the bar must be *express* as stated above. The more speedy and summary remedy provided by any enactment in a certain case does not

- (ii) *Injunctions,*
- (iii) *The appointment of a receiver of immoveable property, or*
- (iv) *The interlocutory orders referred to in clause (c) of section 94, and sections 96 to 112 and 115.*

## COMMENTARY.

This section specifically mentions the provisions and the sections of the Civil Procedure Code which are not applicable to Courts of Small Causes. In other words, it lays down that the provisions of the Civil Procedure Code shall be generally applicable to Courts of Small Causes with the exception of those specifically mentioned in this section. In this connection, see section 17 of the Provincial Small Cause Courts Act (IX of 1887).

**Alterations in the Section.**—The words in italics in cl. (b) numbered (i), (ii), (iii) and (iv) were substituted for the words "so far as they relate to injunctions and interlocutory orders" which occurred in cl. (b) of the original rule.

**Power of Small Cause Court to Order Attachment of Property Before Judgment under Or. XXXVIII, C. P. C.**—For the purpose of interpreting cl. (b) of s. 7 of the C. P. Code, an attachment before judgment is not one of the interlocutory orders there referred to. The only orders excluded are those specifically mentioned in s. 94 as injunctions or interlocutory orders, that is to say, orders under cl. (c) or cl. (e) of s. 94. A Provincial Small Cause Court has the power to attach moveables before judgment; *Kumud Behary v. Hari Charan*, 46 C. 717 53 I. C. 814: 31 C. L. J. 179.

As regards the question whether a Provincial Small Cause Court has jurisdiction to order an attachment of *immoveable property* before judgment, the decisions of the Calcutta High Court were conflicting. In *Kedarnath v. Hem Nath*, 49 C. 994 A. I. R. 1923 Cal 176, it was held that a Provincial Small Cause Court has the power to attach immoveable property before judgment. A contrary view was taken in *Sadek Ali v. Samed Ali*, 28 C. W. N. 16 where it was held that a Provincial Small Cause Court does not possess the power to attach immoveable property before judgment. The whole question was considered by a Full Bench of the Calcutta High Court in *Barada Kanta v. Shaikh Majjuddi*, 52 C. 275: 28 C. W. N. 1056: A. I. R. 1925 Cal. 1 and it was decided by a majority that a Court of Small Causes has such jurisdiction, though in so deciding the Judges expressed a doubt as to the intention of the legislature in the matter when the present Code was passed. These conflicting decisions have now been set at rest by the C. P. Code Amendment Act I of 1926, s. 3, by which the words in italics in cl. (b) of the present section were substituted for the words "so far as they relate to injunctions and interlocutory orders" which occurred in cl. (b) of the original section. A new rule being rule 13, has also been added to Or. XXXVIII of the Code, by the same Amendment Act I of 1926, which expressly provides that "*nothing in this order shall be deemed to empower any Court of Small Causes to make an order for the attachment of immoveable property.*"



acts of State are numerous but an attempt has been made to embody the more important decisions classified as follows under suitable headings.

**Suits for Damages Against Government for Acts Done in the Exercise of Sovereign Powers, When Not Maintainable.**—The Government cannot be made liable for acts of its officers, specially when they are guilty of wrongful acts outside the scope of their authority.—*Moti Lal v. Secretary of State*, 1 C. L. J. 355; 9 C. W. N. 495. (1 Cal. 11, referred to and 4 Mad. 344, distinguished). But where Government enters into a contract in the capacity of a private individual, and not in the exercise of sovereign powers, a suit for breach of contract by Government to grant proprietary rights in land is maintainable.—*Kishen Chand v. Secretary of State*, 3 All. 829.

A Civil Court has no jurisdiction to entertain a suit in respect of acts of State or acts of Sovereignty.—*Jehangir v. Secretary of State*, 27 B. 189; *Shivabhajan v. Secretary of State*, 28 B. 314; *Ross v. Secretary of State*, 39 M. 781; *Madnuny v. Secretary of State*, 39 M. 351.

A suit is not maintainable against the Government for publication of a Government resolution in a Government Gazette respecting the conduct of a public servant, though it may amount to a libel. Such a publication is an act of State in respect of which no action lies.—*Jehangir v. Secretary of State*, 27 Bom. 189.

When, by an Act of the Legislature, powers are given to any person for public purpose, from which an individual may receive injury, if the mode of redressing the injury is pointed out by the Statute, the ordinary jurisdiction of Civil Courts is ousted; and, in the case of injury, the party cannot proceed by action.—*Rama Chandra v. Secretary of State*, 12 Mad. 105. Refd to in 29 Bom 480 and in 10 C. W. N. 991. Distd. in 34 Mad. 253; 21 M. L. J. 132.

See also cases noted under section 79.

**Suits for Damages Against Government, for Acts Done in the Exercise of Sovereign Powers, when Maintainable.**—A suit to recover surplus sale-proceeds of a sale for arrears of revenue is maintainable against Government.—*Secretary of State v. Guru Prosad*, 20 Cal. 51. (18 Cal. 234 overruled).

A suit is maintainable against Government to recover sale proceeds of property forfeited to Government by order of a Magistrate under ss. 523 and 524 of the Cr. P. Code, 1898; *Wasappa v. Secretary of State*, 40 B. 200; 17 Bom. L. R. 979, *Queen-Empress v. Tribhovun*, 9 B. 181.

A suit for compensation for damages done to an oil-mill by the officials of a State Railway is maintainable against Government in the Mofussil Small Cause Court.—*Bunwari v. Secretary of State*, 17 C. 290.

The Government is liable to the sender for the price of a value-payable article, which was delivered to the addressee without collecting its value from him by mistake.—*Mothu Rungaya v. Secretary of State*, 28 Mad. 213; 15 M. L. J. 226.

A suit to recover tax illegally assessed upon a person is maintainable; *Collector of Farcedpore v. Gooroo Das*, 11 W. R. 425; See also, *Secretary of State v. Karuna*, 35 Cal. 82, F. B.; 11 C. W. N. 1053; 6 C. L. J. 312; and *Narain v. Sahharam*, 11 Bom. 519.

# PART I

## SUITS IN GENERAL.

### JURISDICTION OF THE COURTS AND RES JUDICATA.

9. The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Courts to try all  
civil suits unless  
barred.

*Explanation.*—A suit in which the right to property or to an offence is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

### COMMENTARY.

**Alterations in the Section.**—The words either "*expressly or impliedly barred*," have been substituted for the words "*barred by any enactment for the time being in force*" which occurred in section 11 of the Old Code. The reason for the substitution seems to be that the words of the Old Code covered those cases only that were barred by any express enactment but they did not cover cases impliedly barred; *Kishori v. Chundra Nath*, 14 C. 644, 648. The wording of the present section is wide enough to cover cases that are barred by any express enactment as well as those barred by implication.

**"Subject to the provisions herein contained."**—The expression refers to the provisions contained in this Code, *see* sections 10, 11, 12, 18, 47, 66, 83, 84, 86, 91, 92, etc.

**"Jurisdiction."**—The word jurisdiction means the power or authority to hear and determine judicially a suit or other proceeding. There are different kinds of jurisdiction, *viz*, (1) local or territorial, (2) pecuniary, (3) as regards subject-matter, (4) as regards parties. As to local or territorial jurisdiction, *see* sections 16-20; as to pecuniary jurisdiction, *see* sections 6 and 15 and the Civil Courts Acts of the different provinces, mentioned under section 15; as regards subject matter, the ordinary civil Courts have jurisdiction over the subject-matter of the various kinds of suits mentioned in sections 16, 17 and 19, with the exception of certain classes of suits triable exclusively by the Provincial and Presidency S. C. Courts, which have limited jurisdiction of an exclusive character over certain subject-matters. As regards parties, all persons of whatever nationality whether Europeans or Americans are amenable to the Civil Courts, and neither of them are excepted (as in Criminal Cases) from the jurisdiction of the Civil Courts. Before the year 1850, native Judges were incompetent to try civil suits against Europeans and Americans, but that restriction has been removed since the passing of the Civil Procedure Code of 1859.

The jurisdiction of Courts under s 9 depends, upon the allegations made in the plaint and not upon those which may ultimately be found true. The allegations may, after the trial of the suit, be held to be unfounded and in that case the suit would be dismissed—not because the Court had no jurisdiction, but because the allegations on which it was based were found to be untrue. At the same time the Court would have no

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A suit is not of a civil nature, where the only question or the principal question to be determined relates to religious rites or ceremonies or to caste questions. But where, for the determination of any right to any property or to any office, a question relating to religious rites or ceremonies or a caste question incidentally arise, in other words, where the substantive question for determination in a suit relates to any right to property or to any office, and any religious or caste question is merely subsidiary to it, it is a suit of a civil nature; *Lalji v. Walji*, 19 B. 507; *Pragji v. Govind*, 11 B. 534. The explanation to this section embodies the above principle and states that a suit is a suit of a civil nature if the *principal* question involved in it relates to a civil right. The mere fact that the determination of such a question depends entirely on the decision of caste questions or questions as to religious rites or ceremonies does not take the suit out of the category of *suits of a civil nature*.

**"Suit in which the right to property or to an office is contested," etc.**  
**Explanation clause to this section.**—The explanation attached to this section lays down that a suit in which the right to any property or to an office is contested, is a suit of a civil nature, although such right may entirely depend on the determination of questions as to religious rites or ceremonies. In other words, where the *principal* question for determination in a suit relates to any right to any property or to any office, for the determination of which a subsidiary question as to religious rites or ceremonies incidentally arise, still it is a suit of a civil nature.

**"Property."**—The word "property" here evidently refers to property dedicated for religious or caste purposes.

**"Office."**—The word "office" here refers to religious office, as that of a *pujari*, *purohit*, or priest in a temple. The right to an "office" is a right of a civil nature. It follows therefore that suits in which the principal question relates to the right to an office are suits of a civil nature, although the right claimed may depend on the decision of caste questions or questions as to religious rites or ceremonies.—*Krishnasami v. Krishnamacharyar*, 5 M 313

**"Religious rites or ceremonies."**—The expression means, the formalities and acts of which the observance is enjoined by any particular religion. The word "religious" means ecclesiastical or spiritual as opposed to secular or temporal. A suit is not cognizable in a civil court where the subject of the plaintiff's claim is confined exclusively to rights in religious ceremonies without a claim to any office or any emolument.

If the right litigated is a *right to worship*, it is a civil right and nobody can prevent a worshipper from going to the temple and worshipping the deity. Secondly, where the claim is made to *office and emoluments*, however, insignificant the emoluments may be, the plaintiff is entitled to seek the aid of the Court to have his right established. Thirdly, where a *right has been acquired or exercised hereditarily for performing certain festivals* in the temple and where such right is negatived, the person whose rights have been so infringed, is entitled to ask the Court to have that right declared in his favour; *Kadirrelu Chetty v. Nanjundayar*, 3 L. W. 512; 35 I. C. 88 (32 A. 527, 19 M. 62, 11 M. 450 referred to; 28 M. 23, 7 M. 91, distinguished).

The protection of the law in religious matters is confined to the protection of religious property or religious office. The Court will not decide

A civil suit lies against the proceedings of a Magistrate ordering the removal of an encroachment not treated as a local nuisance.—*Anund Chunder v. Rokho Tarun*, 2 W. R. 287.

A suit to set aside an order by a Magistrate relating to nuisances, or to restrain him from carrying such order into effect, is not maintainable.—*Ujalamoyi v. Chandra Kumar*, 4 B. L. R. (F. B.) 24: 12 W. R. 18. See *Bulaki v. Secy. of State*, 31 All. 371; 6 A. L. J. 458.

No suit to set aside Magistrate's order declaring a certain river to be a public thoroughfare, is maintainable without direct proof of plaintiff's title to exclusive possession of the right of water claimed.—*Ram Kristo v. Kaloo* 18 W. R. 284.

A suit for recovery of possession under sec. 9 of Act I of 1877, is maintainable after an award of Criminal Court under sec. 145 of the Cr. P. Code.—*Chyton v. Brojo Kanto*, 20 W. R. 12, and *Nagappa v. Syad Budruddin*, 26 Bom. 353. But see *Moore v. Monoranjan*, 12 C. W. N. 696; 7 C. L. J. 547.

**Suit to Recover Duties, Abwabs, and other Customary Payments when Not Maintainable.**—A suit for recovery of *abwabs* existing before the time of the permanent settlement, but not consolidated with the rent is not maintainable, although they had been paid for a period of unknown length.—*Tilukdhari v. Chulhan Maton*, 17 Cal. 181 (P. C.) 11 Cal. 175, affirmed). Followed in *Radha Prosad v. Bal Komar*, 17 Cal. 726 (F. B.) (15 Cal. 828, overruled). Distinguished in *Assanulla v. Tirthabasini*, 22 Cal. 680, in which Chowkidari tax payable by a putnidar under putni settlement has been held recoverable. Followed in *Atulya Churn v. Tulsi Dass*, 2 C. W. N. 543, and in *Krishna Chundra v. Sushila Soondury*, 26 Cal. 611: 3 C. W. N. 608, see also 31 Cal. 834, and 13 C. L. J. 148; 11 C. W. N. 20.

*Abwabs* are not recoverable from a permanent tenure-holder under a lease created before the B. T. Act came into operation.—*Aparna v. Kasam Ali*, 10 C. W. N. 527: 4 C. L. J. 527.

A sum collected by a tahsildar as *puravibhka* considered as an illegal cess and therefore not recoverable in a suit.—*Nobin v. Gooroo Gobind*, 14 W. R. 447. But see *Nogendra Bala v. Guru Doyal*, 30 Cal. 1011; 7 C. W. N. 535.

An agreement to pay a tax prohibited by an Act of the Legislature cannot be enforced.—*Goswami Shri Purush Otamji v. Robb*, 8 Bom. 398.

A suit will lie in the Civil Court to try the question whether *Vatandar Kulkarni* is entitled to receive perquisites from his ryot.—*Vishnu Hari v. Ganu Trimbaki*, 12 Bom. 278.

**Suits to Recover Duties, Abwabs and other Customary Payments when Maintainable.**—A claim for legal due or cess arising out of his privilege of selling *pan* on *hat* days is maintainable.—*Hurrish v. Gopal Barooye*, 3 W. R. Act X, 158.

*Pujan Kharach* or expense for a *Puja* agreed to be paid in excess of the rent is an *abwab* and cannot be enforced.—*Narendra Kumar v. Gorachand*, 3 C. L. J. 391; 33 Cal. 683. (4 Cal. 576, referred to). A contract by which a tenant undertakes to pay the whole road-cess is not illegal.

**Suit for Interference with Temple Property.**—Removal or alteration of *namams* or religious marks in a temple amounts to an interference with property and will be a ground for action in a Civil Court; *Krishnasami v. Samaram*, 30 M. 158; 17 M. L. J. 1:2 M. L. T. 69.

**Suits relating Purely to Religious Rights or Ceremonies are Not Suits of a Civil Nature.**—The Court will not decide mere questions of religious rites or ceremonies nor will it pronounce on any religious doctrine unless it is necessary to do so in order to determine rights to property; *Advocate-General of Bombay v. Yusuf Alli*, 24 Bom. L. R. 1060; *Lokenath v. Dasarathi*, 32 C. 1072, 10 C. W. N. 505; *Vasudev v. Vamnaji*, 5 B. 80. A right to cite sacred texts in a temple is a matter of ritual or ceremony in a religious matter with which a Civil Court has nothing to do.—*Subbaraya v. Venkatachariar*, 28 Mad. 23. So is a right to parade bullocks on certain days, *Rama v. Shivram*, 6 B. 116; or to compel *pujaris* to adorn an idol at certain seasons, *Vasudev v. Vamnaji*, 5 B. 80; or to instal it in a particular temple instead of in another, *Lokenath v. Dasarathi*, 32 C. 1072; 10 C. W. N. 505.

The question whether an individual may repeat any particular *mantram* or portion of the *prabandham* is one not for the Civil Courts to decide; *Thiruvengadachariar v. Krishnaswami*, (1915) M. W. N. 281; 28 I. C. 604.

A suit by dancing girls for declaration of their exclusive right to attend at the religious services in a temple will not lie—*Chinna Umaji v. Tegarai Chetti*, 1 Mad. 168. Distinguished in *Kamalam v. Sadagopa Sami*, 1 Mad. 356. Refd. to in 19 Mad. 127.

**Suits Involving Purely Caste Questions are Not Suits of a Civil Nature.**—The term "Caste" may be defined to be a combination of a number of persons governed by a body of usages which differentiate them from others. These usages may refer to social, or religious observances, to drink, food, ceremonial, pollution, occupation or marriage. Some of these usages may be common to others also. The caste is invariably known by a distinctive name for identification; it has its own rules for internal management and has also got power of exclusion, *Muthusami v. Masilamani*, 33 M. 342; 20 M. L. J. 49; 7 M. L. T. 17. The term is not necessarily confined to Hindus; *Abdul Kadir v. Dharma*, 20 B. 190.

In order to determine whether or not a question is a caste question and what matters relating to caste property and affairs are beyond the jurisdiction of Civil Courts, the test which ought to be applied is: "Would the Court's taking cognizance of the matter in dispute be an interference with the autonomy of the caste?" If the Court's taking cognizance amounts to an interference with the autonomy of the caste, the question is a purely caste question and no Civil Court has jurisdiction to entertain it; *Murari v. Suba*, 6 B. 725.

"Autonomy of the caste" means that where rights to property are not involved, all matters of internal management must be left to the decision of the caste. Courts will not interfere where the rules of the caste make special provision of the question in dispute. Where there is a question between the caste and the section of the caste, it is outside the jurisdiction of the Court; *Jethabai v. Chapsey*, 34 B. 467, 487; 4 I. C. 106; *Appaya v. Padappa*, 23 B. 122, 130.

**Suits Relating to Ferry Rights.**—A suit to re-open a ferry which had been included in a settlement of an estate by Government, but which had been closed by an order of a Magistrate is not maintainable.—*Samjewan v. Collector of Shahbad*, 15 W. R. 132.

A suit to restrain a person from running another ferry over the same spot where plaintiff's ferry plies for hire, is maintainable.—*Luchmesshur Singh v. Lelanund Singh*, 4 Cal. 199; A rival ferry cannot be set up so as to interfere with the proprietary rights in an existing ferry.—*Narain v. Narendro*, 22 W. R. 269, and *Kishoree v. Gokool Monee*, 18 W. R. 281. See also *Nityahari v. Dunne*, 18 Cal. 652.

A right of establishing a private ferry and levying tolls is recognised in British India.—*Parmeshari Proshad v. Mahomed Syud*, 6 Cal. 608: 7 C. L. R. 504.

A suit for compensation for resumption of ferry by Government is not maintainable.—*Collector of Pubna v. Roma Nath*, B. L. R. Sup. Vol. 630: 7 W. R. 191. Approved in 8 Cal. 260. Refd. to in 26 All. 594. Dist. 25 Bom. 574.

**Suits relating to Fishery Rights.**—A suit for damages and injunction to restrain illegal interference with the plaintiff's right to fish in the sea is maintainable.—*Baban Mayacha v. Nagu Shravucha*, 2 Bom. 19 See also *Satcowri v. Secy. of State*, 22 Cal. 252.

A right of fishing in a navigable river is not affected by reason of the river having merely changed its course.—*Tarini Charn v. Watson and Co.*, 17 Cal. 763. If a navigable river shifts its course leaving lakes, dobas or sheets of water, in its old bed, the grantee of the exclusive right of fishery in the river retains that right over such lakes, dobas, etc., so long as these latter remain in communication with the main channel at all seasons of the year.—*Hem Chandra v. Jagadindranath*, 9 C. W. N. 934: 2 C. L. J. 49 n.

Although there may not be any express grant, a right of fishery in a navigable river running through land permanently settled with the plaintiffs, may still be presumed in their favour, as included in the settlement, from a long continued user of such right.—*Sarat Chandro v. Kalaram*, 33 Cal. 1339. See also *Abhoy Churn v. Dwarka Nath*, 39 Cal. 53: 15 C. W. N. 972; *Srinath v. Dinabandhu*, 20 C. L. J. 385 P. C.; 42 Cal. 469 P. C.: 18 C. W. N. 1217 P. C. (11 Cal. 434 approved).

One who has a right of fishery in a public navigable river is entitled to such right also in a channel which is connected with it like an arm of the river system and flows in the bed from which the river has shifted.—*Raj Jogendra Narain v. M. M. Crowford*, 2 C. L. J. 569: 32 Cal. 1141. See *Ishan v. Upendra*, 12 C. W. N. 559. But the right of fishery in a non-tidal and non-navigable river is dependent on and incidental to the ownership of the soil or bed of the river. When, therefore, such a river, by slow and gradual sifting, encroached on a neighbouring estate, the original owner of such right lost and the neighbouring proprietor acquired it over such portion of the river as covered a bed owned by the neighbouring proprietor. *Narendra v. Nripendra*, 4 C. L. J. 51: 10 C. W. N. 540.

A suit for the possession of a right to fish in a *khal*, the soil of which does not belong to plaintiff, is not maintainable under section 9 of the Specific Relief Act, I of 1877.—*Notabar v. Kubir* 18 Cal. 80, and *Fadhu Jhal v. Gour Mohun*, 19 Cal. 544 (F. B.).

**Questions relating to Expulsion from Caste are Suits of a Civil Nature.**—A suit will lie for a declaration that the plaintiff is entitled to be re-admitted into the Caste and also for damages for expulsion from the Caste; *Jagannath v. Akali*, 21 C. 463. To entitle the plaintiff to a decree for damages in such a case, it must be shown that the excommunication is wrongful and in such cases the Court will enquire into the validity of the sentence of excommunication. Excommunication is wrongful, if a member is expelled from the caste without opportunity of explanation being offered to him.—*Appaya v. Padappa*, 23 B. 122; *Keshavlal v. Bai Girja*, 24 B. 13, 22-23; *Vallabha v. Madhusudana*, 12 M. 495; *Ganapathi v. Bharati*, 17 M. 222. It is also wrongful, if a member is expelled for an alleged breach of a caste rule which he has not broken; *Krishnasami v. Virasami*, 10 M. 133.

A suit for damages for exclusion from a temple and excommunication from society on account of widow marriage, and also for injunction to restrain the defendant from interfering with plaintiff's right to enter the temple, is maintainable.—*Venkatachalapati v. Subbarayadu*, 13 Mad. 293. (L. R. 6 Mad. 381 referred to). See also *Appaya v. Padappa*, 23 Bom. 122 and *Uppangala v. Bedradi*, 7 M. L. T. 190: 5 Ind. Cas. 5.

No suit for damages is maintainable for excommunication from society on account of infringement of caste-rules.—*Raghunath v. Janardhan*, 15 Bom. 599. See also *Joy Chunder v. Ram Churn*, 6 W. R. 323; *Sudharam Patar v. Sudharam*, 3 B. L. R., A. C. 91; *Shankara v. Hamma*, 2 Bom. 470; and *Gopal Gurain v. Gurain*, 7 W. R. 299.

In Bombay, a suit for a mere declaration that an excommunication is invalid, and for restoration to caste does not lie, the cognizance of such a suit being expressly barred by Bombay Regulation II of 1827, s. 21; *Nathu v. Keshawji*, 26 B. 174: 3 Bom. L. R. 718.

A suit for exclusion of certain lower Hindu castes from directly drawing water from a particular well, which is based upon custom is maintainable; *Mariappa v. Vaithulinga* (1913) M. W. N. 247; 18 Ind. Cas. 979.

Where the question at issue is not a matter relating to the internal administration and affairs of the caste, but to the property of the caste, the Civil Court has jurisdiction to entertain such a suit, notwithstanding that there has been a division of opinion in the caste; *Fulchand v. Harilal*, 50 B. 124: A. I. R. 1926 Bom. 69.

**Suits relating to Caste Property.**—Where certain lands had been purchased out of their own funds and for their own purposes by members of a small section of a caste all of whom, excepting one member, subsequently seceded from their own section and joined with the majority, the lands remaining in the possession of the one member who had not seceded—a suit by a member of the section who had seceded against the member who had not seceded for recovery of possession of the lands will lie, notwithstanding the fact that in deciding the suit it might be incidentally necessary for the Court to inquire into the usages and practices of castes and sections of castes; *Mehta Jethalal v. Jamiatram*, 12 B. 225; *Pragji v. Gorind*, 11 B. 534; but a claim by the members of one division of a caste against the members of the other division for recovery of one-half of the caste property or its value, does not lie, because the subject-matter is caste property and the claim is not against an outsider but against another section of the caste; *Girdhar v. Kalya*, 5 B. 83.



A suit by the owner of a house for a perpetual injunction restraining the Municipality from demolishing a latrine in the plaintiff's house is maintainable in a Civil Court, the object of the suit being to prevent an infringement of the plaintiff's proprietary rights by the Municipal Board. *Municipal Board of Ferozabad v. Bholanath*; A. I. R. 1927 All. 433; 10 I. C. 446.

The Calcutta S. C. Court has jurisdiction to set aside valuations and assessments made by Commissioners.—*The Corporation of Calcutta v. Cohe*, 6 C. W. N. 480.

The Chief Judge of the Small Cause Court at Bombay is the tribunal to determine questions relating to disputed elections.—*Bhaishankar Nana bhai v. The Municipal Corporation of Bombay*, 81 Bom. 604; 9 Bom. L. R. 417.

Persons living with a particular individual occupying a holding by reason of some connection with or relation to him, such as sons or servants, would not be separately assessable, by reason of possessing separate incomes, and an action for refund of the money paid under protest is maintainable; *Ambika Churn v. Satish Chunder*, 2 C. W. N. 689.

A suit for damages is maintainable against a municipality for negligence of the contractors employed by it in digging a trench for laying a drain pipe.—*Dhondiba Krishnaji v. The Municipality of Bombay*, 17 Bom. 307.

A suit to recover house-tax and water-tax assessed on school buildings is maintainable against the municipality, as the building was exclusively used for charitable purposes.—*Fischer v. Twigg*, 21 Mad. 367. Suit to recover taxes illegally realized is maintainable; *Rajputana Ry. Stores v. Ajmere Municipality*, 32 All. 491.

A suit for damages by the parents of a child killed on account of the negligence of the servants of a Municipality in not properly fencing holes and ditches will lie against the Municipality.—*Narayan Jetha v. The Municipal Corporation of Bombay*, 16 Bom. 254. See *Rajendra v. Surat Municipality*, 33 Bom. 393; 10 Bom. L. R. 948. See, however, 28 Bom. 340.

A suit will lie at the instance of an individual tax-payer for an injunction restraining a municipality from misapplying its funds.—*Vaman v. Municipality of Sholapur*, 22 Bom. 646.

A suit for a declaration of plaintiff's right to vote and stand as a candidate at a municipal election is maintainable.—*Shabhapat Singh v. Abdul Guffur*, 24 Cal. 107.

Where the plaintiff, a duly qualified voter himself was debarred from voting because of his failure to have his name placed in the Register under R. 7 of the Bengal Municipal Election Rules—it was held that the Chairman acted in contravention of the rules in not rectifying the omission of the plaintiff's name in the register under the proviso to R. 1 and that the plaintiff had his remedy by suit under s. 9 of the C. P. Code, s. 42 of the S. R. Act and Prov. (2) to s. 15 of the Bengal Municipal Act; *Molla Ataul Hug v. Chairman of Manicktollah Municipality*, 24 C. W. N. 969; 57 I. C. 980.

A suit is maintainable against a municipality for a declaration that a certain street is a private street, which is lighted and swept by the municipality; *The Anklewar Municipality v. Rikhav Chand*, 25 Bom. 315.

v. *Krishnabhat*, 3 Bom. 232; and *Maro Mahadev v. Anant Bhimaji*, 21 Bom. 821.

A *vatandar* barber has the right to perform services as a barber on ceremonial occasions and is entitled to recover customary fees from another barber who without any right performs them; *Bhagoji Ganu v. Babu Balu*, 44 B. 733, 22 Bom. L. R. 410; 57 I. C. 185.

A suit for a declaration that the plaintiff is entitled to hoist a flag of a particular saint and to take the offerings that were made to it and that the defendant had no right to interfere and pull it down will lie; *Rajah Shah v. Husain Shah*, 7 A. L. J. 830; 7 I. C. 314.

Suit for damages for disturbance of office of village priest against an intruder who deprives the plaintiff of the exercise and benefits of that office, is maintainable.—*Vithal Krishna v. Anant Ram Chandra*, 11 Bom. H. C. 6.

Civil Courts have jurisdiction to determine the order of precedence in the distribution of honors in a temple and to protect by an injunction, persons having a right to the first honors from such right being infringed by others who are entitled to the same honors subsequently. Where a long established usage in a temple has determined the rights of particular persons to receive the first *thirtham*, such usage will be followed by Civil Courts even though it may be an innovation on any prescribed rule of the Hindu Shastras; *Soma Ballachariar v. Tiruvenkatachari*, 15 I. C. 409.

Where the plaintiff claims hereditary right to officiate exclusively as a priest at the cremative ceremony of all dead bodies brought for funeral to a particular place, the suit is one of civil nature; but a claim for declaration that the plaintiff is entitled, to the exclusion of all other Brahmins of his class, to officiate as a priest at the cremation ceremony is not maintainable under Hindu Law; *Gourmoni v. Chairman of Panihaty Municipality*, 12 C. L. J. 74; 14 C. W. N. 1057. See also *Sona Devi v. Kahir Chand*, 35-A 412 F. B.; 11 A. L. J. 563.

**Suits for Religious Office to which No Fees are Attached are Not Suits of a Civil Nature.**—As regards the question whether a suit for a religious office to which no fees are attached will lie in a Civil Court, different views have been taken by the different High Courts. It has been held by the Calcutta High Court that a suit by a person claiming to be entitled to a religious office (musician to a *satra*) against an intruder for a declaration of the plaintiff's right to the office is a suit of a civil nature even though no fees or emoluments are attached to it. The reason for arriving at this decision was that the right claimed in this case being in respect of a religious "office," the suit is of a civil nature within the meaning of the proviso to s. 9.—*Mamat Ram v. Bapu Ram*, 15 C. 159. In *Dinanath v. Pratap*, 27 C. 80, where the suit was by one member of a family against another for declaration of a hereditary right to officiate as *shebait* at a certain place of worship, it was similarly held that the suit was maintainable, though in this case also no fees were attached to the office.

The Madras High Court has taken a contrary view in this matter and held that a suit for a religious office to which no fees are attached is not a suit of a civil nature. This decision was based upon the reasoning that a religious office to which no fees are attached is not an "office" w

**Suit upon Contract in Violation of the Provisions of the Municipal Act.**—An agreement falling within the scope of section 37 of the Bengal Municipal Act (III of 1884), is invalid if the provisions of the section have not been complied with even though partly acted upon.—*Chairman, South Barrackpore Municipality v. Amulya*, 34 Cal. 1030; 12 C. W. N. 50. See also *Raman Chetty v. Municipal Council of Kumbakonam*, 30 Mad. 290 (27 Bom. 618, followed); *Ramaswamy Chetty v. The Municipal Council, Tanjore*, 29 Mad. 360; *Radha Krishna v. The Municipal Board of Benares*, 27 All. 592 (28 Bom. 66, dissented from). See, however, *The Municipal Board of Najibabad v. Sheo Narain*, 29 All. 346.

**Civil Court's Jurisdiction to Set Aside or Alter Partition Effected by the Revenue Authorities when Barred.**—Partition of revenue paying estates cannot be effected in a Civil Court.—*Doorga v. Mohesh*, 15 W. R. 242; *Rutton v. Brojo*, 22 W. R. 11 and 333; *Damoodur v. Senabutti*, 8 W. R. 537; 10 C. L. R. 501; *Badri v. Bagwant*, 8 Cal. 649. See also *Dattatraya v. Mahadaji Parashram*, 16 Bom. 528.

A Civil Court has no jurisdiction to entertain a suit to set aside or alter a partition effected by the revenue authorities.—*Sarat v. Hur Gobindo*, 4 Cal. 510, see 20 Cal. 285.

The proceedings of the Revenue Court declaring the rights of the parties and prescribing the mode of effecting partition cannot be interfered with by a civil suit disputing its correctness.—*Bhola v. Ramdhin*, 7 All. 894, and *Ranjit Singh v. Illahi Baksh*, 15 All. 520. See also *Jagannath v. Tirbeni*, 31 All. 41.

If a complete private partition is once effected, no subsequent partition can take place, except under the conditions mentioned in section 7 of the Partition Act (V of 1897 B. C.). But where it is found that there had been a previous arrangement by which the co-sharers had possession of different lands but there had not been a complete partition by metes and bounds, held that there was no complete partition as contemplated by section 7 so as to bar a partition under the Act; *Tajumal Ali v. Mussad Ali*, 14 C. W. N. 632; 11 C. L. J. 291.

A Civil Court is not competent to adjudicate upon question of title affecting partition which might and ought to have been raised in the partition proceedings before the Revenue authorities.—*Nathi Mal v. Tej Singh*, 29 All. 604; 4 A. L. J. 578; and *Muhammad Sadiq v. Laute Ram*, 23 All. 291, F. B. 9 All. 429, overruled). Distinguished in *Mahadeo Prosad v. Takia Bibi*, 25 All. 19, P. C. See also *Muhammad Jan v. Sadanad Pande*, 28 All. 394; 3 A. L. J. 43 and *Khasay v. Jugla*, 28 All. 432.

A suit by a co-sharer in a joint estate for partition and possession of his proportionate share of an isolated piece of land is not maintainable in a Civil Court, with reference to sections 135 and 241, Act XIX of 1873.—*Ijrail v. Kanhai*, 10 All. 5.

A suit for partition without division of revenue, of certain lands held jointly by the parties in four different estates, is a suit for an "imperfect partition" and is barred by section 154 (e) of the Assam Land and Revenue Regulation (I of 1886).—*Abdul Khaliq v. Abdul Khaliq*, 23 Cal. 514. See also *Sarat Chandra v. Prokash Chandra*, 24 Cal. 751.

See also cases noted under section 54 and Or. XXVI, rr. 13 and 14.

Dues paid by *baggals* and shop-keepers to *Chowdhris* of bazars are in the nature of voluntary payments; a suit therefore will not lie for the recovery of such dues or for a declaration of the right to recover them; *Barsati v. Chamom*, 29 A. 683.

A suit for declaration that the plaintiffs are alone entitled to exercise *haks* known as *Rafai* and *Kadri* and to receive income or emoluments in connection with the exercise of those *haks*, is not a suit of civil nature, *Sayad Nurruddin v. Abas*, 14 Bom. L. R. 573.

A Brahmin of *Agradani* class, who is invited to the *Sradh* ceremony and acts there, does not thereby acquire a vested interest in the offerings. If the performer of the *Sradh* gives away the articles to other *Agradani Brahmins*, he has no cause of action against the latter, though he may be entitled to remuneration from the person who employed him; *Hari Charan v. Sasti Charan*, 11 C. L. J. 275.

**Suits for Secular Office.**—Where no remuneration is attached to the office of the Secretary of an Association, a suit for a declaration that the plaintiff is the honorary secretary of the association and that his dismissal from the office was not justified by the rules of the Association is not maintainable in a Civil Court; *Maharaj Narain v. Shoshi Sekhaheswar*, 37 A. 313: 13 A. L. J. 45: 29 I. C. 53.

**Suits to Establish Right to Mere Dignity or Honour are Not Suits of a Civil Nature.**—A suit for a declaration of a right to receive marks of distinction and honour or to establish right to mere dignity unconnected with any fees, profits, or emoluments is not maintainable.—*Sri Sunkar v. Bharati*, 3 M. I. A. 198: 6 W. R. (P. C.) 39, *Gurkha Association, Simla v. Mahomed Umar*, 1 Lah. L. J. 161: 51 I. C. 905; *Shankara v. Hanma*, 2 B. 470; *Gossain Dass v. Gooroo Das*, 16 W. R. 198. The suits in all the above cases were not for establishing right to an office but to vindicate an alleged honor or dignity attached to an office; but if such honours or dignities are inseparably attached to an office by way of remuneration or as part of its emoluments, a suit for such honours will lie in a Civil Court, *Runga Chariar v. Rungasami*, 32 M. 291. 5 M. L. T. 33

Where honours are not attached to any office in the temple, no suit will lie to establish the same—where the honour is a thing which is considered a part of the ritual as necessary to fit the recipient spiritually to perform the duties of his office, it may be held to be indissolubly attached to the office.—*Athan v. Elayavalli* (1913) M. W. N. 289: 13 M. L. T. 240.

A suit for a declaration of title to a *stanom* where no properties are attached to the *stanom* is a suit relating to a mere dignity and therefore not maintainable; *Mundacheri v. Mundacheri*, 10 I. C. 110: (1911), 1 M. W. N. 353.

The claim by a person that he as a *Jagadguru* is entitled to be carried in procession through a public street in a cross palanquin as a religious dignity and privilege is not a suit of a civil nature, *Andamiswami v. Todadswami*, 23 Bom. L. R. 75. 45 B. 590 60 I. C. 907; *Sri Sunkar v. Bharati*, 3 M. I. A. 198: 6 W. R. 39 P. C

A suit will not lie for a declaration that the plaintiff as the spiritual leader is entitled to receive certain honours and emoluments due to his rank from the wardens of the Pagoda on the occasion of certain annual festivals because the duty of individuals to submit to and perform certain

against the Zemindar for recognition of his transfer is not maintainable.—*Rakhal v. Umapada*, 18 C. W. N. 629.

A suit by a transferee of a permanent transferable tenure to have his name registered in the *sherista* of the zemindar in the place of that of his vendor is cognizable by the Civil Courts.—*Madhub Chunder v. Hille*, 1. B. L. R. 175; 10 W. R. 197. But the transferee of an occupancy holding transferable by custom cannot maintain a suit for registration of his name in the landlord's *sherista* by expunging that of his vendor; he can maintain a suit for declaration of his right.—*Ambika Pershad v. Chowdri Keshri Sahai*, 24 Cal. 642; *Moti Lal v. Sheikh Omar Ali*, 3 C. W. N. 19; 27 Cal. 545 and 2 C. W. N. (S. N.) 181. See also *Jagat Tara v. Daulati*, 37 Cal. 75; 13 C. W. N. 1110 and 10 C. W. N. 176; 4 C. L. J. 68; 19 Bom. 43.

**Civil Court's Jurisdiction under the Land Registration Act.**—The Civil Courts have no jurisdiction to reverse the order of Revenue Courts regarding the registration of name of any person. The Civil Courts can only declare the title of an individual or give him a decree for possession, and then the registration officers would proceed to amend their registers accordingly.—*Omrnunissa Bibee v. Dilwar Ally*, 10 Cal. 350, fol. in 26 Cal. 845. See also 9 C. L. J. 91; 11 C. W. N. 152, and *Jugut Shobhun v. Binud Chunder*, 9 Cal. 925.

A Civil Court has no jurisdiction to pass an order which would bring about a reconsideration of the order passed by the revenue authorities under the Land Registration Act (VII of 1876 B. C.) regarding the registration of the name of the plaintiff, as co-trustee with that of another.—*Chhatrapat Singh v. Maharaj Bahadur*, 7 C. L. J. 395 P. C.

**Civil and Revenue Court's Jurisdiction in Special Cases.**—The Civil Courts have jurisdiction to entertain a suit to compel the Collector to register and assess land transferred in accordance with Madras Regulation XXV of 1892.—*Ponnusamy Tevar v. Collector of Madura*, 3 Mad. 35.

Finality of the Commissioner's order under sec. 61 of the Village Chowkidar's Act (VI of 1870 B. C.), does not affect the jurisdiction of the Civil Courts to decide the question of title to the property.—*Hira Lal v. Premamoyee*, 2 C. L. J. 306. See also *Saradindu v. Benode*, 18 C. W. N. 143.

In a suit by the plaintiff to recover money from the defendant on the allegation that his property having been wrongfully attached to realise arrears of Government revenue due from the defendant, he, (the plaintiff) had, in order to save his property, paid the arrears of revenue held, that the Civil Court has jurisdiction to entertain the suit.—*Tulsa Kunwar v. Jogeshwar Prasad*, 28 All. 563; A. L. J. 372.

The Civil Courts have no jurisdiction in respect of claims against the Government on account of *inams*, that is, claims referring to total or partial exemption from the payment of Government Revenue.—*Shidmat v. Anderson*, 11 Bom. H. C. 39. See also *Irapabin v. Apashaheb*, 16 Bom. 649.

The Broach Talookdar's Relief Act, XV of 1871, does not bar the cognizance by the Civil Court of a suit to recover the amount improperly levied as rent of rent-free land and to obtain a declaration that such land

constitute a bar to a regular suit. For instance, the speedy and summary remedy given to a claimant under Or. XXI, r. 58, C. P. Code does not prevent him from instituting a regular suit for establishing his right to the property claimed under Or. XXI, r. 63. Similarly, Or. XXI, r. 95, C. P. Code though providing a summary remedy to a purchaser at an execution sale, does not debar him from bringing a regular suit against the judgment-debtor to recover possession, *Kishori v. Chandra*, 14 C. 644. It should also be remembered that the jurisdiction of a Civil Court is not excluded unless the cognizance of the entire suit as brought is barred. Where some of the claims in the suit were not cognizable by Civil Courts, the decree was restricted to the claims which were cognizable, *Antu v. Ghulam*, 6 A. 110. See also *Abidunnissa v. Jamal*, (1897) A. W. N. 205.

The general power vested in the Courts under section 9 of the C. P. Code to entertain all suits of a civil nature, excepting suits of which cognizance is barred by any enactment, does not carry with it the general power of making declarations except in so far as such power is expressly conferred by Statute; *Bai Shri Vaktulea v. Agarsingi*, 34 Bom. 676; 12 Bom. L. R. 697.

No suit against landholders of Chota Nagpur in respect of debts and liabilities to which they were subject, or with which their property was charged is maintainable; the jurisdiction of the Civil Court is barred by the Acts (VI of 1876 and V of 1884).—*Kameshar Prasad v. Bhikan Narayan*, 20 Cal. 60.

A suit by a Hindu father to recover possession of his minor son, alleged to have been illegally detained by the defendant, is barred by Act IX of 1861.—*Sham Lal v. Bindo*, 26 All. 594. But see *Krishna v. Reade*, 9 Mad. 31; *Sharifa v. Munkhan*, 25 Bom. 574.

A suit for declaration that the election of the defendant as additional member of the Supreme Council was void and for injunction restraining the defendant from exercising powers and functions as non-official member is not maintainable; *Bhupendra v. Ranjit Singh*, 41 Cal. 384; 20 Ind. Cas 676.

A suit concerning a matter, which was the subject of an application made under s. 105 of the B. T. Act, is barred by the provisions of section 109 of that Act; *Sheodhani v. Beni Pershad*, 16 C. L. J. 67.

Under s. 106 of the B. T. Act, a Civil Court is precluded from entertaining a suit in respect of any matter decided under that section; *Jogendra v. Krishna*, 35 Cal. 1018; 12 C. W. N. 1032; 8 C. L. J. 322.

"Impliedly barred."—"Impliedly barred" means barred by general principles of law to suits which re  
policy, etc., and refers  
etc. For instance, no  
suit will lie for  
for acts done in good  
faith in the discharge of his judicial functions within the limits of his jurisdiction (2 M. L. A. 203, 1 A. 280, 2 M. 306, 7 B. L. R. 440, 16 W. R. 63, 12 All. 115, 39 C. 953 P. C., 16 C. W. N. 865), similarly, no suit is maintainable against the Government for dismissal of its servant for misconduct (27 B. 189; 33 C. 669, 18 C. W. N. 106; 17 C. L. J. 75. 31 B. 86, 114; 13 C. L. J. 357; 15 C. W. N. 486; 34 C. 863. 11 C. W. N. 801). Suits that are impliedly barred by the general principles of equity and common law or on grounds of public policy, morality or decency or because they

rent, under the provisions of the N. W. P. Rent Act (XII of 1811).—*Shankar Sahai v. Din Dial*, 12 All. 409.

A Civil Court has no jurisdiction to entertain a suit, the decision of which necessarily involves the determination of the class of tenancy of one or other of the parties to it.—*Sakina Bibi v. Swarath Rai*, 15 All. 115.

No suit will lie against a landlord in a Civil Court for the wrongful dispossession of a tenant from a holding to which Act XII of 1891 applies—*Toraput Ojha v. Ram Ratan*, 15 All. 387. The principle of this decision is affirmed in *Shco Narain v. Parmeshar Rai*, 18 All. 270.

Where a dispute arises between rival claimants to a tenancy, the question of title to the tenancy is a question cognizable by a Civil Court.—*Jaggannath v. Ajodhya*, 35 All. 14: 10 A. L. J. 103.

A suit by a Zemindar to eject as trespassers persons who claimed to be mortgagors of an occupancy tenant, such tenant having died without heir before suit, is cognizable by a Civil Court.—*Mahabir Kandu v. Shco Parsad*, 16 All. 325. (15 All 115 distinguished).

A suit by a landlord to eject as a trespasser, a person who claimed to be entitled to succeed to the holding of a deceased occupancy tenant, and who obtained mutation of names in his favour, and also got possession of the holding is maintainable in a Civil Court; *Baru Mal v. Naidar*, 23 All. 360. See also *Naidar v. Baru Mal*, 24 All. 153. But see *Subarani v. Bhagwan Khan*, 19 All. 101.

A suit by a *lambardar* for arrears of land-revenue payable by the proprietors against several defendants, of whom some were co-sharers and other mortgagees in possession, is not cognizable by a Civil Court.—*Lachman Singh v. Ghashi*, 15 All. 137. (3 All. 144 referred to).

A suit for a decree for maintenance of possession as tenants at fixed rates, on the allegations that the settlement officer had entered the defendants as the tenants at fixed rates of the holding and had entered the plaintiffs simply as mortgagees, is not cognizable by the Civil Courts.—*Ajudhia Rai v. Parmeshar Rai*, 18 All. 340. Referred to in *Dukhna Kunwar v. Unkar Pande*, 19 All. 452.

After the execution of a mortgage deed, the mortgagee granted a lease of the mortgaged premises to the mortgagor, who having made a default in the payment of the rent stipulated in the lease, the mortgagee sued to recover the arrears due upon the lease. Held, that the mortgagee was entitled to maintain his claim in the Civil Court.—*Allap Ali v. Lalita Prasad*, 19 All. 406.

A Civil Court has jurisdiction to entertain a suit by a landlord against his tenants to enforce acceptance of *pattas* and the execution of *muchulkas* by them.—*Easwara Dass v. Pungavanachari*, 13 Mad. 361. See also *Ramayyar v. Vedachalla*, 14 Mad. 441; followed in *Sattappa Pillai v. Raman Chetti*, 17 Mad. 1.

A suit for ejectment and recovery of pasture rent is cognizable only by Civil Courts; *Raja of Venkatagiri v. Ayyapareddi*, 38 Mad. 733.

A suit for a declaration of the invalidity of a sale of a holding under s. 11 of the Madras Estates Land Act (I of 1908) is cognizable by a Civil Court, *Chidambaram v. Muthaimal*, 38 Mad. 1042.

See also cases noted under section 70.

**Suits Involving Political Questions.**—The Courts of British India are competent to determine the title to property belonging to a Native State and situated within their jurisdiction, although a political question is involved.—*Neel Kristo v. Beer Chandra*, 12 M. I. A. 523. But Courts should decline jurisdiction where the real purpose of the litigation is to settle the right of succession to the *Raj* and the right to property is only contingent; *Samarendra v. Birendra*, 12 C. W. N. 777.

The question to whom a *jaagir* shall be granted upon the death of its holder is one which belongs exclusively to the Government to be determined upon political considerations; and it is not within the competence of any legal tribunal to review the decision.—*Sultan v. Ajmodin*, 17 B. 431 P. C.

**Suit for Damages Against Public Officers when Not Maintainable.**—No action for damages will lie against a judicial officer for acts done in good faith in the discharge of his judicial functions within the limits of his jurisdiction.—*Calder v. Balket*, 2 M. I. A. 293; *Meghraj v. Zakir Husain*, 1 All. 280; *Parankussam v. Stuart*, 2 Mad. 396; *Collector of Hoogly v. Tarack Nath*, 7 B. L. R. 449; 16 W. R. 63; *Teyen v. Ram Lal*, 12 All. 115. See *Clarke v. Brojendra Kishore*, 39 Cal. 953 I. C.; 16 C. W. N. 865; 16 C. L. J. 231 10 A. L. J. 193; 14 Bom. L. R. 717; 22 M. L. J. 32, reversing 36 Cal. 433 13 C. W. N. 458; 9 C. L. J. 298.

An action for defamation cannot be maintained against a Judge for words used by him whilst trying a cause in Court, even though such words are alleged to be false, malicious and without reasonable cause.—*Raman Nayar v. Subramanya*, 17 Mad. 87, (10 Mad. 28, referred to). Refd. to in 31 Mad. 400.

A Judge cannot be prosecuted for using insulting and defamatory language towards a pleader in the course of the trial of a case.—*Nando Lal v. Mitter*, 26 Cal. 852; 3 C. W. N. 539. (7 Bom. 61; 2 Bom. 481, approved; 9 Mad. 439, dissented from).

A subordinate Government Officer made a report to his superior containing imputations defamatory of the plaintiff. In an action for libel against the defendant: *Held*, that the defendant was not liable, as his communication was protected by privilege.—*Narasimha v. Balwant*, 27 Bom. 585.

**Suit for Damages Against Public Officers when Maintainable.**—A suit for damages will lie against a judicial officer when he acts illegally, without due care and attention, and beyond the limits of his jurisdiction.—*Vinayak Dinakar v. Bai Itcha*, 3 Bom. H. C. 36; *Venkata Shrinivas v. Armstrong*, 3 Bom. H. C. 47; *Vithoba Nialhari v. Corgeld*, 3 Bom. H. C. 41; *Reg. v. Dalukram*, 2 Bom. H. C. 407; *Ashburner v. Keshav Valad*, 4 Bom. H. C. 150; *Ragunanda Rar v. Nathumani*, 6 Mad. H. C. 423; *Seshayiyangar v. Raghunatha*, 5 Mad. H. C. 345; *Chunder Narain v. Brijoo Bullur*, 14 B. L. R. 254; 21 W. R. 391 (affirming 21 W. R. 126); *Ammiappa v. Mahomed Mustafa*, 2 Mad. H. C. 443; *Collector of Sea Customs v. Punniar Chithabaram*, 1 Mad. 89; *Sinclair v. Broughton*, 9 Cal. 341 (P. C.); 13 C. L. R. 185; *Girijashankar v. Gopalji*, 30 Bom. 241; 7 Bom. L. R. 951; 10 M. L. J. 232.



was vitiated by a material irregularity leading to substantial injury. Meaning of the word "final" in section 19, Bengal Act I of 1835, explained.—*Ram Tarak v. Dilwar Ali*, 29 Cal. 73, F. B.: 5 C. W. N. 531. (23 Cal. 641, and 14 Cal. 1, overruled); See also *Ram Tarak v. Mosakebali*, 29 Cal. 94: 6 C. W. N. 246; *Chunder Kumar v. Secretary of State*, 27 Cal. 608; 4 C. W. N. 586; *Janki v. Ramgolam*, 28 Cal. 813: 6 C. W. N. 331; *Matangini v. Girish*, 30 Cal. 619: 7 C. W. N. 433 and 33 Cal. 451: 10 C. W. N. 347.

A suit to set aside a certificate sale, where the certificate decree was satisfied and no sum was due, is maintainable; *Nandan Misser v. Harakh Narain*, 14 C. W. N. 607: 11 C. L. J. 268. See also *Janukdhari v. Possain*, 37 Cal. 107: 13 C. W. N. 710: 11 C. L. J. 254.

A suit to set aside a certificate sale on the ground of fraud is not barred by sec. 47 of the C. P. Code; *Raghubans Sahai v. Fulkumari*, 1 C. L. J. 542; 32 Cal. 1130. See also *Srinath v. Bishan Chandra*, 2 C. L. J. 504. But see *Barhmadso Narayan v. Bibi Rasul Bandi*, 32 Cal. 691, where it has been held that sec. 47 of the C. P. Code is applicable in its entirety to proceedings in execution of a certificate and a separate suit to set aside a certificate sale is not maintainable. See also *Umed Ali v. Rajlaksami*, 10 C. W. N. 130.

**Civil Court's Jurisdiction to Set Aside Patni Sales and Sales under Rent Act.**—The heirs of *patnidar*, though unregistered, can maintain a suit to set aside *patni* sale; *Chunder Pershad v. Subhadra*, 12 Cal. 622; see *Joy Krishna v. Sarfannesa*, 15 Cal. 345. One of several co-owners of a *patni* taluk can alone maintain suit to set aside the sale; *Gaudadhar v. Abdul Aziz*, 14 C. W. N. 128. An under-tenure holder can also maintain a suit; *Annada v. Erskine*, 12 B. L. R. 372: 12 W. R. 68. See also *Brij Kumar v. Dhanugdhari*, 10 C. W. N. 976.

A *patni* sale can be set aside by the Civil Court on the ground of irregularity in publishing notice of sale; see 9 Cal. 619; 19 Cal. 703; 32 Cal. 953: 11 C. W. N. 723 and 729.

A suit to recover the deficiency for which the defaulting purchaser is made answerable under section 9 of Reg. VIII of 1819 is maintainable in Civil Court.—*Roghu Ram v. Moheah Chunder*, 7 C. W. N. 111.

No suit lies to set aside an order of a Court refusing to set aside a sale held under section 174 of the Bengal Tenancy Act (VIII of 1885).—*Kabilaso Koer v. Kagh Nath*, 18 Cal. 481.

**Jurisdiction of Civil Courts to Interfere with the Decision of Special Tribunals Created by Statute.**—Where the duty of deciding upon disputes between the subjects of the Crown is cast upon a special tribunal constituted by the legislature, the tribunal constituted must act in good faith and fairly listen to both sides before coming to a decision. The tribunal must act in the same spirit and with the same responsibility as a Court of Justice. If the tribunal comes to a conclusion after due and proper inquiry, then the decision is final and the jurisdiction of the ordinary Civil Court is barred. But if the decision is reached without any enquiry and without hearing the parties, then the jurisdiction of ordinary tribunals to protect the rights of a subject is not taken away and the decision is no bar; *Ganesh v. Secy. of State*, 43 B. 221: 21 Bom. L. R. 27: 49 I. C. 427 (28 B. 314; 15 Bom. L. R. 27 P. C.; 29 B. 480; 25 B. 312; 12 M. 105, referred to).

Suit to recovery moiety of two villages granted as *Jaghir*: Held that, as the original grant was not of the freehold or full ownership in the soil, the suit was barred by section 4 of the Pensions Act, 1871.—*Rama v. Subba*, 11 Mad. 98.

**Suits Not Barred by the Pensions Act.**—The right to hold land is a right distinct from the right to money or revenue. The right to hold land, even though it be not as proprietor of the soil, is incontestably one of which the Civil Courts can take cognizance, if not barred by statutory provision.—*Balvant v. Secy. of State*, 29 Bom. 480: 7 Bom. L. R. 497

A suit for maintenance-allowance under an agreement by which claim to pension and other properties is relinquished is not a suit relating to pension and is cognizable by Civil Courts.—*Raja Venkatanarasimha v. Raja Lakshminarasamma*, 30 Mad. 266: 17 M. L. J. 139.

Where the object of the endowment was to provide for certain religious and pious purposes, the provisions of the Pensions Act were not applicable to it. "Pensions, and grants" in that Act meant personal grants and not grants to endowments.—*Secy. of State v. Abdul Hakkim*, 2 Mad. 294. Referred to in *Kolandai Mudali v. Sankara*; 5 Mad. 302. See also *Athavulla v. Gouse*, 11 Mad. 283 and *Venkateswara Aiyar v. Secy. of State*, 31 Mad. 12. Dissented from in *Miya Valiulla v. Syed Bava Saheb*, 22 Bom. 496.

Where a suit was brought in relation to the management of *saranjam* lands, held that the suit was *prima facie* one not included in the Pensions Act (XXIII of 1871).—*Keshavrao v. Ganpatrao*, 16 Bom. 596. See however, *Ram Rao v. Secy. of State*, 34 Bom. 232: 11 Bom. L. R. 1313.

A suit by the assignees from Government of land-revenue, whose rights were admitted by Government, to recover arrears from persons admittedly liable to pay revenue to somebody, but who disputed plaintiff's right thereto, is not barred by section 4 of the Pensions Act, 1871; *Nagar Mal v. Ali Ahmad*, 10 All. 396.

In a suit by an *inamdar* of a village against a *khot* to recover rent in kind, according to the market-rate at the time of payment. Held that the suit was not barred under section 4 of the Pensions Act (XXIII of 1871) *Gangadhar Hari v. Morbhat Purohit*, 18 Bom. 525.

A suit for declaration that the plaintiffs are *vatandars* of a share of a moiety of a *Kulkarni vatan* consisting exclusively of a cash allowance from Government, is not a suit relating to "money grant" within the contemplation of section 4 of the Pensions Act, 1871.—*Gorind v. Bapuji*, 18 Bom. 516. But see, *Dararka Nath v. Mahadev*, 14 Bom. L. R. 938: 37 B. 91.

**Suits of which Cognizance is Barred by Criminal Procedure Code.**—A suit for the recovery from Government of the proceeds of the sale of property attached and sold under ss. 523 and 524 of the Crim. Pro. Code is maintainable in a Civil Court; *Queen-Empress v. Tribhovan*, 9 B. 131; *Wasappa v. Secy. of State*, 40 B. 200: 31 I. O. 499. So also a suit to act beyond his jurisdiction, may be remedied by a Civil Suit.—*Mutty Ram* 27 A 572.

The interference of a Magistrate with private right of ways, being act beyond his jurisdiction, may be remedied by a Civil Suit.—*Mutty R v. Mohi Lal*, 6 Cal. 291, and 15 Cal. 460, F. B.



Road cess is not an *abwab* within the meaning of section 74 of the B. T. Act.—*Ashutosh v. Amir Mollah*, 8 C. L. J. 897. See 12 C. W. N. 154: 8 C. L. J. 525.

A condition in a lease by which the tenant agreed to pay to the landlord collection-charges can be enforced if the condition is definite and certain in its nature. *Mahomed Fayez v. Jamoo Gaze*, 8 Cal. 730. Referred to in *Radha Charan v. Golap Chandra*, 31 Cal. 834: 8 C. W. N. 529.

A suit by one of the *Mahars* of a village against his fellow *Mahars* to establish his right to share in the *Mahar's* perquisites, such as the carcasses of dead animals, etc., etc., will lie.—*Yellapa Valad v. Mankia*, 8 Bom. H. C. R. 27.

**Suits for Removal of Obstruction to Public Way when Maintainable.**—An owner of land has a right to bring a suit against any one of the public who formally claims to use such lands as a public road and who thereby endangers the title of the owner. Such a suit is not barred by an order of a Criminal Court under section 137, (Act X of 1882); *Chuni Lal v. Ram Kishen*, 15 Cal. 460, F. B. (14 Cal. 60, overruled). See also *Kali Charan v. Ramkumar*, 17 C. W. N. 73, and *Secretary of State v. Jethabhai Kalidas*, 17 Bom. 293.

Civil Courts have no jurisdiction to try the question of opening and closing a public road or to try a suit for declaration of right of way for obstructing a public road, unless special damage is caused to plaintiff. Where a special damage is caused, an action will lie. See *Raj Narain v. Ekadasi Bag*, 27 Cal. 793. See also 3 B. L. R. 351; 12 W. R. 275; 3 B. L. R. 295; 12 W. R. 160; 4 B. L. R. Ap 73; 7 B. L. R. 184; 14 W. R. 173; 18 W. R. 58; 22 W. R. 463; *Karim Buksh v. Kudha*, 1 All. 249; *Raj Koomar v. Sahebzada*, 8 Cal. 20 F. B. Mere inconvenience or a remote danger will not make such an action maintainable.—*Mahomed Alam v. Dildar Khan*, 5 C. W. N. 285 (*Winterbottom v. Lord Derby*, L. R. 2 Ex-816, 1867, followed). In order to maintain an action for obstruction of a highway, the plaintiff must show a particular damage suffered by himself over and above that suffered by the public at large.—*Abzal Miah v. Nasir Mahomed*, 22 Cal. 551. See also *Rama Chandra v. Joti*, 33 All. 287; A. J. J. 19 and *Siddeswara v. Krishna*, 14 Mad. 177. See also *Fazul Huq v. Maha Chand*, 1 All. 557; and *Ramphal v. Raghu Nandan*, 10 All. 498.

Where a *bona fide* question as to the way being public is raised, there is no jurisdiction of the Criminal Court to make an order under section 133 of Act X of 1882, and the question should be left for determination by the Civil Court; *Queen-Empress v. Bissesar Lal*, 17 Cal. 592.

**Suits to Establish a Right to Hold or Continue Market.**—There is no legal objection to the holding by any person of a "hat," or market, wherever he may please, provided that he does so on his own land and in such a way as not to be a nuisance to neighbouring landholders.—*Sukdeo Prasad v. Nihal Chand*, 29 All. 740: 4 A. L. J. 729

A suit to establish right to continue a market and to hold it on certain fixed days, by cancelment of Magistrate's order directing that it should not be held on those days, is maintainable.—*Gopi Mohan v. Taramoni*, 5 Cal. 7 (F. B.); 4 C. L. R. 309. Ref. to in 10 All. 118, and in 30 Cal. 155.

*Meram v. Ratnavelu*, 25 M. L. J. 1; 37 Mad. 181 (37 Cal. 358 and 38 Cal. 880 followed).

In a suit for malicious prosecution, the plaintiff must prove, that he was innocent of the charge; that the defendant acted without reasonable and probable cause in instituting the prosecution, and that he was actuated by feelings of malice.—*Pestonji Mody v. The Queen Insurance Co.*, 25 Bom. 332 P. C.: 4 C. W. N. 781 P. C. Followed in *Harish Chunder v. Nishikanta*, 28 Cal. 591: 6 C. W. N. 159; and in *Ramayya v. Sivayya*, 24 Mad. 549. See also *Nalliappa v. Kailappa*, 24 Mad. 59; *Madhu Lal v. Sahi Pande*, 27 Cal. 532 and *Syama Charan v. Jhatoo Haldar*, 6 C. W. N. 298; *Shikh Muchi v. Horsmul*, 17 C. W. N. 434; and *Paidinadiar v. Krishnasamy*, 36 Mad. 375: 24 M. L. J. 515.

To maintain an action for damages for a malicious prosecution, it must be shown that there was an absence of reasonable and probable cause, and that there was malice or some indirect and illegitimate motive for the prosecution.—*Hall v. Venkata Krishna*, 13 Mad. 394. See also *Shama Bibi v. Chairman of Baranagore Municipality*, 37 Cal. 358; *Raghubendra v. Kashinath Bhat*, 19 Bom. 717; *Rai Jung Bahadur v. Rai Gudor Shahoy*, 1 C. W. N. 537: and *Jadubar Singh v. Seo Saran Singh*, 21 All. 26.

Malice cannot be inferred from the mere fact that prosecution has failed and the accused has been acquitted. The burden of proving malice and the absence of reasonable cause lies on the plaintiff; *Coreea v. Peiris*, 14 C. W. N. 86 P. C.

Mere absence of reasonable and probable cause does not of itself justify the conclusion as a matter of law that an act is malicious.—*Bhim Sen v. Sitaram*, 24 All. 363. Want of reasonable and probable cause is some evidence of malice —*Srinath Shaha v. Ralli*, 10 C. W. N. 253.

A suit will not lie to recover as damages, the expenses incurred by the plaintiff in prosecuting the defendant in a Criminal Court.—*Fazal Imam v. Fazal Rasul*, 12 All. 166. Followed in *Churamoni Dasi v. Baidyanath*, 32 Cal. 429. Nor will a suit lie to recover costs incurred in defending a criminal prosecution. The only way of recovering such costs is by a suit for damages for malicious prosecution.—*Mahomedali v. Bayama*, 14 Bom. 100. See also *Rai Jung Bahadur v. Rai Gudor Shahoy*, 1 C. W. N. 537; *Bannomali Nundi v. Hurry Das*, 8 Cal. 710.

A person is responsible not merely for starting a prosecution but also for continuing the same and he is also responsible whether such prosecution was ordered by the Court or was initiated by the party himself.—*Musa Yakub v. Monilal*, 29 Bom. 363: 7 Bom. L. R. 20.

A suit for damages on account of torts is maintainable in Civil Courts without instituting criminal proceedings in the first instance.—*Shama Churn v. Bhola Nath*, 6 W. R. Civ. Ref. 9; *Sree Nath Mukerjee v. Koul Kurmoker*, 16 W. R. 83; *Choitunno Pramanik v. Zumeeroodee*, 18 W. R. 27; *Abdul Kawder v. Muhammad Mirza*, 4 Mad. 410.

Commencement of the prosecution, though *bona fide*, may, nevertheless, become malicious, if the prosecutor having acquired knowledge of the innocence of the accused perseveres *malo animo* in the prosecution with the intention of procuring *per nefas* the conviction of the accused.—*Town Municipality of Jambusar v. Girjashanker*, 30 Bom. 87: 7 Bom. L. R. 655.

**Suit for Invasion of Right of Privacy is Generally Barred.**—The invasion of privacy by opening windows is not wrong for which an action will lie.—*Sayyad Azuf v. Ameerunbibbi*, 18 Mad. 169; 5 M. L. J. 26.; (8 Mad. H. C. 141, 5 B. L. R. 676; 14 W. R. 103; 9 Bom. H. C. 266, followed; 5 Bom. H. C. 42; 6 Bom. H. C. 143; 10 All. 358, and 16 All. 69, distinguished.)—See also *Ram Lal v. Mahesh*, 5 B. L. R. 677, note; *Kalu Persad v. Ram Pershad*, 18 W. R. 14; *Golam Ali v. Mohamed Zahur*, 6 B. L. R. Ap. 76; *Gibbon v. Abdur Rahman*, 3 B. L. R. 411; *Joogul v. Jasoda Bibi*, 3 N. W. 311; *Keshav v. Ganpat*, 8 Bom. H. C. 87.

In a suit for closing the window on the wall of the defendant and for injunction restraining him from opening any window in future on the ground of the invasion of the plaintiff's privacy. *Held*, that the fact that the defendant's wall had been standing there over 50 years, without any window, was not sufficient to give the plaintiff a prescriptive right to prevent the defendant from opening a window in that wall.—*Sri Narain v. Jodoo Nath*, 5 C. W. N. 147.

Where the defendant opened certain apertures towards the plaintiff's house, which was already overlooked by the defendant's house in several places, *held*, that there was a substantial and material invasion of the right of privacy.—*Abdul Rahman v. Bhagwan*, 4 A. L. J. 445; 19 All. 582.

No action will lie for the removal of erections in front of a shop merely on the ground that such erections obstruct the view which passers-by formerly had of the shop.—*Gopinath v. Muno*, 29 All. 22; 3 A. L. J. 637.

**Suits Against Municipal Corporations when Maintainable.**—A suit against a municipality to set aside an assessment on the ground that the person assessed does not occupy a holding is maintainable.—*Dwarka Nath v. Addya Sundari*, 21 Cal. 319.

An assessment of tax made in consideration of the assessee's "circumstances and property" (altogether or partly) outside the local limits of the municipality is *ultra vires* and illegal; and the Civil Court has jurisdiction to set aside such an assessment.—*Kameshwar v. The Chairman of the Bhalma Municipality*, 27 Cal. 849; and *Debnarain v. Baraipur Municipality*, 17 C. W. N. 1230; 39 Cal. 141; and 41 Cal. 168, where it has been held that the expression "circumstances and property" signify the means and property of the person within the municipality. See also *Naradip Chandra v. Purnananda*, 3 C. W. N. 73, where it has been held that there is nothing in the Municipal Act to prevent a rate-payer from seeking in a Civil Court a decision that the assessment made by a municipality is *ultra vires* and not binding upon him. An assessment is to be made according to net income and not according to gross income.—27 Mad. 547.

A Civil Court has jurisdiction to determine the question whether the imposition of a Tax (profession tax under ss. 82 & 242 of the Punj. Municipal Act, 1917) is illegal and *ultra vires* and to give relief if a tax has been levied from a person who is not liable to pay the same. The power conferred by a Special Act on a local authority to impose a particular tax for a particular purpose in a special manner does not oust the jurisdiction of the Civil Courts to give relief against an illegality committed by that body under cover of statutory powers; *The Committee of Notified Area, Una v. Chatar Lehari Narain*, 74 P. L. R. 1918; 74 P. W. R. 1918; 44 I. C. 910.

**Suits Based upon Illegal or Unlawful Contracts.**—An agreement of which the consideration is unlawful, is void, and a suit is not maintainable upon such an agreement.—*Thithi Pakurudasu v. Bhumadu*, 28 Mad. 430. See also *Behari Lall v. Jogodish Chunder*, 31 Cal. 798, *Gagan Chunder v. Janakee*, 20 W. R. 235.

A suit to enforce a contract to pay money upon the consideration that the plaintiff would give evidence in a civil suit on behalf of the defendant is not maintainable.—*Sashannath Chetti v. Ramasami Chetti*, 4 Mad. H. C. 7.

The plaintiff's husband being in jail, she paid the defendants Rs. 50 in consideration of their obtaining her husband's release. Held, that a suit for breach of the contract to recover the money so paid is not maintainable.—*Protima Aurat v. Dukhia Sircar*, 9 B. L. R. (Ap.) 38; 18 W. R. 450.

A suit is not maintainable upon a contract entered into while the defendant was under imprisonment, and the prisoner entered into the contract with the view of obtaining release.—*Mouny Shoag v. Ko Byaw*, 1 Cal. 330, P. C.

In places where gambling is not prohibited by law, a suit to recover money lent for such gambling is maintainable.—*Subbaraya v. Devandra*, 7 Mad. 301.

An agreement to pay a tax prohibited by an Act of the Legislature is void, and cannot be enforced.—*Goswami Shri Purushotamji v. Robb*, 8 Bom. 398.

A mortgage of non-transferable occupancy holding is illegal and the contract is void.—*Ram Sarup v. Kishan Lal*, 29 All. 327; 4 A. L. J. 306.

The rule that person in *pari delicto* cannot recover, is applicable not only where the unlawful agreement has been fully carried out but also where there has been part performance of a substantial character of such agreement.—*Muthuraman Chetty v. Krishna Pillai*, 29 Mad. 72; 15 M. L. J. 478. See also *Bindeshari v. Lekhraj*, 20 C. W. N. 607.

Where a contract is based upon mere breach of duty which does not amount to criminal offence, such a contract is not void and is enforceable, *Ramkrishna v. Narain*, 40 Bom. 126.

**Suits Based upon Immoral Contracts.**—A bequest by Hindu testator, made conditional on the continuance of immoral relations between himself and the legatee, is void.—*Tayaramma v. Sitharamasami*, 23 Mad. 613. See also *Ningareddi v. Lakhshmau*, 26 Bom. 163.

Where the transaction amounted to a voluntary gift, it cannot be set aside; but where the transaction, though completed, was intended to be for consideration, it can be impeached if the consideration is immoral, and it makes no difference whether the transaction is executed or executory.—*Thasi Muthukannu v. Shunmugarvelu Pillai*, 28 Mad. 413; 15 M. L. J. 286.

Co-habitation past or future, if adulterous, is not merely an immoral but an unlawful consideration.—*Alice Mary Hill v. William Clarke*, 27 All. 266.

A suit to recover rent for lodgings knowingly let to a prostitute who carries her vocation there is not maintainable.—*Gowri Nath Mukerji v.*

**Suits Against Municipal Corporations when Barred.**—It is only when the Municipal Committee acts *bona fide* reasonably, and in conformity with and strictly within the powers conferred by the law that it can escape the exercise of the restraining powers of the Civil Courts; and that if its requisition go beyond the powers conferred upon it then the Civil Courts have jurisdiction to restrain it from enforcing them. The Courts have no jurisdiction to interfere with the mode in which the powers of Municipal bodies are exercised but they are competent to restrain such bodies if they act *ultra vires*; *Chairman of Giridih Municipality v. Suresh*, 35 C. 859: 12 C. W. N. 709; *Lahore Municipality v. Mt. Alla Rakhi*, 100 I. C. 1010: A. I. R. 1927 Lah. 358.

A suit to declare that the assessment of Municipal tax is erroneous, as being based on wrong valuation, is barred by section 116 of the Bengal Municipal Act; *Chairman of Chapra Municipality v. Basudeo Narain*, 37 Cal. 374: 14 C. W. N. 437: 11 C. L. J. 400. See also *Manessur v. Chapra Municipality*, 1 C. 409.

A suit does not lie against the corporation for an injunction restraining the same from causing portions of plaintiff's buildings to be demolished which had been erected with sanction; *Bholaram v. Corporation of Calcutta*, 36 Cal. 671; 13 C. W. N. 740.

A suit to try question of liability to pay municipal tax is not maintainable.—*Kamayya v. Leman*, 2 Mad. 37. See however, *Municipal Council of Tuticorin v. South India Ry. Co.*, 13 Mad. 78; *Chairman of Giridhi Municipality v. Suresh*, 12 C. W. N. 709; 7 C. L. J. 631: 35 Cal. 859.

So long as the action of the Municipal Corporations is within their jurisdiction and is in conformity with the provisions of the law, the Civil Courts cannot challenge their action. The Civil Courts have jurisdiction only to try the question whether the Municipality has been acting within its statutory power or whether its acts are *ultra vires*.—*Chairman of Howrah Municipality v. Rameshwar Malia*, 3 C. W. N. 508: 26 Cal. 811 and 12 C. W. N. 709. 7 C. L. J. 631: 35 Cal. 859. See also *Brindaban Chunder v. Municipal Commissioners of Serampore*, 19 W. R. 309.

It is entirely within the discretion of the Municipality to grant or refuse a license for a market, and the Courts have no jurisdiction to control such power, however arbitrarily exercised.—*Queen-Empress v. Mukunda*, 20 Cal. 654. But see *Strachey v. The Municipal Board of Cawnpore*, 21 All. 848.

In the absence of proof of *mala fides*, perversity or manifest error, a Civil Court has no power to revise the valuation of houses made by a Municipality for the purpose of imposing a house-tax.—*Morar v. Borsad Town Municipality*, 24 Bom. 607. See also *Kasandas v. Anklesvar Municipality*, 26 Bom. 291.

A Municipality has discretion to issue such orders as it thinks proper with reference to a proposed building. Civil Courts cannot interfere with that discretion, unless exercised in a capricious, wanton, and oppressive manner.—*Nahar Palab v. Municipality of Dhandhuka*, 12 Bom. 490.

A suit for a declaration of right to be entered in the list of candidates for appointment as a member of a Municipal Board, is not maintainable.—*Abdur Rahim v. The Municipal Board of Kail*, 22 All. 143.



affirmatively proved that there is any negligence, omission, or breach of duty on the part of the company, or their servants.—*The E. I. Railway Co. v. Kalidas Mukerji*, 28 Cal. 401, P. C.; 5 C. W. N. 449, P. C. (26 Cal. 465; 3 C. W. N. 781, reversed).

A suit for damages for injuries sustained for negligence of Railway Co. is maintainable.—*Bromley v. G. I. P. Railway Co.*, 24 Bom. 1; *Kessawji Issen v. The G. I. P. Railway Co.*, 11 C. W. N. 721, P. C.; 6 C. L. J. 5: 31 Bom. 381; 17 M. L. J. 347; 4 A. L. J. 461. So also for negligence of gas company; *Dominion Natural Gas Co. v. Collins*, 14 C. W. N. 159 P. C.

Suit for damages is not maintainable against a person who kills vicious animal in self-defence.—*Turner v. Jagmohan Singh*, 27 All. 531; 2 A. L. J. 297.

A suit for damages for dog biting is maintainable against the owner of the animal, if the defendant or his servant was aware that the dog was to bite mankind without provocation; *Prakash v. Harvey*, 36 Cal. 1021; 13 C. W. N. 1123. See also 10 C. L. J. 53-n.

As to the Applicability of the Principle of Contributory Negligence.—See 35 Bom. 427; 35 Bom. 478; 37 Bom. 575, 18 C. W. N. 325; 41 Cal. 308; 12 Bom. L. R. 73 and the article in 7 C. L. J. 51-n to 72-n.

Suits upon Decrees and Judgments.—The principle on which an action is allowed to be maintained on a judgment is that when a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum on which an action of debt to enforce the judgment may be maintained. This principle is subject to the qualification that an action is permissible only where the judgment cannot be enforced in some other way: *Kali Charan v. Sukhada*, 22 C. L. J. 272; 20 C. W. N. 58.

A suit will not lie upon a decree the execution of which is barred by the provisions of the Limitation Act.—*Gopi Mohan v. Tincouri*, 1 C. L. R. 254; *Nubo Doorga v. Seetamonee*, 23 W. R. 407; *Hossein Buksh v. Masund Hossein*, 18 W. R. 260; *Nursing Dass v. Kumrooddeen*, 20 W. R. 412; *Fakirapa v. Pundurangapa*, 6 Bom. 7 and *Oman Sheik v. Halakuri Sheik*, 33 Cal. 679.

A suit was held to lie for the amount of an unsatisfied claim adjudged by a decree when the record was lost or destroyed during the Mutiny.—*Emamun v. Hurdyal Singh*, W. R. (1864), 301; Contra—*Nasur Banoo v. Hossein Ali*, W. R. (1864) 378; *Rajgir v. Iswardhari*, 11 C. L. J. 243.

There is nothing in the C. P. Code which prevents a suit from being instituted on a decree of the High Court.—*Attermoney v. Hurry Dass*, 7 Cal. 74; 9 C. L. R. 357. An order of the High Court in its insolvency jurisdiction is judgment and a suit based upon such order is maintainable.—*Annoda Prasad v. Nabo Kissore*, 9 C. W. N. 952; 33 Cal. 560.

No suit will lie in the High Court on a decree of the Small Cause Court.—*Golam Arab v. Currembux*, 5 Cal. 294. (4 C. L. R. 477; 2 Cal. 434, dissented from). But see 6 Bom. 292, and *Fakirapa v. Pandurangapa*, 6 Bom. 7.

A suit is not maintainable on a decree, when the mere passing of the decree does not give rise to a cause of action distinct from the original obligation; *Ramasami v. Veerappa*, 33 Mad. 423.

**Civil Court's Jurisdiction to set aside or alter Partition made by Revenue Authorities when Not Barred.**—If in the course of partition proceedings under Act VIII of 1876 (B. C.), a dispute arises as to which of the proprietors is entitled to certain specific lands, a civil suit lies to determine the question.—*Raghunath Pershad v. Khajeh Mohamed*, 2 C. L. J. 351.

A Civil Court has jurisdiction to entertain a suit for partition of a revenue-paying estate, when no separate allotment of revenue is asked for. But it cannot partition the estate into several revenue-paying estates.—*Jogodishury v. Kailash*, 24 Cal. 725, (F. B.); 1 C. W. N. 374, (16 Cal. 203, approved; 23 Cal. 679, and 8 C. L. R. 367, overruled). See also *Chinnaseetayya v. Krishnavanamma*, 19 Mad. 435; *Zahrun v. Gouri Sunkar*, 15 Cal. 198. Section 149 of the Estates Partition Act does not oust the jurisdiction of the Civil Court in matters which involve a question of title; *Janaki Nath v. Kali Narain*, 37 Cal. 662; 15 C. W. N. 45, and *Ananda v. Daije*, 36 Cal. 726; 10 C. L. J. 189.

A suit by an allottee under a private partition to stay subsequent proceedings under the batwara law, to have his possession of the lands allotted confirmed and to declare that those lands belonged to his divided share, is maintainable.—*Jajinath v. Lall Bahadur*, 8 Cal. 126; 10 C. L. R. 146.

A suit for partition of lands excluded by the Collector at the time of partition is maintainable, where it is subsequently found that the lands so excluded really belonged to the mehal.—*Krishno Kumar v. Bhim Lal*, 4 C. L. R. 38.

A suit by a co-sharer for partition of a piece of land, or of a mouzah forming part of a revenue-paying estate in which he does not seek to have his joint liability for the whole of the Government revenue annulled, is maintainable.—*Chunder Nath v. Hur Narain*, 7 Cal. 153; approved in *Secretary of State v. Nundan Lal*, 10 Cal. 435. See also *Ajoodhya Pershad v. Collector of Durbhanga*, 9 Cal. 419; 11 C. L. R. 550.

A suit to stay partition, directed by the Collector, on the ground that a private partition has already been come to, is maintainable, Section 26 of the Act does not bar such an action.—*Kalup Nath v. Lala Ramdein*, 16 Cal. 117.

A suit to set aside the decision of revenue-authorities under Act VIII of 1876 B. C. is maintainable if brought within one year from the date of the order.—*Parbati v. Raj Mohun*, 29 Cal. 367; 6 C. W. N. 92.

See also cases noted under s. 54 and Or. XXVI, rr. 13 and 14.

**Suit when Barred by a Decision under the Survey Act.**—A decision under the Survey Act (V of 1875 B. C.), relating to a boundary dispute is conclusive as to possession, but would not bar a suit based on title.—*Kasturi Singh v. Raj Kumar*, 8 C. W. N. 876. See also *Bissessuri v. Ram Purtab*, 14 C. W. N. 366. But where Survey proceedings have been taken for the purpose of settling the boundaries of private property, and not for some public purpose, the party aggrieved by the order is not debarred from bringing a civil suit to have the boundaries ascertained; *Hurri Prasad v. Jamuna Prasad*, 6 Cal. 453.

**Suit for Recognition of Transfer of a Portion of Permanent Tenure or Occupancy Holding.**—A suit by a transferee of a portion of putni taluk

A suit for a declaration that a decree of a Court was passed fraudulently, the Judge being bribed by the defendant, is not maintainable.—*Kunhamed v. Kutti*, 14 Mad. 167. Fol. in 8 C. L. J. 485 (29 All. 418 explained) Ref. to in 4 M. L. J. 140: Dist. in 25 Cal. 49.

A suit will lie to set aside a judgment on the ground that it was obtained by fraud committed by the defendant upon the Court by committing deliberate perjury and by suppressing evidence.—*Venkatappa Naick v. Subba Naick*, 29 Mad. 179; 16 M. L. J. 59. See *Baishnab Charan v. Basanta*, 13 C. W. N. 300; *Kedar v. Hemanta Kumari*, 18 C. W. N. 447. See also 38 Cal. 936; 15 C. W. N. 1010; *Munsi v. Surandra*, 1 C. W. N. 1002. See however, *Janki Kaur v. Lachmi Narain*, 37 All. 53 (29 Mad. 179, not followed).

A suit will lie to set aside an order under proviso to r. 52, Or. XXII determining any question of title or priority as between the decree-holder and any other persons in respect of money in deposit in a Court of Justice.—*Tikum Singh v. Sheo Ram Singh*, 19 Cal. 286.

The question as to when a suit to set aside a decree on the ground of fraud is maintainable and when not, has been fully discussed; and the Indian and English cases on the subject have been reviewed, explained and discussed, *Chirenyya v. Ramauna*, 38 Mad. 203; 23 M. L. J. 282. This is a very important case and every reader should carefully read the case. See also, *Rajwant Prasad v. Mahant Ram Ratan*, 20 C. W. N. 85 P. C.: 37 All. 405. P. C., 29 M. L. J. 165; 17 Bom. L. R. 754; 18 A. L. J. 937; 23 C. L. J. 55.

**Suit to Recover Barristers' and Doctors' Fees.**—A barrister enrolled as an advocate of the High Court is not competent to enter into a contract of hiring as an advocate and cannot maintain a suit for the recovery of his fees.—*Smith v. Guneshee*, 3 N. W. P. H. C. R. 83; *Gray v. Lachmandas*, 51 P. R. 185; *Alston v. Pitambar Das*, 25 A. 509; nor is he liable to be sued for recovery of a fee paid for work which has not been done.—*Alston v. Pitambar*, 25 A. 509; *Gangaram v. Durdas*, 61 P. R. 1907; *Fhazan Chand v. Gobind Singh*, 160 P. R. 1888; *Thakardas v. Buchay*, 49 P. R. 1906 F. B.

**Suit to Recover Subscription Promised.**—A suit will lie to recover subscription promised.—*Kedar Nath v. Gorie Mahomed*, 14 Cal. 64. See also *In the matter of Kedar Nath Mitter v. Alisar Rohman*, 10 C. L. J. 197.

**Suit for Brokerage.**—A suit by a broker to recover his brokerage at the rate agreed upon, is maintainable, where he performed his part of the contract, but the transaction fell through on account of the defendant's inability to satisfy the intending lender that his title to the property which he intended to mortgage was free from defect.—*Elias v. Govind Chunder*, 30 Cal. 202; 7 C. W. N. 297. Ref. to in 8 M. L. J. 40. See, *Martyrose v. Courjon*, 15 C. L. J. 312 and *Kishen Prasad v. Purnendu Narain*, 15 C. L. J. 40; 16 C. W. N. 753.

**Separate Suits for Costs, if Maintainable.**—See cases noted under s. 85.

**Suit to Enforce a Declaratory Decree for Maintenance.**—A suit to enforce a declaratory decree, which directs that a Hindu widow should receive future maintenance annually at a certain rate, is not maintainable.—

is not subject to the payment of rent.—*Asmal Saleman v. Collector of Broach*, 5 Bom. 135.

Although Civil Courts have jurisdiction that the villagers of a specified village are entitled to rights of a free pasturage over Government waste land within their village still they cannot enjoin the Collector to pursue any particular course in connection with them; *Trimbak Gopal v. Secy. of State*, 21 Bom. 684.

A suit by a zemindar for declaration that certain land was his *sir*, and that defendants were in possession thereof, as his lessees, was held cognizable in the Civil Courts.—*Kauleshar v. Girdhari*, 7 All. 338.

**Suit for Correction of Entry in the Record of Rights.**—Failure to institute a suit under s. 106 of the B. T. Act for correction of entry in a record of rights, does not debar a person from bringing a regular suit to establish his rights; *Gulab Misser v. Kumar Kalanand*, 14 C. W. N. 884 (28 Cal. 28 approved, 35 Cal. 1013 dissented from).

A suit for alteration or correction of entries in the record of rights is not maintainable, 35 Cal. 1013; 12 C. W. N. 1032; 8 C. L. J. 322; *see also Tokhi Sahu v. Tosi Munda*, 13 C. W. N. 111; 9 C. L. J. 83. But *see Dibakar v. Chatto*, 14 C. W. N. 686.

**Civil and Revenue Court's Jurisdiction under Rent Acts.**—A suit by a zemindar against a tenant for removal of trees planted by the tenant on his agricultural holding, and for a mandatory injunction directing the defendant to remove the trees and to restore the land to its original condition is not cognizable in a Civil Court.—*Kanhaiya Lal v. Hariyan*, 23 All. 386, F. B. (8 All. 85; 6 All. 68; 8 All. 446; and 9 All. 35, overruled).

A suit for the recovery of certain sums of money as the plaintiffs' share of rent, alleged by them to have been wrongfully received by the defendants (their co-sharers), and in which the plaintiffs' right to receive any portion of the rent claimed is denied by the defendants, is cognizable by the Civil Courts.—*Mahadeo Singh v. Bechu Singh*, 11 All. 224.

A suit by the lessee of an ejected occupancy tenant against the tenant of the Zemindar for restoration of possession is not cognizable by a Civil Court.—*Ram Lal v. Chuni Lal*, 27 All. 372; 2 A. L. J. 69.

A suit by a landholder for a declaration that a tenant is not a tenant at fixed rates, or an occupancy-tenant, but a tenant-at-will, is not cognizable in the Civil Courts.—*Maharaja of Benares v. Angan*, 7 All. 112. A suit for a declaration that a certain tenant is a tenant-at-will, and is liable to have his rent enhanced at the will of the plaintiffs, is cognizable in the Civil Courts.—*Anfu v. Ghulam Muhammed*, 6 All. 110.

A suit by an usufructuary mortgagee of an occupancy holding for possession of the property mortgaged to him, is cognizable by the Civil Courts.—*Bindeshri Rai v. Sadho Charan*, 26 All. 519. A suit by the zemindar to elect the mortgagee of an occupancy holding or his representatives in possession is cognizable by a Civil Court.—*Madho Lal v. Sheo Prasad*, 12 All. 419. *See also Sri Kishen v. Ishri*, 14 All. 223.

A Civil Court has jurisdiction to entertain a suit for declaration of right to, and maintenance of, possession of certain trees with fruits thereon, said to have been wrongfully distrained and sold by the zemindar for arrears of

version to Mahomedanism, and subsequent re-marriage, forfeit her right to her late Hindu husband's estate; *Abdul Aziz v. Nirma*, 35 All. 466: 11 A. L. J. 678. Renunciation of religion or exclusion from caste, is no ground of forfeiture of rights in the property; *Kunni Lal v. Gobind Krishna*, 33 All. 356 P. C. 15 C. W. N. 545: 13 C. L. J. 575: 13 Bom. L. R. 427: 21 M. L. J. 645.

**Forfeiture of Hindu Widow's Estate after Re-marriage.**—A Hindu widow, after re-marriage with a person not a Hindu, forfeits her interest in her first husband's estate, and is not entitled to maintain a suit to recover possession of the property left by her first husband.—*Matangini v. Ram Rutton*, 19 Cal. 289, F. B. (8 W. R. 206, overruled). Referred to in 22 Bom. 321 (F. B.) and in 22 Cal. 589. See also *Sundari Letani v. Pitambari Letani*, 2 C. L. J. 97; 9 C. W. N. 1003; *Gouri Churn v. Sita*, 14 C. W. N. 346. See however, *Chamar Haru v. Kashi*, 26 Bom. 389 and 29 Bom. 91. Right of inheritance of a Hindu widow is not affected by her re-marriage.—*Lakshamana v. Siva*, 28 Mad. 425: 15 M. L. J. 245. (26 Bom. 389, followed); *Gajadhar v. Kaunsilla*, 31 All. 161: 6 A. L. J. 107.

**As to Whether a Hindu Widow's Maintenance is a Charge upon her husband's property or not,** see the cases noted under order XXXIV, r. 15.

**As to the mode of fixing maintenance,** see 13 Cal. 339; 12 All. 558; 22 Cal. 410; 25 All. 266: and *Karunamoyee v. Administrator-General of Bengal*, 9 C. W. N. 651.

**As to right to compensation by a purchaser from a Hindu widow when her alienation is set aside;** see 82 Mad. 530; 12 C. L. J. 391; 13 C. W. N. 357; 40 Cal. 555, P. C.

**As to whether a reversioner can maintain a suit to set aside alienation without offering to reimburse money spent on legal necessity;** see *Dinanath v. Hrishikesh*, 18 C. W. N. 1303: 20 C. L. J. 285; *Paparayudu v. Rattamma*, 37 Mad. 275, where it has been held that the suit is maintainable.

**Suit by Remote Reversioners during the Life-time of the next Reversioner, when Maintainable.**—See the cases noted under Or. I, r. 1.

**Debtor and Creditor.**—A suit by a debtor to compel his creditor to accept money due from him will not lie.—*Kristya v. Kasipati*, 9 Mad. 55.

Every loan implies a promise to repay, and an unqualified admission of indebtedness is equivalent to an express covenant and creates a personal obligation. A creditor is not limited to a mode of payment prescribed; he may enforce the obligation by other means, if that mode is found insufficient; *Maharaja Ram Narain v. Odindra Nath*, 15 C. L. J. 17; 17 C. W. N. 369 (4 C. L. J. 510 Ref.).

**Suits to Enforce Contract to Refer to Arbitration and for Damages Against Arbitrators.**—No suit to enforce specific performance of contract to refer to arbitration is maintainable.—Section 21 of the Specific Relief Act (I of 1877) is a bar to such a suit.—*Coomud Chunder v. Chunder Kunt*, 25 Cal. 498 (1 Cal. 42 referred to). Referred to in 11 Bom. 214. See also, *Crip v. Adford*, 23 Cal. 956.

A suit for damages is not maintainable against arbitrators for mere negligence in giving an award unless there be fraud and collusion.—*Sarappa v. Deychand Volchand*, 26 Bom. 132.

A suit by reversionary heir on death of Hindu widow in a Civil Court to recover a holding is barred by s. 167 of the Agra Tenancy Act, II of (1901), *Badri v. Bindsra*, 36 All. 55; see also *Ramachandrita v. Jinsi*, 36 All. 48.

In districts where Act X of 1859 is still in force, the jurisdiction of the Civil Courts cannot be ousted except in cases where the matters in dispute come exclusively within the category of subjects in respect of which express jurisdiction is given to the Revenue Courts.—*Kumood Narain v. Purna Chunder*, 4 Cal. 547; 3 C. L. R. 258.

In districts where Act X of 1859 is still in force, a suit for rent of land granted for mining purposes, and for purposes of building, making roads, and so forth, is cognizable in a Civil Court. The word "land" in section 23 (4) of the Act refers to land for agricultural or horticultural purposes; and the words "or the like" in the same clause must be taken *ejusdem generis* with the rights spoken of therein.—*Rooke v. Bengal Coal Co.*, 28 Cal. 485; 5 C. W. N. 480.

A suit to recover arrears of rent of a tank, which is not a part of agricultural holding but is used for rearing and preserving fishes, is not maintainable in a Revenue Court. The term "land" in section 6 of Act X of 1859 means cultivated land and does not include tank.—*Maharanda v. Mangala*, 31 Cal. 937; 8 C. W. N. 804.—See also 11 C. L. J. 63-n.

**Jurisdiction of Civil Courts to Set Aside Sale for Arrears of Revenue and Road Cess.**—A suit to set aside a sale held under Act XI of 1859 is maintainable where the property sold is insufficiently described in the sale notification.—*Hem Chundra v. Sarat Gamini*, 6 C. W. N. 526. So also where there was misstatement of the proprietor's name in the sale notification.—*Rajrani v. Ganesh*, 14 C. W. N. 626; 37 Cal. 407. But see *Dilchand v. Baijnath*, 8 C. W. N. 337 and *Ismail Khan v. Abdul Aziz*, 9 C. W. N. 343. 1 C. L. J. 14; 32 Cal. 502, F. B. and 9 C. W. N. 384; 1 C. L. J. 91; 32 Cal. 509; distinguished in *Nibaran Chandra v. Chiranjib*, 32 Cal. 542; 9 C. W. N. 487.

The Civil Court has jurisdiction to set aside a revenue sale held by the Collector for a supposed arrear of revenue, where there has been no arrear at the time of the sale; and that the provisions of section 33 of Act XI of 1859 relating to an appeal to the Commissioner of Revenue do not exclude that jurisdiction.—*Balkishen Das v. Simpson*, 25 Cal. 833 (P. C.); 2 C. W. N. 513. Ref. to in *Indramani v. Priyanath*, 18 C. L. J. 505.

A suit may be brought in the Civil Court to set aside a sale held under Act XI of 1859, on the ground that no arrears were due although such ground was not declared and specified in an appeal to the Commissioner as provided for in section 33 of Act XI of 1859.—*Harkoo Singh v. Bansidhar Singh*, 25 Cal. 876. See, however, *Jannori Chowdhurani v. Secretary of State*, 7 C. W. N. 377. But see *Mahomed Aga v. Jadu Nandan*, 2 C. L. J. 325; 10 C. W. N. 137.

A suit to set aside a sale for arrears of road and public cess will lie, although no previous appeal to the Commissioner has been made under s. 33 of Act XI of 1859; *Mohibul Huq v. Shew Sahay*, 25 Cal. 85.

**Jurisdiction of Civil Court to Set Aside Certificate Sale.**—A suit to set aside a sale in execution of the certificate under the Public Debt Recovery Act, is maintainable in the Civil Court, on the ground that

version to Mahomedanism, and subsequent re-marriage, forfeit her right to her late Hindu husband's estate; *Abdul Aziz v. Nirma*, 35 All. 466: 11 A. L. J. 678. Renunciation of religion or exclusion from caste, is no ground of forfeiture of rights in the property; *Kunni Lal v. Gobind Krishna*, 33 All. 356 P. C. 15 C. W. N. 545: 13 C. L. J. 575: 13 Bom. L. R. 427: 21 M. L. J. 645.

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**Debtor and Creditor.**—A suit by a debtor to compel his creditor to accept money due from him will not lie.—*Kristya v. Kasipati*, 9 Mad. 55.

Every loan implies a promise to repay, and an unqualified admission of indebtedness is equivalent to an express covenant and creates a personal obligation. A creditor is not limited to a mode of payment prescribed; he may enforce the obligation by other means, if that mode is found insufficient; *Maharaja Ram Narain v. Odindra Nath*, 15 C. L. J. 17; 17 C. W. N. 369 (4 C. L. J. 510 Ref.).

**Suits to Enforce Contract to Refer to Arbitration and for Damages Against Arbitrators.**—No suit to enforce specific performance of contract to refer to arbitration is maintainable.—Section 21 of the Specific Relief Act (I of 1877) is a bar to such a suit.—*Coomud Ohunder v. Ohunder Kunt*, 25 Cal. 408 (1 Cal. 42 referred to). Referred to in 11 Bom. 214 See also, *Crip v. Adlord*, 23 Cal. 956.

A suit for damages is not maintainable against arbitrators for mere negligence in giving an award unless there be fraud and collusion.—*Savilappa v. Devchand Volchand*, 26 Bom. 132.

**Jurisdiction of Civil Courts to Interfere with the Orders of Revenue Authorities.**—It is only when boundary-dispute arises between owners of adjoining lands; and the Collector is called upon to determine the dispute, that his determination becomes final under section 121 of Bom. Act (V of 1879) so as to oust the jurisdiction of the Civil Court.—*Lakshman v. Antaji*, 25 Bom. 312.

The plaintiff, having obtained from the revenue-officers a *pattah* of Government waste land, sued for cancellation of a *pattah* for the same land subsequently granted to other persons by the Collector: *Held* that the Civil Court was competent to pass a decree declaring the second *pattah* null and void.—*Collector of Salem v. Rangappa*, 12 Mad. 404. (4 Mad. H. C. 429, followed).

Where an order of the Board of Revenue, purporting to be made under Act IX. of 1847, subjected land included in the permanent settlement to assessment, *held* that the Civil Court had jurisdiction to entertain a suit brought by the land owner contesting that order and to declare if unauthorized by law.—*Secretary of State v. Fahamidannissa Begum*, 17 Cal. 590 (P. C.).

**Suits against Court of Wards.**—No action will lie against the Court of Wards in respect of anything done by it regarding the person and the education of any minor entrusted to its superintendence.—*Collector of Beerbhoom v. Mundaknee*, W. R. (1864) 332; 1 W. R. (Mis.) 7. But see 1 W. R. (Mis.) 27.

The High Court cannot restrain the Court of Wards, whether acting with or without jurisdiction, from interference in the bestowal in marriage of a minor.—*Gujadhur Pershad v. Narain Singh*, 5 W. R. (Mis.) 41.

The Court of Wards can take possession only of an estate of a minor and has no right to take over an estate from an executrix in whom the estate is vested in law, until the infant beneficiary becomes the proprietor; and a suit lies against the Court of Wards if it commits a trespass upon properties in possession of the executrix; *Ganoda Sundari v. Nalini Ranjan*, 36 Cal. 28; 12 C. W. N. 1065.

**Suits Relating to Breach of Contract of Marriage.**—A suit for a declaration that the alleged Hindu marriage is invalid will lie in the ordinary Civil Courts.—*Aunjona Dasi v. Prahlad Chandra*, 6 B. L. R. 243; 14 W. R. 403 (reversing 14 W. R. 132). A suit to declare a Hindu marriage invalid and also for issue of an injunction restraining the bride from marrying the bride to any one else, is maintainable.—*Shankar v. Rangacharyulu*, 14 Mad. 316. Referred to in 11 W. R. 515. But see *Ram Saran v. Rakhal Das*, 6 B. L. R. 244-n; 11 W. R. 412.

A suit to enforce a contract of marriage cannot be entertained in the Civil Courts; *Bhugun v. Ramjan*, 24 W. R. 380. But a suit to recover damages for breach of an agreement of betrothal, and to recover money paid in pursuance thereof is maintainable.—*Mulji Thakersey v. Gomti*, 11 Bom. 412; see *Gulab Chand v. Fulbai*, 33 Bom. 411; 11 Bom. L. R. 640 and 33 Mad. 417.

A contract which entitled a father to be paid money in consideration of giving his son or daughter in marriage is against public policy, and cannot be enforced.—*Dholidas v. Fulchand*, 22 Bom. 658. See *Falarakunta*



them for payments made for the expenses of the idols.—*Sham Lall v. Huro Soonduree*, 5 W. R. 29; and *Peary Mohun v. Narendra*, 87 Cal. 229 P. C.: 14 C. W. N. 261; 11 C. L. J. 220; 7 A. L. J. 183: 20 M. L. J. 171; 12 Bom. L. R. 257.

Where the purchaser of a *putni* taluk paid off a decree for rent obtained against the old tenant for a period anterior to that of the rent-decree in execution of which the tenure was sold, he is not entitled to contribution from the old tenant.—*Peary Mohun v. Sreeram Chundra*, 6 C. W. N. 794. Approved in *Monindra v. Jowahir Kumari*, 32 Cal. 643; 9 C. W. N. 670; fol. in *Khitish Chunder v. Khulna Loan Co.*, 16 C. W. N. 804, Dist. in *Ajodhya v. Jamroo*, 14 C. W. N. 699; 16 C. L. J. 156.

A co-heir is not liable, either under an implied contract or on grounds of equity, to contribute towards the expenses of litigation *bona fide* carried on by other heirs in respect of the common property.—*Halima Bee v. Roshan Bee*, 30 Mad. 526; 17 M. L. J. 439; 2 M. L. T. 468.

A suit for contribution by a partner against one of his co-partners on account of money paid by him for the satisfaction of a debt contracted by him also to carry on the partnership-business is maintainable.—*Durga Prosonno v. Raghu Nath*, 26 Cal. 254, and *Guda Kulita v. Joy Ram Das*, 26 Cal. 262; *Sadhu v. Rameswamy*, 32 Mad. 203.

A *benamidar* who holds himself out as owner is liable for contribution.—*Umesh Chandra v. Khulna Loan Company*, 34 Cal. 92; see *Ajodhya v. Jamroo*, 14 C. W. N. 699.

A suit does not lie by an under-tenant of non-agricultural land to recover from the tenant (his lessor), money which had been paid by him under Or. XXI, r. 89 to set aside a sale of his lessor's interest under a decree passed against the lessor.—*Bepin v. Calidas*, 6 C. W. N. 336; considered in 29 Cal. 459.

Where the landlord sues only the recorded tenants for the rent, this would not, in a suit for contribution, relieve the unrecorded tenants from the equitable liability of paying their share of the rent to those of the recorded tenants who are obliged to pay the whole.—*Gobinda v. Basan*. 3 C. W. N. 384.

Where a co-sharer is kept out of possession wrongfully by another co-sharer, a suit for contribution at the instance of the latter for rent paid by him during the period of dispossession does not lie against the former.—*Swarnamoyee v. Hari Das*, 6 C. W. N. 903.

A person who pays the decretal amount of a co-sharer landlord is entitled to maintain a suit for contribution: *Satya Bhusan v. Krishnakali*, 20 C. L. J. 196; 18 C. W. N. 1908.

A suit for contribution by a manager of a joint Hindu family, who borrowed money on his personal security for purposes of necessity, is maintainable.—*Aghore Nath v. Grish Chunder*, 20 Cal. 18.

The mere existence of a decree against one of several joint-debtors, without payment of money, does not afford ground for a contribution suit against the others.—*Ram Pershad v. Neerbhoy Singh*, 11 B. L. R. 76; 19 W. R. 24; *Serajool Huq v. Luchmeput*, 20 W. R. 242; *Puffe Narayanamurthi v. Marimuthu Pillai*, 26 Mad. 322. Dist. in 21 M. L. J. 983.

A suit for damages for assault of a very gross character, although on provocation, is maintainable and the fact that the defendant was fined in the Criminal Court was no bar to it.—*Akhul Chandra v. Akhul Chandra*, 6 C. W. N. 915. See also *Varaj Lal v. Ram Dat*, 26 Bom. 259; and *Rama Kumar v. Ali Husain*, 31 All. 173; 6 A. L. J. 135.

**Slanderous Statements in Pleadings or in Depositions.**—Statements made by parties to the suits in the pleadings are not absolutely privileged, and a charge for defamation is maintainable in respect of them—*Kali Nath v. Gobinda Chandra*, 5 C. W. N. 293. See also *Sandyal v. Bhabsundari*, 15 C. W. N. 995; 14 C. L. J. 31; *Angada Ram v. Nemai*, 23 Cal. 867; and *Crowdy v. Reilly*, 17 C. W. N. 554; 17 C. L. J. 105 and 31 Mad. 400. But see *Isuri Prasad v. Umrao Singh*, 22 All. 234; *Nathji v. Lalbhai*, 14 Bom. 97; 2 Mad. 13.

No action for damages will lie against a party or a witness for making defamatory statement in the course of a judicial proceeding. *Baboo Ganesh v. Mungnee Ram*, 11 B. L. R. 321 P. C.: 17 W. R. 283; *Mungnee Ram v. Ganesh*, 6 W. R. 134; *Chidambara v. Thirumani*, 10 Mad. 87; *Manjaya v. Sessa Cheti*, 11 Mad. 477; *In the matter of Alagar Naidu*, 30 Mad. 222; *Bhikumber Singh v. Becharam Sirkar*, 15 Cal. 264; *Daman Singh v. Mahip Singh*, 10 All. 425; *Queen-Empress v. Gobinda Pillai*, 16 Mad. 265; *Queen-Empress v. Babaji*, 17 Bom. 127; *Queen-Empress v. Bal Krishna*, 17 Bom. 573; *Woolfun Bibi v. Jesarat Sheikh*, 27 Cal. 262; and *Templeton v. Lauri*, 25 Bom. 230. See, however *Raghavendra v. Kashi Nath Bhat*, 19 Bom. 717 and *Emperor v. Ganga Prasad*, 20 All. 685; 4 A. L. J. 605.

It is clear from the above cases that in India witnesses and parties stand on a different footing.

A voluntary and irrelevant statement made by a witness maliciously is not privileged.—*Haidar Ali v. Abru Mia*, 32 Cal. 756 2 C. L. J. 105. See also *Girwar Singh v. Sriman Singh*, 2 C. L. J. 396; 9 C. W. N. 847; 82 Cal. 1060. Applied in 4 C. L. J. 390.

No action for damages is maintainable for words spoken in answer to a question put by a police-officer conducting an investigation.—*Methu Ram v. Jagan Nath*, 5 C. W. N. 804; 28 Cal. 794.

**Suit for Damages for Malicious Prosecution.**—An action for maliciously putting the law in motion lies in all cases where there is a concurrence of the following elements. (1) the commencement or continuance of a criminal proceeding; (2) its legal causation by the present defendant against the plaintiff who was a defendant in the original proceeding; (3) its *bona fide* termination in favour of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; (6) damage conforming to legal standards resulting to the plaintiff. Any enforcement of the criminal law through Courts of justice concerning a matter which will subject the accused to a prosecution, without regard to the technical form in which the charge has been preferred and irrespective of the grade of the criminal offence, is a sufficient proceeding upon which an action for malicious prosecution may be based; *Crowdy v. Reilly*, 17 C. W. N. 554; 17 C. L. J. 105. But see *Golap Jan v. Bholanath*, 15 C. W. N. 917; 38 Cal. 880, where it is held that a suit for malicious prosecution does not lie where the complainant is dismissed without issue of process. See also *Sheikh*,

25 M. L. J. 104; 11 A. L. J. 418; 83 Mad. 15; 16 C. L. J. 156; 80 All. 167; 18 C. W. N. 1808; 20 C. L. J. 196.

**Suits for Contribution Amongst Joint Wrong-doers.**—Where a joint-decree is passed against several persons, no suit for contribution will lie as between them if they were wrong-doers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act. But if they are not guilty of wrong in that sense but acted under a bona fide claim of right, then there is a right of contribution.—*Hari Saran v. Jotindra Mohan*, 5 C. W. N. 393. See also *Ram Ratan v. Aswini*, 87 Cal. 559; 14 C. W. N. 849; 11 C. L. J. 503.

Where a decree for costs against two defendants jointly was executed against one of them, and where it appeared that they conspired in setting up a false defence in the former suit, held that the suit for contribution was not maintainable, as they were joint wrong-doers.—*Gobind Chunder v. Srigobind*, 24 Cal. 330; 1 C. W. N. 179, and *Mulla Singh v. Jaganath*, 32 All. 585. See however, *Lakshmana Ayyar v. Ramasami Ayyar*, 17 Mad. 78.

The question as to whether, as between joint wrong-doers, there is any right to contribution at all, depends upon the question whether the defendants in the former suit were wrong-doers in the sense that they knew, or ought to have known, that they were doing an illegal or wrongful act.—*Suput Singh v. Imrit Tewari*, 5 Cal. 720; 6 C. L. R. 62; *Kishna Ram v. Rakmini Sewak Singh*, 9 All. 221; *Fakire v. Tassaddug Husain*, 19 All. 462. See also *Brojendra Kumar v. Rash Behari Roy*, 13 Cal. 300.

**Suits to Compel Registration.**—A suit to compel registration is maintainable only, when the provisions of s. 77 of the Registration Act (XVI of 1908) have been complied with.—*Venkata Sami v. Kaistayya*, 16 Mad. 341; *Edun v. Mahomed Siddik*, 9 Cal. 150; *Lakhmoni v. Akroonani*, 9 Cal. 851; *Bhagwan Singh v. Khuda Buksh*, 3 All. 397; *Kunhimmu v. Viyyathamma*, 7 Mad. 535. See however, *Abdullah Khan v. Janki*, 16 All. 303. *Radha Kissen v. Choonee Lall*, 5 Cal. 445; *Shama Charan v. Joyenoolah*, 11 Cal. 750; *Sajibullah Sirkar v. Hazi Khosh Mohamed*, 13 Cal. 254; *In re Abdul Aziz*, 11 Bom. 691. But rejection of an application by the Registrar on the ground of limitation is not a refusal to register within the meaning of section 76 of the Act.—*Udit Upadhia v. Imam Bandi Bibi*, 24 All. 402, F. B.

No suit lies under s. 77 of the Registration Act (III of 1877) against an order made under s. 24 of that Act refusing to direct a document to be accepted for registration.—*Gangava v. Sayava*, 21 Bom. 699.

Under the Registration Act (III of 1877), a suit lies to compel registration of documents of which the registration is not compulsory.—*Topa Bibi v. Ashanullah*, 16 Cal. 509.

Where the executant did not appear after service of summons, and the Sub-Registrar thereupon refused to register the document, held in a suit under s. 77 of the Registration Act, that the case was one of denial of execution within the meaning of ss. 85 and 78 of the Registration Act (XVI of 1908); *Kuratlit Begam v. Najibunnessa*, 25 Cal. 93.

In a suit under s. 77 of the Registration Act (III of 1877), a Court cannot go into any matter affecting the validity of the document apart

In a suit for compensation for malicious prosecution it does not follow that the suit will not lie, where the plaintiff was acquitted in appeal after conviction in the lower Court.—*Boja Reddi v. Perumal Reddi*, 26 Mad. 506. See also 17 C. W. N. 484.

A suit for damages for malicious prosecution will lie only against the person, who prosecutes and not against the person upon whose information to the Police the prosecution was started.—*Narasinga Row v. Methaya Pillai*, 26 Mad. 362; *Dudh Nath Kandu v. Mathura Prosad*, 24 All. 317, and *Balbhaddar Pande v. Basdeo Pande*, 29 All. 44; 3 A. L. J. 650. But see *Hari Charan v. Kailash*, 36 Cal. 278; 12 C. W. N. 817. Followed in *Bandi v. Ramabin*, 6 A. L. J. 516; See *Gaya Parshad v. Bhagat Singh*, 12 C. W. N. 1017 P. C.; 8 C. L. J. 337 P. C.; 30 All. 525 P. C. Ref. to in *Mina Kumari v. Surendra*, 14 C. W. N. 96; 10 C. L. J. 226.

**Liability of the Principal for Wrongful Acts of Servants or Agents.**—As to liability of a master or a firm for damages on account of torts committed by servant, agent or partner, see *Sarat Chandra v. Dawlat Singh*, 10 C. W. N. 723 and *Ahmedbhai v. Framji* 28 Bom. 226; *Iswar Chunder v. Satis Chundra*, 30 Cal. 207; 7 C. W. N. 126; and *Doorga Narain v. Baney Madhab*, 7 Cal. 199; *Sherjan Khan v. Alimuddi*, 23 C. L. J. 225.

**Master and Servant—Suit for Wages for Broken Period.**—A suit is not maintainable by a person engaged on a monthly salary for broken portion of a month, if he leaves service without the consent of his employer or without giving one month's notice before leaving the service; *Ralli Brothers v. Ambika Prasad*, 35 All. 132; 11 A. L. J. 104; *Stewart v. Gonslaus*, 6 B. L. R. 74; 5 Bur. L. T. 167; 17 Ind. Cas. 900; 13 Cal. 80; and 10 Bom. H. C. 57.

**Suit to Enforce Contract Based on a Condonation of a Criminal Offence.**—A contract to pay money in consideration of foregoing a criminal prosecution, is opposed to public policy, and will not be enforced.—*Kandan Chetti v. Coorjee Srit*, 2 Mad. 187. *Mottai v. Ramasami*, 37 Mad. 385. So a suit to enforce a contract based on a condonation of a criminal offence is not maintainable.—*Kumala Nath v. Beharree*, 11 W. R. 314; *Jetoo Mahito v. Monu Ram*, 17 W. R. 84. See also *Dalsukhram v. Charles De Brutton*, 28 Bom. 326. Fol. in *Rai Charan v. Amrita Lal*, 11 C. L. J. 131. So also a suit to enforce an agreement to suppress a criminal prosecution, or to recover money paid in pursuance of such unlawful agreement, is not maintainable.—*Raj Kristo v. Koylash Chunder*, 8 Cal. 24; *Amsadnessa v. Rahim Baksh*, 19 C. W. N. 383.

A contract based upon a consideration of stifling a criminal prosecution in respect of a compoundable offence is not forbidden by law or against public policy, and may be enforced.—*Amir Khan v. Amir Jan*, 3 C. W. N. 5, and *Mathoor Nath v. Kenaram*, 7 W. R. 33. *Mathoor Nath v. Gopal*, 5 W. R. S. C. C. Ref. 16. See also *Jai Kumar v. Gourinath*, 28 All. 718; 3 A. L. J. 506. But, where the offence is not compoundable, the contract is void.—*Sriranga Chariar v. Rama Sami*, 18 Mad. 189. Ref. to in 22 All. 224. See also *Bindeshari v. Lekkray*, 20 C. W. N. 760.

**Transfer of property by sale or mortgage as compensation for criminal charge is illegal.**—*Sheikh Majbar v. Syed Muktashed*, 40 Cal. 113; 16 C. W. N. 854 (8 W. R. 412 declared obsolete)

On this point see the article in 7 C. L. J. 41n to 48n.

*Co. v. Ram Chund Dutt*, 18 Cal. 10, P. C. (15 Cal. 214, reversed); See also 19 Cal. 253, P. C., and 20 Bom. 467; *Syed Ali v. Najab Ali*, 11 C. W. N. 143; *Mohesh Narain v. Nawbut Pathak*, 1. C. L. J. 437: 32 Cal. 837; *Ananda v. Parbati*, 4 C. L. J. 193; *Dwijender Narain v. Purnendra Narain*, 11 C. L. J. 189; *Amba v. Jnanoda*, 4 C. L. J. 254. See however, *Surendra v. Hari Mohan*, 33 Cal. 1201. Ref. to in 18 C. W. N. 609. See also 18 C. W. N. 328: *Jagarnath v. Jainath*, 27 All. 88; *Ram Shankar v. Jnanada Sundari*, 5 C. L. J. 297; *Phani Singh v. Nawab Singh*, 28 All. 161; *Israil v. Samser*, 18 C. W. N. 176; 19 C. L. J. 47; 19 C. W. N. 442.

**What Constitutes Adverse Possession Amongst Co-sharers.**—Mere occupation and enjoyment by one co-sharer does not *per se* constitute adverse possession as against the other co-sharer.—*Baroda Sundari v. Annoda, Sundari*, 3 C. W. N. 774. As between brothers especially when no partition is proved, the adverse possession of one should be proved by more satisfactory evidence.—*Jagjivan Das v. Bai Amba*, 25 Bom. 362. See also *Ujalbi Bibee v. Umakant*, 31 Cal. 970; 9 C. W. N. 32 and *Inayat v. Husen*, 20 All. 182.

To constitute an adverse possession as between tenants-in-common there must be an exclusion or an ouster. Presumption of actual ouster when may arise.—*Gangadhar v. Parashram*, 29 Bom. 300; 7 Bom. L. R. 252; 33 Bom. 317; *Lokenath v. Dhakeswar*, 20 C. W. N. 51; 21 C. L. J. 253

A case of adverse possession by a coparcener cannot be established by mere paper assertions not brought home to the knowledge of the other coparceners, when there has been no actual exclusion of the latter from use and enjoyment for the period of limitation.—*Anandrao Gunpatrao v. Vasantrao Madhavrao*, 11 C. W. N. 478, P. C.: 5 C. L. J. 838; 17 M. L. J. 184; 9 Bom. L. R. 595. See *Jogendra Nath v. Baladeb Das*, 12 C. W. N. 127; 35 Cal. 961; 6 C. L. J. 735; *Ahmad Raja v. Ram Lal*, 37 All. 203; *Ayeninassa v. Shaik Isuf*; 16 C. W. N. 849; 32 Mad. 191 and 37 Bom. 84.

**Suits for Revocation of Probate or Letters of Administration.**—A suit for revocation of probate on the ground of forgery is not maintainable; the proper course is to make an application under section 50 of the Probate and Administration Act (V of 1881). In the goods of *Mohendra Narain*, 5 C. W. N. 977. See also *Komallochun v. Nilrutton*, 4 Cal. 360; 4 C. L. R. 175. But where it is sought to revoke a grant of probate on the ground of invalidity of the will, the proceedings should be initiated by a regular suit.—In the goods of *Harendra Krishna*, 5 C. W. N. 883.

A suit to administer the estate of a living Hindu debtor is not maintainable; *Gangaram v. Nagindus*, 32 Bom. 381.

Persons who have any interest in the property of the deceased can oppose the grant or apply for revocation of probate.—*Bajinath v. Desputty*, 2 Cal. 208; *Komallochun v. Nilrutton*, 4 Cal. 360; *Umanath v. Nilmony*, 6 Cal. 429; In re *Bhobosoondari*, 6 Cal. 460; *Mohun Dass v. Lutchmun Dass*, 6 Cal. 11; In re *Hurro Lall*, 8 Cal. 570; *Nilmony v. Umanat* 10 Cal. 19 (P. C.); *Surbomongala v. Shashi Bhusan*, 10 Cal. 413; *Mudun Mohun v. Kali Churn*, 20 Cal. 87; *Rahamutulla v. Rama Rao*, 17 Mad. 373; *Kettra Moni v. Shyama Churan*, 21 Cal. 539 and 697. Even slight or bare possibility of an interest is sufficient; *Brindaban v. Sureswar*, 10 C. L. J. 263.

*Madhumani Peshakar*, 9 B. L. R. (Ap.) 87; 18 W. R. 445. See *Ohoga Lal v. Peiyri*, 31 All. 58; 6 A. L. J. 7. In *Opfll v. Wright*, 15 C. W. N. (CIX) 109n, it has been held that the principle applies even if she be the kept mistress of a single man.

**Suit Based upon Contracts Induced by Undue Influence or Coercion.**—Contracts induced by undue influence or coercion cannot be enforced, *Bhimbhat v. Yeshwantrao*, 25 Bom. 126. See also *Sital Prasad v. Parbhu Lal*, 10 All. 535. Approved in *Mannu Singh v. Umadat*, 12 All. 523; *Gobardhan v. Jai Kishen*, 22 All. 224; *Turnbull and Co. v. Duval*, 6 C. W. N. 809, P. C.; *Ganga Buksh v. Jugat Bahadur*, 23 Cal. 15, and *Rangnath v. Govind*, 28 Bom. 689.

**Power to Dominate the will of Another when Amounts to Undue Influence.**—See *Dhanpal Das v. Raja Maheshwar Baksh*, 28 All. 570, P. C. 10 C. W. N. 849; 4 C. L. J. 1; 16 M. L. J. 292; 8 Bom. L. R. 491; Fol. in 31 All. 386 P. C.; 10 C. L. J. 76; 13 C. W. N. 1069. *Poma Dongra v. W. Gillespie*, 31 Bom. 348; 9 Bom. L. R. 143. See, however, *Rani Sundar Koer v. Rai Sham Krishen*, 34 Cal. 150, P. C.; 11 C. W. N. 249; 5 C. L. J. 106; 4 A. L. J. 109; 17 M. L. J. 43; 9 Bom. L. R. 304; *Ganes Narayan v. Vishnuram Chandra*, 32 Bom. 37 and *Chatring Moolchand v. Whitcomb*, 32 Bom. 208.

**Suit for Damages for Illegal Imprisonment and Malicious Arrest.**—To support an action for false imprisonment nothing short of actual detention and complete loss of freedom is sufficient. A person is not under imprisonment after his release on bail. *Mahammad Yusufuddin v. Secretary of State*, 30 Cal. 872; 7 C. W. N. 729.

An action for malicious arrest is not maintainable, when the defendant has placed all the facts before the officer with discretionary power to order such arrest and when such officer with full knowledge of the facts exercised his discretion and ordered the arrest.—*Thakdi Hajji v. Budrudin Caib*, 29 Mad. 208.

Liability for damages for illegal confinement; *Deb Nath v. Umacharan* 9 C. W. N. (S. N.), cclxiv (264). Liability for damages for illegal arrest; *Chairman of Cossipore Municipality v. Monmotho Nath Dutt*, 9 C. W. N. 736.

**Suit for Compensation for Wrongful Seizure of Cattle.**—A suit for compensation for wrongful seizure of cattle will lie in a Civil Court, the provisions of Act I of 1871 being no bar to such a suit.—*Shuttrughon Das v. Hokna Shoutal*, 16 Cal. 159. (15 W. R. 279, approved: 2 C. L. R. 844, dissented from.) Ref. to in 273 Mad. 483 F. B.

**Suit for Damages for Destruction of Life or for other Injuries Sustained.**—A suit for damages for destruction of life is maintainable by the representatives of the deceased.—*Lyell v. Ganga Dai*, 1 All. 60; *Vinayak Raghu Nath v. G. I. P. Railway Co.*, 7 Bom. H. C. 113; *Sarab Ratanji v. G. I. P. Railway Co.*, 7 Bom. H. C. 119-n.; *Ratanbai v. G. I. P. Railway Co.*, 8 Bom. H. C. 130. See also *Johnson v. Madras Ry. Co.*, 28 Mad. 479; 15 M. L. J. 363.

See the provisions of Act XIII of 1855.

A suit for damages against a Railway Company for destruction of life in the railway carriage, is not maintainable against the company unless it is

Co., 32 Mad. 95: 18 M. L. J. 497: *British and Marine In. Co., v. I. G. S. N. Co.*, 38 Cal. 28: 15 C. W. N. 226.

Loss owing to negligence—goods sent as “luggage” and value and description not declared and excess charge not paid—carrier is liable in damages. Burden of proof of negligence is on the company and not on plaintiff; *I. G. S. Navigation, Co., v. Bhagwan*, 40 Cal. 716: 17 C. L. J. 639: 17 C. W. N. 633 (24 Cal. 786 followed). See *I. G. S. Navigation and Ry. Co. v. Gopal Chundra*, 17 C. W. N. 970: 41 Cal. 80. (16 C. W. N. 766, distinguished); *Laki Chand v. G. I. P. Ry.*, 37 Bom. 1: 14 Bom. L. R. 165; *Hirji Khelsi v. Bombay Baroda Ry. Co.*, 39 Mom. 191: see however, 41 Cal. 576: 19 C. W. N. 95.

Non-liability for damages on the basis of risk note; *Arunachellam v. Mad. Ry. Co.*, 33 Mad. 120; *Ganesh Flour Mills, Co. v. G. I. P. Ry. Co.*, 113 P. R. 1908: 15 P. L. R. 1909.

For the liability of common carriers (such as Railway and Steamship Company) for damages on account of loss of property by accident or negligence, consult the following cases:—*Mackillican v. Compagnie, etc., etc.*, 6 Cal. 227; *Moheswar Das v. Carter*, 10 Cal. 210; *Moothora Kant v. I. G. S. Navigation, Co.*, 10 Cal. 166; *I. G. S. Navigation Co., v. Joy Kristo*, 17 Cal. 39; *Chogemul v. Commissioners, etc., etc.*, 20 Cal. 427; *Irrawaddy Flotilla Co. v. Bhugwan Das*, 18 Cal. 620 (P. C.); *Secretary of State v. Budhu Nath*, 19 Cal. 538; *Laljibhai v. G. I. P. Ry. Co.*, 16 Bom. 434; *Pipanna v. Southern Maharatta Ry. Co.*, 17 Bom. 417; *Seshan Pattar v. Miss*, 17 Mad. 445; *E. I. Ry. Co. v. Bungad Ali*, 18 All. 42; *Balaram v. S. M. Ry. Co.*, 19 Bom. 159; *Secretary of State v. Dip Chand*, 24 Cal. 306; *Bana Mal v. Secretary of State*, 23 All. 367; *Toonya Ram v. E. I. Ry. Co.*, 30 Cal. 257; *Chhagan Lal v. E. I. Ry. Co.*, 27 Bom. 597; *Rivers S. N. Co. v. Chaut Mull*, 26 Cal. 398, P. C.: (affirming 24 Cal. 786); *G. I. P. Ry. Co. v. Raisatt Channmull*, 19 Bom. 165 (reversing 17 Bom. 723); *Nankuram v. I. Midland Ry. Co.*, 22 All. 361 and *Madras Ry. Co. v. Gounda Rau*, 21 Mad. 172.

A clear receipt given by the consignee of goods does not preclude him from suing for compensation if it is subsequently found that some of the goods consigned were lost while in custody of the carriers; *E. I. Ry. Co. v. Sispal Lal*, 39 Cal. 311.

**10.** No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in British India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of British India established or continued by the Governor-General in Council and having the jurisdiction, or before His Majesty in Council.

*Explanation.*—The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action.

[8. 12.]

*As to maintainability of suit upon judgment of foreign Court, see the cases noted under s. 13.*

**Suit to Amend or Rectify Mistake in Decree, if Maintainable.**—A suit to rectify a mistake in a decree is maintainable under sec. 9. The remedy provided by sec. 144 is not the only remedy open to a person. Sec. 162 does not apply to such a case.—*Jogeswar v. Ganga Bishnu*, 8 C. W. N. 473. See, however, *Chand Mea v. Asima Banu*, 10 C. W. N. 1024; *Basawan Kurmi v. Nakchedi*, 27 All. 174; and *Bhondi Singh v. Dowat Roy*, 17 C. W. N. 82; 15 C. L. J. 675; *Thamballa v. Thamballa*, 7 M. L. T. 266; 5 Ind. Cas. 119; *Jitendra v. Rasik Lal*, 27 Ind. Cas. 300.

**Suits to Set Aside Decrees on the Ground of Fraud or Want of Jurisdiction, when Maintainable.**—A suit is maintainable to set aside a decree on the ground of fraud.—*Mirali Rahimbhoy v. Rehmoobhoy Habibhoy*, 15 Bom. 594. See also *Mohomed Golab v. Mahomed Sulliman*, 21 Cal. 612; *Tikaram v. Daulat*, 32 All. 145; 7 A. I. J. 74; *Mohendra v. Gopal*, 17 Cal. 769; *Jagannath v. Watson*, 19 Cal. 341 and *Nanda Kumar v. Ramjiban*, 18 C. W. N. 681; 41 Cal. 990, where it has been held that the fraud must be actual positive fraud, i.e., a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance. See also *Bhondi Sing v. Daulat Ray*, 17 C. W. N. 82. 15 C. L. J. 675; *Kusodhaj v. Brojo Mohan*, 19 C. W. N. 1228; *Janki Kuar v. Lachmi Narain*, 37 All. 535.

The High Court has jurisdiction to set aside a decree of a Mufussil Court on the ground of fraud.—*Nistarini v. Nundo Lal*, 30 Cal. 369; 7 C. W. N. 353. See also *Banka Behari v. Pokhe Lal*, 25 All. 48. *Umrao Singh v. Hardeo*, 29 All. 418. A decree of superior Court can be declared void by an inferior Court on the ground of fraud.—*Sarthakram v. Nundo Ram*, 11 C. W. N. 579. Fold. in *Abdul Hug v. Abdul Hafez*, 11 C. L. J. 636; 14 C. W. N. 695.

A suit lies to set aside an *ex parte* decree and the sale held in execution thereof on the ground of fraud, though an application to set aside the decree under Order IX, r. 13, had previously been refused.—*Radha Raman v. Pran Nath*, 28 Cal. 475, P. C.; 5 C. W. N. 757 P. C. (24 Cal. 546 affirmed, 21 Cal. 605, approved). See also *Ram Narain v. Shew Bhunjan*, 27 Cal. 197; *Debendra Nath v. Pasanna Kumar*, 5 C. L. J. 828; *Dwarka Prasad v. Lachman Das*, 21 All. 289; *Kedar Nath v. Prosonna Kumar*, 5 C. W. N. 559, and *Khagendra Nath v. Prannath*, 29 Cal. 395, P. C.; 6 C. W. N. 473, P. C.

A decree passed by a Court having jurisdiction over subject-matter is voidable and not void when it is passed under a misapprehension or is brought about by fraudulent proceedings.—*Sheik Ismail v. Rojab*, 30 Mad. 295; 17 M. L. J. 165; 2 M. L. T. 186.

A suit to set aside a decree on the ground of fraud—Sole question raised the suit already decided in proceedings under s. 108, C. P. Code of 1892. Held, that the suit was not maintainable.—*Naidar Val v. Raunak Husain*, 29 All. 608; 4 A. L. J. 665; (29 Cal. 395, dissented). A decree can be set aside either on the ground of non-service of summons or on review or by regular suit on the ground of fraud. Non-service of summons alone is not a ground for setting aside a decree by suit; *Narasingh v. Bibi Rufflan*, 37 Cal. 197; 11 C. L. J. 250; 14 C. W. N. 307. See *Purna Chand v. Sheodat Rai*, 29 All. 212; 4 A. L. J. 151.



s. 10 nor s. 11 of the C. P. Code precludes the institution of a fresh suit for the same relief; they only bar the trial. In cases coming within s. 10 the proper procedure is to stay the suit and not to dismiss it; *Venkateswara v. Cherasseri*, 27 M. L. J. 405: (1914) M. W. N. 740: 25 I. C. 597.

This section only provides that no suit shall be tried if the same issues are involved in a previously instituted suit. It does not dispense with the institution of a suit within the proper time when the law requires such institution. For instance, under Or. XXI, r. 63, C. P. Code, an unsuccessful party in a claim case has to institute a regular suit to establish the right claimed by him.—*Namagauda v. Paresha*, 22 Bom. 680; See also *Meckjee v. Devachand*, 4 C. L. R. 282; *Ramalinga v. Raghunath*, 20 M. 418; *Venkappa Chari v. Manjunatha*, 16 M. L. J. 526.

An order under s. 10 of the C. P. Code staying a suit amounts to a decision that the Court has under the existing circumstances no jurisdiction to proceed with the trial of the suit. It is, if wrongly passed, a refusal to exercise a jurisdiction vested in the Court and is open to revision under s. 115 of the C. P. Code; *Thakur Sital Singh v. Sitta Baksh Singh*, 6 O. L. J. 96: 50 I. C. 212. A contrary view was taken in 4 Lah. L. J. 425; A. I. R. (1922) Lah. 55: 67 I. C. 870, where it was held that it is not open to revision. Where a suit has been stayed under s. 10, C. P. Code, the Court can pass interlocutory orders, such as orders for a receiver or an injunction or an attachment before judgment; *Senaji v. Paunaji*, 23 Bom. L. R. 1228.

A suit may be stayed under this section even after the hearing has commenced.—*Wahidunnissa v. Zamin*, 42 A. 290: A. I. R. 22 Bom. 276: 55 I. C. 89.

The section provides that, if an issue be in a course of trial in a pending case, the Court shall not entertain another suit to try the same issue and grant the same relief. But where there is no issue between the parties, but only administration of relief on admitted facts (as in a partition-case), this section does not apply.—*Kirty Chunder v. Anath Nath*, 10 Cal. 97: 13 C. L. R. 249.

"Of any suit."—The word "suit" in this section does not include proceeding under section 47 of the C. P. Code. See *Venkata v. Venkatarama*; 22 Mad. 256, where it has been held that a proceeding under section 244, C. P. Code, 1882 (s. 47) is not a suit within the meaning of s. 12, C. P. Code, 1882 (s. 10). Nor does it include application for leave to appeal to His Majesty in Council, see *Nainappa v. Chidambaram*, 21 Mad. 18, where it has been held that the mere pendency of an application for leave to appeal to the Privy Council in an execution case does not bar a subsequent suit under this section. Proceedings to file an award are governed by the same principles of general law as are laid down for suits in section 10 of the C. P. Code 1908; *Macdonald & Co. v. G. D. Emden*, 4 S. L. R. 187: 9 Ind. Cas. 707.

**Applicability of this Section to Appeals, Miscellaneous Proceedings and Arbitration Proceedings.**—The word "suit" in s. 10, C. P. Code, includes appeals and miscellaneous proceedings also. s. 141, C. P. Code is wide enough to make the provisions of s. 10, C. P. Code apply to arbitration proceedings. *Jai Narain Babu Lal*, In the matter of, 66 I. C.

*Venkanna v. Aitamma*, 12 Mad. 183. See also *Ashutosh Banerji v. Lukhimonidebya*, 19 Cal. 139, F. B. Sec, however, *Ram Dial v. Indar Kaur*, 16 All. 179 and 3 C. W. N. 139.

**Suits for and Right to Maintenance.**—Under the Hindu law as well as upon general principles, the father of an illegitimate child is bound to provide for its maintenance. (4 W. R. 182, P. C. referred to). A suit lies in the Civil Court for maintenance of an illegitimate child notwithstanding that the Criminal Court refused to grant the maintenance.—*Ghana Kanto v. Gereli*, 32 Cal. 479: 13 C. W. N. 150 (18 All. 29 and 20 W. R. Cr. 58, dissented from). But see *Subhadra v. Basdeo Dube*, 18 All. 29 (20 W. R. Cr. 58, referred to). An order by a magistrate awarding maintenance does not take away the jurisdiction of the Civil Courts. But no suit will lie for an injunction to restrain proceedings under section 488, Cr. P. Code.—*Deraji Malinga v. Marati Kaveri*, 30 Mad. 400 2 M. L. J. 344. (14 Cal. 276, followed; 2 Weir. 615, approved).

A sonless widowed daughter in indigent circumstances is not entitled to separate maintenance out of her father's estate. A Hindu widow must, in the first instance, look for her maintenance to her husband's family.—*Mokhada v. Nunda Lall*, 28 Cal. 278: 5 C. W. N. 297. (27 Cal. 555; 4 C. W. N. 669, affirmed). The widow of a predeceased son has right to maintenance from a person to whom her father-in-law has bequeathed the whole of his self-acquired property.—*Siddessury v. Janardan*, 29 Cal. 557: 6 C. W. N. 530 (reversing 5 C. W. N. 549). But see *Bai Parvati v. Tarwadi*, 25 Bom. 263; *Meenakshi v. Rama*, 37 Mad. 397.

A Hindu widow having sufficient private income for her own support, cannot claim maintenance from her husband's family.—*Ramawali Koer v. Maughari Koer*, 4 C. L. J. 74; see *Dattatraya v. Rakhambai*, 33 Bom. 50: 10 Bom. L. R. 770. But see *Lingayya v. Kanakamma*, 38 Mad. 153.

A Hindu wife leaving her husband's protection on account of his habitual ill-treatment and cruelty is entitled to separate maintenance from her husband's income.—*Matangini v. Jagendra*, 19 Cal. 84. See also *Seshamma v. Subbarayadu*, 18 Mad. 43. But, where the property is too small, a separate maintenance is not to be allowed.—*Godavaribai v. Sugunabai*, 22 Bom. 52. A Hindu widow is not bound to live with the family of her deceased husband to entitle her to separate maintenance, see 29 Cal. 557; 5 C. W. N. 297; 31 Mad. 338: 13 Ind. Cas. 136.

Keeping a concubine in the house by the husband would be a sufficient justification for the wife to ask for separate habitation and maintenance. *Dular Koeri v. Dwarka Nath*, 9 C. W. N. 270 and 510; 1 C. L. J. 283; 82 Cal. 234 and 34 Cal. 971.

**Forfeiture of Hindu Widow's Right to Maintenance for Unchastity.**—It is a settled principle of Hindu Law that a Hindu widow's right to claim maintenance is forfeited upon her unchastity.—*Rama Nath v. Rajoni Moni*, 17 Cal. 674. See also *Daulata Kuari v. Meghu Tiwari*, 15 All. 382, and *Nagamma v. Virabhadra*, 17 Mad. 392. See also *Kandasami Pillai v. Murugammai*, 19 Mad. 6; 31 All. 161; 22 Cal. 347; and 23 M. L. J. 289; see however *Paramai v. Mahaderi*, 34 Bom. 278: 12 Bom. L. R. 106; *Dal Singh v. Dini*, 32 All. 155: 7 A. L. J. 80.

**Right of Hindu Widow to her Late Husband's Property after Conversion and Re-marriage**—A Hindu widow does not, by reason of her con-

The words "before His Majesty in Council" in this section makes it clear. *Bepin Behari v. Jogendra Chandra*, 24 C. L. J. 514: 36 I. C. 641. But it does not include an application for leave to appeal to His Majesty in Council because the application may not be granted at all.—*Naniappa v. Chidambaram*, 21 M. 18; nor an application under s. 47.—*Venkata v. Venkatarama*, 22 M. 256.

"Between the same parties."—This section requires that the earlier suit shall be between the same parties as the later or between parties under whom they or any of them claim litigating under the same title.—*Sadagopachariar v. Tirumalachariar*, 31 I. C. 25; *Bishen Devi v. Bishenchand*, 61 I. C. 830. If the two suits are not between the same parties or between parties under whom they or any of them claim litigating under the same title, this section will not apply, even though some of the questions in the two suits are the same.—*Rama Krishna v. Krishnaswami*, (1922) M. W. N. 521: 68 I. C. 167.

If the other conditions of the section are satisfied, the mere fact that the first suit is between A and B as plaintiffs and C, D and E as defendants and the second suit is between C as plaintiff and A, B and F. (not a party to the first suit) as defendants will not take the case out of the purview of s. 10.—*Wahidunnisa v. Zamin*, 42 A. 290: A. I. R. 1922 Bom. 276.

"Litigating under the same title."—These words have been added to this section by the new Code. The effect of this addition is that the provisions of this section will not apply unless the parties in the two suits are found to be *litigating under the same, i.e., common title*. S. 10, C. P. Code does not authorize the stay of a subsequently instituted suit where the prior and the subsequent suits are not between the same parties or between parties under whom they or any of them claim litigating under the same title, even though the two suits involve some common questions; *Ram Krishna v. Krishnaswami*, 15 L. W. 687: (1922) M. W. N. 521. A. I. R. 1922 Mad 321: 68 I. C. 167 (42 A. 290 42 C. 926, *refd. to*).

"Where such suit is pending."—Where the previously instituted suit between the same parties or between parties under whom they or any of them claim, is pending in the same or any other Court in British India or in any Court beyond its limits established or continued by the G.-G. in Council, then it constitutes a bar to the subsequent suit. It is the pendency of the first suit in any one of the Courts mentioned in the section that constitutes the bar. *Padamsee v. Lakhmsee*, 43 Cal. 144.

Where defendant filed a suit in the Hyderabad State against the plaintiff and plaintiff subsequently filed another suit relating to the same subject-matter against the defendant in the Bombay High Court and defendant submitted to the jurisdiction of the British Indian Court, held that the British Indian Court had jurisdiction to restrain defendant from proceeding with his suit in the Native State.—*Naik v. Balivant Sitaram*, A. I. R. 1927 Bom. 185.

Section 10 of the C. P. Code applies to an application made to the Subordinate Judge to stay the proceedings in his court where an appeal relating to the same subject-matter between the parties to the suit was pending in the Chief Court at Rangoon. Proceedings in an appeal are

See cases under rule 21, Sch. II.

**Suit to Compel Execution of a Fresh Deed after Loss or Destruction of the First.**—A suit will lie to compel the defendant to execute a fresh deed of sale where the first one has been lost or destroyed after execution, and before registration.—*Nynakha Rowthen v. Vavana Mohomad*, 5 Mad. 123; *Nallapa Reddi v. Ramlingachi Reddi*, 20 Mad. 250. See also *Baldeo Prasad v. Girish Chandra*, 2 All. 754 and *Chinna Krishna v. Dorasami*, 20 Mad. 19.

**Suits for Compensation and Damages.**—A suit for compensation by a Hindu father for the loss of his daughter's services in consequence of her abduction is maintainable.—*Ram Lal v. Tularam*, 4 All. 97.

The defendants by the negligent construction of a railway caused the plaintiff's land to be flooded in the rainy season and consequently damaged. Held, that it being shown that the defendants had exceeded or abused their statutory powers they are liable to the plaintiffs for damages.—*Gaekwar Sarkar of Baroda v. Gandhi Kacharabhai*, 27 Bom. 344, P. C., 7 C. W. N. 393, P. C.

Suit for damages against persons who committed dacoity is maintainable notwithstanding their acquittal in the Criminal Court; *Keshab Nath v. Maniruddin*, 13 C. W. N. 501.

No action for damages will lie against a person for procuring an erroneous decision of a Court of Justice.—*Rani Mina Kumari v. Surendra*, 14 C. W. N. 96.

**Suit for Damages Against a Witness.**—A suit for damages is maintainable against a witness under section 26, Act XIX, of 1853, if he fails, without lawful excuse, to attend the Court in obedience to a summons. But the action will not lie unless personal service has been effected.—*Dhanpat Sing v. Prem Bibi*, 24 W. R. 72. See also *Dwarka Nath v. Anundo Chunder*, 5 W. R. (S. C. Ref.) 18 and *Nataraja Desikar v. Veerabadran Chetty*, 17 M. L. J. 143.

**Suits for Benefit of Schools.**—The secretary of an aided school can maintain a suit for damages against the owner of the school premises for breaking down the building, and removing the materials belonging to the plaintiff.—*Srechury Roy v. Mills*, 6 W. R., Civ. Ref. 21. The secretary is also liable to be sued for rent of the school house.—*Bhojabhai v. Hayem Samuel*, 22 Bom. 754.

The Government has a right to make rules as to the terms on which pupils should be admitted into and allowed to remain in their schools, and a suit to recover money paid for a pupil in accordance with those rules is not maintainable.—*Hurra Mohun v. Bonomalee Mitter*, 11 W. R. 350.

**Suits for and Right to Contribution.**—A suit for contribution by a Hindu widow for the marriage-expenses of her daughter is maintainable against the undivided brother of her deceased husband.—*Vaikuntam v. Kallapiram*, 23 Mad. 512. See also *Vaikuntam v. Kalapiram*, 26 Mad. 497; and *Nandan v. Ajodhya*, 82 All. 825 F. B.: 7 A. L. J. 236.

When a Hindu ancestor makes no endowment or trust for the support of the family-idols, no legal obligation rests on his descendants to support the idols: therefore, a suit for contribution will not lie against any of

This section is not applicable where the previously instituted suit is pending in a court not competent to try it; *Jahangir v. Hira*, 157 P. W. R. 1914: 26 Ind. Cas. 282: 283 P. L. R. 1914; *Chowdhury Jaminath v. Midnapore Zemindary Co.*, 27 C. W. N. 772.

The High Court has jurisdiction to order a party to the suit before it to refrain from prosecuting it in the mofussil Court; *Muill Chand v. Gill & Co.*, 21 Bom. L. R. 968. 53 I. C. 518.

**Where Plea Raised is the Same in Both Suits.**—Where a defendant is sued as the heir of a deceased person and a decree is obtained against which there is an appeal and during the pendency of an appeal, the defendant sues the plaintiff in the former suit as a creditor of the deceased and raises the same plea as was raised in the former suit, the Court would be justified in staying the suit under this section.—*Wahidunnisa v. Zamin Ali*, 42 A. 290: 18 A. L. J. 145.

**Before His Majesty in Council.**—These words indicate that the pendency of an appeal before the Judicial Committee of the Privy Council will bar the trial of a suit in British India.

Where it is shown that an appeal is pending before His Majesty in Council, an order for stay of a subsequent suit can be made without any reference to the nature of the relief claimed in either suit. It is only necessary that there should be in both suits or in the suit and the appeal some matter which is directly and substantially in issue in both cases; *Wahid Ali v. Nusrat Ali*, 58 I. C. 629.

**Power of Court Exercising Insolvency Jurisdiction to Stay Suit.**—A Court exercising insolvency jurisdiction under the Provincial Insolvency Act V of 1920 has no power to stay, under this section, a suit brought by the mortgagee against his mortgagor prior to the insolvency of the mortgagor.—*The Official Receiver v. Palaniswami*, 48 M. 750.

**Interlocutory Orders Pending Stay.**—An order under this section staying a suit does not take away the power of the Court to make interlocutory orders in the stayed suit, such as orders for a receiver, or an injunction or an attachment before judgment.—*Sennaji v. Pannaji*, 46 B. 431: A. I. R. 1922 Bom. 276: 64 I. C. 580; *Kapur Chand v. Devi Chand*, 23 Bom. L. R. 1228: 64 I. C. 580.

**Evidence of Pendency of Prior Suit: Onus.**—If a defendant in a suit wishes to show that the further trial of the suit is barred by s. 10 of the C. P. Code, it is his business to produce before the Court such documents as will satisfy the Court that s. 10 is applicable; *Akbar Zaman Khan v. Sheo Parshantal*, 3 Pat. L. W. 327. 39 I. C. 958.

**11.** No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

*Res judicata.*

See cases under rule 21, Sch. II.

**Suit to Compel Execution of a Fresh Deed after Loss or Destruction of the First.**—A suit will lie to compel the defendant to execute a fresh deed of sale where the first one has been lost or destroyed after execution, and before registration.—*Nynakha Rowthen v. Vavana Mohomad*, 5 Mad. 123; *Nallapa Reddi v. Ramlingachi Reddi*, 20 Mad. 250. See also *Baldeo Prasad v. Girish Chandra*, 2 All. 754 and *Chinna Krishna v. Dorasami*, 20 Mad. 19.

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*Explanation IV* of the old Code has been omitted on the ground that it is liable to mis-construction and that the same is well established apart from the explanation.

" *Explanation VI.*—The inclusion of *public right* in this explanation is to give due effect to suits relating to public nuisance (s. 91)"—*See the Report of the Special Committee.*

**Section 11, Not Exhaustive.**—From the report of the Special Committee quoted above, it appears that it is not possible to make a complete exposition of the doctrine of *res judicata* in a single section of an Act. Section 11 is not exhaustive of the law on the subject, and the general principles of *res judicata* apply to matters on which the section is silent and also govern proceedings to which this section does not in terms apply; *Soorjomonee v. Sudanund*, 12 B. L. R. P. C. 304. In *Hook v. Administrator General of Bengal*, 48 I. A. 157: 48 C. 499: 60 I. C. 631. their Lordships of the Judicial Committee held that s. 11 of the Code is not exhaustive of the circumstances in which an issue is *res judicata*. Although the section did not in terms apply, the plea of *res judicata* still remained, apart from the limited provisions of the Code. This dictum was reaffirmed by Lord Buckmaster in *T. B. Ramachandra Rao v. A. N. S. Ramachandra Rao*, 49 I. A. 129: 45 M. 320: A. I. R. 1922 P. C. 80, where it was remarked that the principle which presents the same cause being twice agitated is of general application and is not limited by the specific words of the Code in this respect. In *Ram Kirpal v. Rup Kauri*, 6 A. 269: 11 I. A. 37 P. C., it was held that s. 13 of Act 10 of 1877 (s. 11 of the present Code) did not apply to execution proceedings but upon general principles of law the decision of a matter once decided in those proceedings was a bar to the same matter being re-agitated at a subsequent stage thereof. All the above cases have been referred to and fully discussed in *Mt. Lachmi v. Mt. Bhulii*, A. I. R. 1927 Lah. 289. See also *Sayam Rama Morthi v. Secretary of State*, 36 Mad. 14: 24 M. L. J. 469, where it has been held that this section does not cover all cases of estoppel by Judgment; and *Venkataratnam v. Yanamandasa*, 46 M. L. J. 339: A. I. R. 1924 Mad. 578: 79 I. C. 44, where it has been held that an order passed after contention in a probate proceeding is *res judicata* in a subsequent proceeding against the caveators who contested it.

**The Doctrine of Res Judicata.**—Section 11 deals with the doctrine of *res judicata*. The doctrine of *res judicata* is of universal application and as remarked by Mr. Hukumchand in his well-known treatise on the Law of *Res Judicata*, "it is in fact a fundamental concept in the organization of every jural society. Justice requires that every matter should be once fairly tried and having been tried once, all litigation about it should be concluded for ever between the parties. It is a rule common to all civilized systems of jurisprudence that the solemn and deliberate sentence of the law upon a disputed fact or facts pronounced after a proper trial by its appointed organs should be regarded as a final and conclusive determination of the question litigated and should for ever set the controversy at rest." (Black on Judgment, Vol. II, page 2.) This rule which treats the final decision of a competent tribunal as irrefragable truth is one of the greatest gifts of Roman Jurisprudence to the modern jural systems of Europe. The spirit of the doctrine is succinctly expressed in the well-known maxim "*Nemo debet bis vexari pro una et eadem causa*" (no one should be vexed twice for the same cause). At times

One of several joint judgment-debtors who purchases the decree cannot execute it against his co-debtors, but can sue his fellow judgment-debtors, for contribution; *Ram Lal v. Khiroda*, 18 C. W. N. 118.

Where a decree was passed against several persons and one of them after paying the whole decretal amount sued for contribution, the co-judgment-debtors should not be allowed to plead non-liability in the contribution suit; they should have raised the plea in the previous suit. The judgment in the previous suit is conclusive as between the judgment-debtors as to their liability; *Siva Panda v. Jujusti Panda*, 25 Mad. 599, see also *Ajodhya v. Jamroo Lal*, 14 C. W. N. 699. But see *Thanagammal v. Thyammuther*, 10 Mad. 518 (5 Cal. 720, followed).

**Suits for Contribution Based on Principles of Equity.**—Where a claimant, having obtained possession of an estate under a decree in good faith, has paid the revenue and cesses, although the decree may have been reversed afterwards, and he may have been deprived of possession, he, nevertheless, is entitled to be repaid by his opponent who benefits by it.—*Dakhina Mohan v. Saroda Mohan*, 21 Cal. 142, P. C.; fol. in *Bindubashini v. Harendra*, 25 Cal. 305; 2 C. W. N. 150; and in *Radha Madhab v. Sasti Ram*, 26 Cal. 826. See also *Mohesh v. Boydya Nath*, 6 C. W. N. 88; *Jinnat Ali v. Fateh Ali*, 15 C. W. N. 332; 13 C. L. J. 646; 20 Mad. 686; 31 Mad. 439.

It is consistent with general principles of equity, that those whose funds are used to meet the legitimate demands of others, when the latter have the benefit of such payments, are entitled to ask the latter to pay to the extent of the benefit; they cannot retain the benefit and plead non-liability. Where the codified law does not cover the case, the Court should apply the general law legal or equitable.—*Chandra Sekhar v. Nafar Chandra*, 4 C. L. J. 555; *Parbhu Narain v. Beni Singh*, 14 C. W. N. 361.

Right of contribution is founded and is controlled by the principles of justice, equity and good conscience, it does not arise from contract. Every joint-debtor, who has been compelled to pay more than his share of the common debt, has the right of contribution from each of his co-debtor; *Matungini v. Brojeswar*, 20 C. L. J. 205; see also 20 C. L. J. 190; 18 C. W. N. 1308.

A co-tenant making deposit under Or. XXI, r. 89, and in consequence of which the sale is set aside, is entitled to maintain a suit for contribution against his own co-sharers; *Suchand v. Balaram*, 38 Cal. 1.

**Claim for Contribution if Creates only Personal Liability or Charge.**—A claim for contribution creates only a personal liability against the co-sharer on account of whose share the payment is made and does not create a charge on the estate.—*Upendra v. Girindra*, 25 Cal. 565; 2 C. W. N. 425, (14 Cal. 809, F. B. followed; 9 Cal. 355, and 18 Bom. 520, referred to). See also *Seth Chitor Mal v. Shih Lal*, 14 All. 273; *Gopi Nath v. Isaur Chandra*, 22 Cal. 808; and *Shivrao v. Pundli*, 26 Bom. 497. But see *Raja of Vizianagram v. Raja Setrucherlu*, 26 Mad. 686, F. B.; 13 M. L. J. 83. Followed in *Alayakammal v. Subbaraya*, 28 Mad. 493; 15 M. L. J. 219. See also *Upendra v. Tara Prasanno*, 30 Cal. 794, and *Parbhu Narain v. Beni Singh*, 14 C. W. N. 361 and 26 All. 407.

**As to What Amounts to Voluntary Payment.**—See 32 Mad. 456; 40 Cal. 509, P. C.; 17 C. W. N. 541; 17 C. L. J. 478; 15 Bom. L. R. 472;



favour the view that it is a rule of procedure only. The fact that s. 11 finds place in the Code of Civil Procedure, seems to point in the same direction. Rules of procedure should be so construed as to advance substantial justice and technicality should be avoided as far as possible.

**Distinction Between Res Judicata and Estoppel.**—The rule of estoppel is not a rule of substantive law, in the sense that it does not declare any immediate right or claim. It is a rule of evidence, but capable of having the greatest effect on the substantive rights of the parties. *Res judicata* ousts the jurisdiction of the court; while estoppel does no more than shut the mouth of a party. To put it colloquially and compendiously, estoppel never means anything more than that a person shall not be allowed to say one thing at one time and the opposite of it another time; while *res judicata*, means nothing more than that a person shall not be heard to say the same thing twice over in successive litigations, see *Cassamally v. Currembhoy*, 36 Bom. 214; 13 Bom. L. R. 717 and *Bhaishanker v. Mororji*, 36 Bom. 283.

The doctrine of *res judicata* is sometimes treated as a branch of the doctrine of estoppel and is referred to as estoppel by judgment. The doctrine of estoppel properly so called is dealt with in s. 115 of the Evidence Act. There is a difference in the principle upon which the two doctrines are based. *Res judicata* in this country is founded on the principle that there should be an end to litigation as to any issue which has been directly determined between the parties by a court of competent jurisdiction; and it affects not only the original parties but all others afterwards claiming under them and litigating under the same title. It bars fresh litigation at the outset. Estoppel is a rule of evidence based on the principle that a man who by his acts or statement has induced another to believe a thing to be true should not afterwards be heard to deny the truth of that thing to the prejudice of the other who acted upon the belief so induced. *Kali Dayal v. Umesh Prasad*, A. I. R. 1922 Pat. 33; 3 Pat. L. T. 506.

The law of *res judicata* does not compel the court trying the latter suit to hold, without trial, that the decision in the earlier suit was correct: it merely estops the parties to the earlier suit and their privies from showing that it is incorrect. The judge trying the later suit must give effect to the decision, but he is not bound to hold that it is right; *Fabsurana v. Mutha-krishna*, 21 M. L. J. 57; 9 M. L. T. 288; 9 Ind. Cas. 686; *Kalicharan v. Sheobuz*, 17 C. L. J. 93; 16 C. W. N. 783.

A plea of estoppel by *res judicata* can prevail even where the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute; *Chagan Lal v. Bai Harkha*, 33 Bom. 479; 11 Bom. L. R. 345.

**The Essential Requisites for a Plea of Res Judicata.**—To constitute a valid plea of *res judicata* the following conditions must exist:—

**Condition (1).**—The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit either as a matter of fact or constructively. Explanations III and IV should be read as elucidating the meaning of the words "matter directly and substantially in issue." Explanation III speaks of *Direct Res judicata* and Explanation IV speaks of *Constructive Res judicata*.

from its genuineness. The question of its validity must be determined in a suit properly framed for that purpose.—*Rajlakhi v. Debendra*, 24 Cal. 668. (18 Mad. 255, approved). See *Broucki v. Mohan Bikram*, 14 C. W. N. 12; 29 All. 284.

When the signature of the executant is obtained by undue influence, intimidation, duress, misrepresentation, or fraud, it is no execution within the meaning of the Registration Act.—*Chundra Kishore v. Dinendra Nath*, 1 C. L. J. 126. Registration in fraud of Registration law by fictitious entry of property to give jurisdiction is invalid; *Harendra v. Hari Dasi* 18 C. W. N. 817 P. C.

**Suits Based upon Previous Possession.**—Mere previous possession will not entitle a plaintiff to a decree for the recovery of possession except in a suit under s. 9 of the Specific Relief Act (I of 1877).—*Purmeshur v. Brij Lal*, 17 Cal. 256. See also *Nisa Chand v. Kanchiram*, 26 Cal. 579; 3 C. W. N. 568; *Shama Churn v. Abdul Kabeer*, 3 C. W. N. 158; 15 Bom. 685. But lawful possession of land is sufficient evidence of right as owner, as against a person, who has no title whatever and who is a mere trespasser; *Ismail Ariff v. Mahomed Ghous*, 20 Cal. 834 (P. C.). Followed in *Ganga Ram v. Secretary of State*, 20 Bom. 798. See also *Shyama Charan v. Surja Kanto*, 15 C. W. N. 163; *Banka Behary v. Raj Chandra*, 14 C. W. N. 141; *Manik v. Bani*, 13 C. L. J. 649 and *Krishna Iyer v. Secretary of State*, 33 Mad. 173.

It is an undoubted rule of the law that a person who has been ousted by another, who has no better right, is, with reference to the person so ousting, entitled to recover by virtue of his previous possession even though that possession was without any title.—*Mustabha Saheb v. Santha Pillai*, 23 Mad. 170. See also *Hanmantrav v. Secretary of State*, 25 Bom. 287. *Narayan Roy v. Dharmachar*, 26 Mad. 514; *Adhar v. Dibakar*, 41 Cal. 394; *Sundar v. Parbati*, 12 All. 51 P. C. P., p. 56; *Wali Ahmad Khan v. Ajudhia Kandu*, 13 All. 537, and *Fazlar Rahman v. Raj Chunder*, 5 C. W. N. 234. The above rule applies to defendant also, 38 Bom. 240.

**Suit by real Owner Against Benamidar.**—See cases noted under section 66.

**Co-sharer's Right of Suit with Regard to Joint Property.**—When one co-sharer excavates a tank on joint property without the consent of the other, the Court is not justified in granting an injunction unless the plaintiff proves that he has sustained, by the act he complains of, some injury of substantial nature, which materially affects his position.—*Joy Chunder v. Bipro Churan*, 14 Cal. 236 (14 Cal. 189, approved.) See also *Atarjan Bibee v. Sheik Ashak*, 4 C. W. N. 788. The same principle applies to the erection of buildings by one co-sharer against the wish of another on joint property.—*Paras Ram v. Sherjit*, 9 All. 661. See also *Fazilatunnissa v. Ijaz Hossain*, 30 Cal. 901. See however, *Sadhi v. Anup Singh*, 12 All. 436 (F. B.); *Najjiv Khan v. Imtazuddin*, 18 All. 115; *Muhammad Ali v. Fais Baksh*, 18 All. 361; *Kannakayya v. Narasimhulu*, 19 Mad. 38; *Ram Bahadur v. Ram Shankar*, 27 All. 688; 2 A. L. J. 455.

Where one co-sharer holds possession of certain land and deals with it in a particular way, and another co-sharer objects to that dealing, his proper course is to sue for partition. It is not open to the latter to obtain khas possession of land so improved, jointly with his co-sharer or with his tenant.—*Madan Mohun v. Rajab Ali*, 23 Cal. 223. See also *Watson &*

subject matter of the rent suit was the amount of the rent claimed and the subject matter of the title suit is the property itself; so also the causes of action and the reliefs claimed are different; see *Ali Moiden v. Kombi*, 5 Mad. 239; *Sitanath v. Basudeb*, 2 C. L. J. 540; *Wil'iti Begum v. Nurkhan*, 5 All. 514; *Tribhuwan v. Kameshar*, 28 All. 727; *Jamadar Singh v. Serajuddin*, 35 Cal. 979; 12 C. W. N. 862; 8 C. L. J. 82; *Sreenath v. Kaser Sheik*, 18 C. W. N. 116; *Surya Kanta v. Fani Bhusan*, 18 C. W. N. 888; *Bayyan Naidu v. Surya Narayana*, 37 Mad. 70 F. B., pp. 84 and 85; 23 M. L. J. 543 F. B. Thus the rule of *res judicata*, which requires identity as regards the matter in issue, will apply even when the subject matter, the cause of action and the relief claimed are different. See *Kenchi v. Shankarih*, 15 M. 4 C. R. 210.

**Trial of Issue.**—Issues are of two kinds, viz., (1) issues of fact, (2) issues of law (See Or. XIV, r. 1). There may be mixed issues of law and fact. Former decision on issues of fact, as well as on mixed issues of law and fact, as has been shown, bars the trial of identical issues in a subsequent suit. But a former decision on a pure issue of law does not always operate as *res judicata*, it may or may not operate as *res judicata*. There is a considerable divergence of judicial opinion as to whether an erroneous decision on a pure question of law bars the trial of the same issue or issues in a subsequent suit. From the reported decisions the following principles may be deduced: (1) An erroneous decision on a point of pure law cannot have the force of *res judicata* in a subsequent case in which the cause of action is not the same; (2) where the dispute relates to matters which have been already in controversy and have formed the subject of consideration in the previous suit, although the cause of action in the two suits be distinct, the estoppel is limited to matters distinctly put in issue and determined in the prior action, and it should further be restricted to questions of fact and mixed questions of fact and law. See *Aghore Nath v. Kamini Debi*, 11 C. L. J. 461; *Purna Chandra v. Rasick Chandra*, 13 C. L. J. 119. Where a decision lays down what the law is and is found to be erroneous and contrary to law, it cannot have the force of *res judicata* in a subsequent litigation for a different relief. A decision cannot alter the law of the land. See *Bajinath v. Pudmanund*, 39 C. 848; 16 C. W. N. 621; 16 C. L. J. 154 (1 C. W. N. 687; 28 Cal. 318 followed); *Sree Raja Bommadevara Venkata v. Andavolu Venkataratnam*, 32 M. L. J. 63; (1917) M. W. N. 321; 5 L. W. 682; 37 I. C. 857.

**Erroneous Decision on an Issue of Law When Operates as Res Judicata.**—An erroneous decision on a pure question of law directly and substantially in issue between the parties, operates as *res judicata* in a subsequent suit between the parties and relating to the same subject-matter. — *Gouri Koer v. Andh Koer*, 10 Cal. 1087. See also *Phundo v. Janig Nath*, 15 All. 327; *Rai Churn v. Kumud Mohon*, 1 C. W. N. 687; *Bishnu Priya v. Bhaba Sundari*, 28 C. 318; fol. in 39 C. 848; 16 C. W. N. 621; 16 C. L. J. 154; 21 C. L. J. 157, p. 161; See also 11 C. L. J. 461 and 13 C. L. J. 119 noted ante, 3 I. C. 351; *Behari Lal v. Majid Ali*, 24 All. 138; *Kaneri Ammall v. Sastri Ramier*, 26 M. 104; *Waman Hari v. Hari Vithal*, 31 B. 128; 8 Bom. L. R. 932; *Latore v. Bindraban*, 19 I. C. 244; *Kuppans v. Kumara*, 34 M. 450; *Musst. Ulfat v. Barkat-un-nessa*, 56 I. C. 983; 21 Cr. L. J. 276; *Veluswami v. Bommachi Naicker*, 25 M. L. J. 324; (1913) M. W. N. 776; 5 L. W. 299; 21 I. C. 219; 14 M. L. T. 229; *Latu v. Zipri*, 61 I. C. 603; *Rajaram v. Central Bank of India*, 28 Bom. L. R. 876;

A judgment-creditor who, but for the will, would, in execution of his decree, have a right to seize the property which should descend to his debtor is a person interested in the estate of the deceased—*Kishen Dai v. Satyendra Nath*, 28 Cal. 441.

A purchaser of properties from the heir of a deceased person has a *locus standi* to apply for revocation of a letter of administration of a will.—*Lalit v. Navadip*, 28 Cal. 587. See also *Sheikh Azim v. Chandra Nath*, 8 C. W. N. 748. A reversioner is also entitled to apply for revocation.—*Bepin v. Manoda*, 6 C. W. N. 912.

Persons, claiming outside and independent of the will, have no right to intervene and challenge the will.—*Baistab Charan v. Ganga Sagar*, 1 C. L. J. 268; *Srigobind v. Lal Jhari*, 14 C. W. N. 119 (17 Cal. 48 fol.); and *Pirojshah v. Pestonji*, 34 Bom. 459: 12 Bom. L. R. 366.

**Suit to Set Aside Certificate under Succession Certificate Act.**—A suit to set aside a certificate and decree passed in favour of the decree-holder on the ground that the certificate was obtained by the use of false evidence is not maintainable; *Rupan Bibi v. Bhagelu*, 36 All. 423.

**Suits to Enforce Champertous Transactions.**—An agreement to supply funds to carry on a suit in consideration of having a share in the property, if recovered, is not necessarily opposed to public policy; yet such agreement should be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable or to be entered into for improper objects for the purpose of gambling in litigation or of injuring others by encouraging unrighteous suits, should be held contrary to public policy and ought not to be enforced.—*Ram Coomar v. Chunder Kanto*, 2 Cal. 233 (P. C.); *Chunni Kuar v. Rup Singh*, 11 All. 57; *Loke Indar v. Rup Singh*, 11. All. 118; *Husain Bakash v. Rahmat Hosain*, 11 All. 128; *Tara Chand v. Suk Lal* 12 Bom. 559; *Guru Sami v. Subharaya*, 12 Mad. 118; *Gopal Ram v. Ganga Ram*, 14 Bom. 72; *Mokham Singh v. Rup Singh*, 15 All. 352 (P. C.); *Raqui Nath v. Nil Kanth*, 20 Cal. 843 (P. C.); *Ramanuja v. Narayana*, 18 Mad. 374; *Gopal Das v. Lakhmi Das*, 8 Bom. 402; *Harari Lal v. Jaduan Singh*, 5 All. 76; *Amedhhoy v. Vulleebhoy*, 8 Bom. 323, and *Siva Ramayya v. Ellama*, 22 Mad. 810.

Sale by a person out of possession but entitled to possession in consideration of funds for suit to recover it—*Held* that the transaction was not champertous and contrary to public policy.—*Achal Ram v. Kazim Hussan*, 27 All. 271; 9 C. W. N. 477, P. C.: 15 M. L. J. 197, pol. in *Gossain Ramdhan v. Gossain Dalmeir*, 14 C. W. N. 191.

In India an agreement cannot be avoided on the ground of champerty. An assignment cannot be questioned as unfair and unconscionable by a person not a party to the assignment.—*Bhagwat Dayal v. Debi Dayal*, 35 Cal. 420: 12 C. W. N. 393, P. C. (31 Cal. 433 reversed).

**Suits for Damages Against Common Carriers for Loss of Goods by Accident or Negligence when Maintainable.**—A Suit is not maintainable in respect of the loss of goods left on the premises of a Railway Company without a receipt being obtained for them.—*Bonna Mal v. Secretary of State*, 23 All. 367. But the company is liable for loss of luggage delivered; *Veleyat Hossein v. B. and N. W. Ry. Co.*, 36 Cal. 819: 18 C. W. N. 847.

A ship owner is not exempted from liability for negligence, unless the contract is express and clear; *Sheik Mahamad v. B. I. S. Navigation a*

(1923) M. W. N. 347; 17 L. W. 521. The question whether an issue arising in a case is one of law or is of mixed fact and law must depend on the way in which the issues are framed quite apart from the question which is really decided in the case; *Sree Raja Bommadevara v Andavolu Venkataratnam*, 32 M. L. J. 63; (1917) M. W. N. 321; 5 L. W. 682; 37 I. C. 857.

A judgment in a previous suit between the same parties not based on misapprehension as to a general rule of law but deciding a question of mixed law and fact, is binding as *res judicata* in a subsequent suit.—*Koyyana v. Doosy Gavaramma*, 29 Mad. 225; 16 M. L. J. 136, (15 Cal. 521, followed.); *Jhanda v. Budha*, 99 P. W. R. 1913; 156 P. L. R. 1913; *Veeraraghava v. Krishnaswami*, 31 Ind. Cas 269. See also 4 Mad. 219; 30 Mad. 46; 37 Mad. 70; *Ramabehari v. Surendra*, 19 C. L. J. 34; 21 I. C. 979.

**Matters Directly and Substantially in Issue.**—The question of *res judicata* has to be determined not on a consideration whether the decision of the controverted point was essential or necessary to the decision of the former suit, but upon the question whether it was directly and substantially in issue in the former suit. The word “substantial” has not such a stringent signification as the word “essential” or “necessary.” As to what is substantial question and what is not, no invariable rule can be laid down except that if the parties by their conduct of the litigation clearly treated it as a substantial question, and the court also further treated it as a substantial question, it would be almost conclusive to show that the question was substantially in issue; *Ramawaswamy v. Vana-mamalai*, 26. I. C. 873.

The question what was the “matter which was directly and substantially in issue” in a previous suit depends on whether the parties to the suit and the Court have dealt with the matter as if there was a relief claimed in respect of that matter also, that is to say, though the matter was in the first instance brought in issue as ancillary or incidental to the matter in respect of which relief was claimed, it was dealt with and decided as if it formed a direct and principal issue in the suit; *Muhammad Abdul Adir v. Jnanchandra*, 32 I. C. 738. See also 34 I. C. 259 and 34 I. C. 225.

A defence or claim based on a question of law is “matter” within s. 11, C. P. Code; where the point of law directly affects the rights in litigation between the parties to the suit it is matter within s. 11; *Sree Raja Bommadevara v. Andavolu Venkataratnam*, 32 M. L. J. 63; (1917) M. W. N. 321; 5 L. W. 682; 37 I. C. 857.

To constitute *res judicata* the matter must be directly and substantially in issue in a former suit, i.e., alleged by one party and either denied or admitted expressly or impliedly by another. The mere expression of opinion in a judgment on a matter which did not form the subject of an issue will not constitute the matter *res judicata* in a subsequent suit; *Sethu Rama Sahib v. Chotta Raja Sahib*, (1917) M. W. N. 827; 40 I. C. 80.

A decision on a matter in a previous rent suit operates as *res judicata* in a subsequent suit if the matter in question is directly and substantially in issue in both the suits; *Mane Mahommad v. Dhani Mahommad*, 17

## COMMENTARY.

**Alterations in the Section.**—This section corresponds with section 12 of Act XIV of 1882 with some additions and alterations. The words "proceed with the trial" have been substituted for the word "try" which occurred in the old section. The words "except where a suit has been stayed under section 20;" the words "for the same relief;" and the words "whether superior or inferior," which occurred in the old section, have been omitted.

**Scope and Object of the Section.**—(a) the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit, (b) the previously instituted suit must be *pending* in the same or in any other Court in British India or in any Court beyond its limits, etc., having jurisdiction to grant the relief claimed in that suit, (c) the parties or their privies in both the suits must be litigating under the same common title. It should be carefully noted that the provisions of this section apply *though the relief claimed in the second suit may not be the same* as that claimed in the first suit. This is due to the omission of the words "for the same relief" which occurred in the corresponding section of the Code of 1882. The difference in the reliefs claimed in the two suits is therefore quite immaterial under this section. What is now material is the identity of the matter directly and substantially in issue. s. 10 of the C. P. Code requires among other things that the suit should be between parties litigating under the same title and the issue should be the same in both suits. A court has no jurisdiction to decide the question of *res judicata* while acting under s. 10 of the C. P. Code. Its only jurisdiction is to stop the new suit, if it finds the existence of the circumstances mentioned in the section, pending the disposal of the prior suit; *Siva-prasad v. Tricom Das*, 42 C. 926; 27 I. C. 917.

Under s. 10 it is necessary that the matters directly and substantially in issue in the one suit should also be directly and substantially in issue in the other suit. Identity of reliefs is not necessary. But the mere identity of one or more issues, apart from their importance and bearing does not suffice. The object of the section is to avoid a conflict of judicial decisions. The cause of action as disclosed in the pleadings, the matter directly and substantially in issue, and the relief claimed, are three connected parts of the same legal structure and must be viewed both singly and as a whole; *Dinshaw v. Galstaun*, 29 Bom. L. R. 382; A. I. R. 1927 Bom. 245.

The object of s. 10 of the C. P. Code is to prevent Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two or more parallel litigation in respect of the same cause of action and the same subject matter, i.e., litigations in which the matters in issue are identical. The mere fact that the decision of the subsequent suit will largely be affected by the decision in the previous suit still pending, is not sufficient for the application of the C. P. Code; *Thakur Sital Singh v. Sitta Baksh Singh*, 6 O. L. J. 96; 50 I. C. 212; *Paira Mul and Sons v. Raj Narain*, 114 P. R. 1919; 53 I. C. 467.

"No Court shall proceed with the trial."—The section does not bar the institution of the suit within the prescribed period of limitation, it simply prevents the courts from proceeding with the trial of suits simultaneously, in which directly and substantially similar issues are involved. Neither

S sued K for recovery of four bonds, alleging satisfaction of the debt, K had formerly sued S on two of these bonds in which S had alleged that those two as well as other two bonds had been satisfied. It was then decided that none of the bonds had been satisfied. *Held* that the second suit was *res judicata* in respect of those two bonds and not in respect of the other two, which were not directly and substantially in issue. *Sheoraj Rai v. Kashi Nath*, 7 All. 247.

Where the validity of a mortgage was a matter substantially in issue in a former suit, a second suit for a declaration that the mortgage was invalid, and for possession of the mortgaged property was held barred by *res judicata*.—*Nirman Singh v. Phutman Singh*, 4 All. 65.

In a suit for *Malikana*, the issue between the parties substantially raises the question of a proprietary right to the estate in respect of which the *malikana* is claimed, and when the question of proprietary right has been decided in a previous suit between the same parties, a subsequent suit for *malikana* will be barred by *res judicata*.—*Gopi Nath v. Bhugwat Pershad*, 10 Cal. 697.

Where a decree, awarding to one of the parties money deposited in a treasury by a third party as the compensation for land taken by the latter for railway purposes, was based upon the right to the land, the question of title having been directly and substantially in issue between the parties. *Held* that the contest of title was conclusive between them and could not be contested in another suit.—*Ram Chandra v. Madho Kumari*, 12 C. 484 P. C. See also 7 C. 388 P. C. But see *Nobodeep Chunder v. Brojendra Lall*, 7 Cal. 406, and *Mahadesi v. Neelamani*, 20 M. 269.

A finding on an evidentiary matter which has been directly and substantially in issue between the parties though not covered by the prayers in the plaint, will be *res judicata* in a future suit relating to the same matter; *Bommireddipalli v. Secretary of State*, (1913) M. W. N. 858: 18 Ind. Cas. 102.

Where a plaintiff has once sued for and obtained a perpetual injunction directing the defendant to refrain from certain acts, it is not necessary for the plaintiff, if in future, the defendant ignores such injunction to sue again for a similar relief; in fact such a suit would be barred by the principle of *res judicata*.—*Ram Saran v. Chatar Singh*, 23 All 465.

Where the nature of tenancy was directly and substantially in issue and decided in the former suit, the question cannot be reopened in a subsequent suit; *Kanai v. Nasik*, 14 C. W. N. 361.

**Matters Not Directly and Substantially in Issue.**—A point not directly and substantially in issue in the previous suit is not *res judicata* in a subsequent suit relating to the same property between the same parties, particularly when it was neither put in issue nor decided in the former suit; *Jan Khan v. Ahmed*, 24 P. W. R. 1912: 134 P. L. R. 1912. *Abdur Rahman v. W. O'Brien*, 257 P. L. R. 1914; 146 P. W. R. 1914; 25 I. C. 357. See also *Parbatty v. Mathura*, 40 C. 29: 16 C. W. N. 877; *Anand Kishore v. Daiji Thakuram*, 21 C. 1. J. 206. *Ilaicha Kumar v. Jang Bahadur*, 4 O. L. J. 75; 30 I. C. 248.

Where a question was not directly and substantially in issue in the former suit, the mere expression of opinion in that suit will not operate

796. For the purposes of this section an appeal is a continuation of a suit.—*Chowdhury Jamininath v. Midnapore Zemindary Co.*, 27 C. W. N. 773: 75 I. C. 231: A. I. R. 23 Cal. 716; *Jai Narain v. Nathoomal*, 82 I. C. 539; *Bepin v. Jogendra*, 24 C. L. J. 514; *Chinna Karuppan v. Meyyappa*, 18 M. L. T. 400: (1915) M. W. N. 844: 30 I. C. 753.

“**Matter in issue.**”—The expression “matter in issue” in this section is equivalent to subject matter. The expression “matter in issue” in s. 10 of the C. P. Code has reference to the entire subject in controversy between the parties. The object of s. 10 is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. Proceedings in appeal are for many purposes deemed only a continuation of the suit instituted in the first Court; *Bepin Behari v. Jogendra*, 24 C. L. J. 514: 36 I. C. 641 (18 M. L. T. 100 *refd. to*); *Dinshaw v. Galstaun*, 29 Bom. L. R. 382: A. I. R. 1927 Bom. 245.

S. 12 of the old Code of 1882 contained the words “for the same relief” after the words “previously instituted suit.” The words “for the same relief” have been omitted in the present section. The effect of the omission of the words is not to make a change in the existing law—*Kesho Prasad v. Shivasaran*, 4 Pat. L. J. 557: 51 I. C. 36. s. 10 of the C. P. Code intends that if all the matters in dispute are substantially the same, then the fact that the relief claimed in the subsequent suit is not identical with the relief claimed in the previous suit shall not operate to enable the parties to continue the litigation.—*Kesho Prasad Shivasaran*, 4 Pat. L. J. 557 (24 C. L. J. 514; 11 A. 148 *refd. to*). *Dinshaw v. Galstaun*, A. I. R. (1927) Bom. 245: 29 Bom. L. R. 382.

It does not follow, because the words “the same relief” are no longer in the section, that s. 10 is applicable to suits for recovery of successive rents. The subject-matter of both the suits must be the same and that s. 10 cannot apply to claims for rent or for cesses which fell due after the institution of the first suit.—*Chowdhury Jamininath v. Midnapore Zemindary Co.*, 27 C. W. N. 772: A. I. R. 1923 Cal. 716: 75 I. C. 231. If the subject-matter of the second suit is different from that of the first suit, it cannot be stayed under s. 10 even if the main issue in both the suits is the same.—*Kuberan v. Koman*, 48 M. L. J. 251: A. I. R. 1925 Mad. 574: 88 I. C. 421.

An applicant under s. 10, C. P. Code for stay of a suit is bound to show that the “matter in issue” in the suit is directly and substantially in issue in the previously instituted suit. It is not sufficient that there are some issues common to the two suits. The matters in issue in the two suits must be identical. The court cannot apply s. 10 when the determination of the two suits depends not merely upon the decision of the common issue but also of other and entirely different issues; *Kota Sreeramulu v. Kota Sreeramulu*, 15 L. W. 646: A. I. R. 1922 Mad. 304: 31 M. L. T. 360 H. C. (24 C. L. J. 514 *folded*).

The words “directly and substantially in issue,” which also occur in the next section 11 have been fully explained in notes to that section.

“**Previously instituted suit.**”—It should be noted that the trial of the subsequent or second suit is barred only because of the pendency of the previously instituted or first suit. The word “suit” includes appeal.



the same period against the defendant as ex-proprietary tenant; *Bhan Partab Shahi v. Sheo Dat*, 15 I. C. 189; 15 O. C. 45. -

Where the court refused to consider a question that was not really decided, the matter is not *res judicata*.—*Drobomoyi v. Devis*, 14 Cal. 323. See also 3 O. C. 273, p. 275.

In a suit for specific performance of an agreement an *ex parte* decree was passed. The defendant then applied to set aside the *ex parte* decree but his application was dismissed. He then applied that the decree should be rectified, by directing that the agreement should be specifically performed by the plaintiff and defendants respectively. Held that the defendant's application to rectify the decree was not barred by the dismissal of his former application to set aside *ex parte* decree as the questions raised in the application for rectification were not decided in disposing of the former application under Or. IX, r. 13.—*Karim Mahomed v. Rajooma*, 12 Bom. 174.

Where a recurring liability is the subject of a claim, a previous judgment dismissing the suit upon findings which fall short of going to the very root of the title upon which the claim rests, cannot operate as *res judicata*, but if such previous judgment does negative the title itself, the plaintiff cannot re-agitate the same question of title by suing to obtain relief for a subsequent item of the obligation.—*Chandi Prosad v. Maharaja Mohendra*, 23 All. 5. On appeal 24 All. 112. See also *Bal Kishan v. Kishan Lal*, 11 All. 148. A dismissal of a suit for enhancement of rent is no bar to the filing of a fresh suit in a subsequent year; *Badri Prasad v. Ram Charan*, 31 I. C. 866.

**Issue Decided as being Necessary, If Res Judicata.**—If in a previous suit, a Court having a question before its mind and especially brought to its notice by the party a thing of importance, decided that the issue did arise and was a necessary one, the decision of that issue will be *res judicata* in a subsequent suit, though the issue might not be a necessary or proper one to be tried; *Midnapore Zemindary Co., Ltd. v. Kumar Naresh Narain*, 33 C. L. J. 317; 63 I. C. 161.

**Finding Which Is Not the Basis of the Decree may be Res Judicata.**—In order that a finding on a particular issue in a previous suit may operate as *res judicata* in a subsequent suit, it is not necessary that that finding should form the basis of the decree in that suit. The insertion of the finding in the decree or of omission therefrom as also its bearing on the general result of the suit, naturally form elements in considering whether the matter has been directly and substantially in issue in the previous suit; *Muthu Pillai v. Veda Vyasa Chariar*, 12 L. W. 277; 60 I. C. 397 (36 M. L. J. 641; 10 M. 102 followed; 11 C. 301 P. C. 25 M. L. T. 66; 37 M. 25; 27 M. L. T. 85; 36 C. 193 distd.; 40 B. 662, relied on).

**Finding on a Question not Material to the Decision of the Suit or Alternative Finding does Not Operate as Res Judicata.**—Where a former suit between the same parties in respect of the same subject-matter has been dismissed on a preliminary point, a finding in that suit on the merits in the plaintiff's favour will not bar the defendant from raising the same defence on the merits in a subsequent suit between them.—*Nando Lal v. Bidhu Mookhy*, 13 Cal. 17 (6 Cal. 319 impliedly overruled by 11 C. 301 P. C.). Relied on in *Thakur Magundeo v. Thakur Mahadeo*, 18 Cal. 647;

only a continuation of the suit instituted in the first court; *Chinnakaruppan v. Meyappa*, 18 M. L. T. 400: (1915) M. W. N. 844: 30 Ind. Cas. 753.

Where a suit is first instituted in a Sub-Judge's Court, and a second suit is instituted for the same relief in a Munsif's Court, the Munsif ought to dismiss the suit, as barred by s. 10 and not merely keep it, pending the decision of the earlier suit in the Sub-Judge's Court. Both ss. 10 and 11, C. P. Code, 1882 are aimed at superfluous suits, and the procedure under both the sections ought, therefore, to be the same.—*Venkappachari v. Manjunath Kamti*, 16 M. L. J. 526 2 M. L. T. 40.

A suit withdrawn with liberty to bring fresh suit, on condition of paying defendant's costs, is to be regarded as pending until the costs are paid; and a fresh suit brought on the same cause of action should not be dismissed as barred for non-payment of costs, but its proceedings should be stayed until the costs are paid; *Sital Prasad v. Gaya Prasad*, 19 C. W. N. 529.

**"Having jurisdiction."**—The words "Court having jurisdiction to grant the relief claimed" in s. 10, C. P. Code have a wider application than the words "Court competent to try the subsequent suit" in s. 11 and "Court of competent jurisdiction" in s. 13. The words, "Court competent to try the subsequent suit" in s. 11 and "Court of competent jurisdiction" in s. 13 apply only to Courts having both pecuniary and territorial jurisdiction. The rule as to stay of suit though based on principles similar to those underlying the doctrine of *res judicata* is not part of the rule of *res judicata*; *Khemka v. Bogla*, 13 Bur. L. T. 19: 57 I. C. 904.

The trial of a suit can be stayed under s. 10, only when the Court trying the previously instituted suit has jurisdiction also to grant the relief asked for in the subsequently instituted suit; *Gopikisan v. Padamraj*, 12 N. L. R. 174: 37 I. C. 510.

The words "jurisdiction to grant the relief claimed" do not mean territorial jurisdiction and the later suit must be stayed if the matter in issue is the same as in the first suit, although the Court in which the first suit was instituted has no territorial jurisdiction over the subject-matter of the later suit; *M. Bogla v. M. Khemka*, 12 Pur. L. T. 203: 55 I. C. 254.

The words "*having jurisdiction*" are important, they refer to the court where the first suit is pending, such court must be a court of competent jurisdiction to grant the relief claimed in the previous suit. For instance:—The pendency of proceedings before a revenue-officer under section 103 of the Bengal Tenancy Act (VIII of 1885), is no bar to the maintenance of a suit in the Civil Court for possession and mesne profits by ejectment, of the tenants from certain plots of land, in respect of which a survey and preparation of a record-of-rights have been ordered under Chapter X of the Act.—*Troylokhya Nath v. Macleod*, 28 Cal. 28.

A, a merchant in Karachi, sued B, his Commission Agent, at Calcutta for account and for recovery of money in the Court at Karachi. At Calcutta the Commission Agent sued his principal for a sum named or for an account: *Held*, that the suit at Calcutta should be stayed as the Court at Karachi has jurisdiction to grant the relief claimed; *Padamsee Narainjee v. Lakhamsee Raisce*, 43 C. 144: 33 I. C. 288.

*Dhalipala*, 15 Ind. Cas. 229; *Ahmedbai v. Dinshaw Manekji*, 13 Bom. L. R. 1061; 12 Ind. Cas. 813; *Naga Ti v. Naga Pan*; 7 Bur. L. T. 249; 27 Ind. Cas. 959; *Maruvada Venkataratnamma v. Maruvada Krishnamma*, 57 I. C. 735, (F. B.); 13 L. W. 25.

Where judgment is based on the findings on two issues, the findings on both the issues will operate as *res judicata*, although the finding on only one would be sufficient to sustain the judgment; *Venkatarama v. Ramana-nna*, 38 Mad. 158; (1913) M. W. N. 775; 21 I. C. 258.

If a decision is based upon two findings of fact, either of which would in law justify the decree actually made, both the findings would operate as *res judicata* and not that finding alone which should, in the logical sequence of necessary issues, have been first found and which would have rendered the other findings unnecessary to support the decree made; *Ramabehari v. Surendra*, 19 C. L. J. 34; 21 I. C. 979 (24 C. 900 approved); *Secretary of State v. Maharajah of Venkatagiri*, 31 M. L. J. 97; 20 M. L. T. 284; (1916) 2 M. W. N. 96; 4 L. W. 133; 33 I. C. 266.

In the final judgment the finding was "whether B's allegation was true or C's allegation was true, the suit must fail: Held that alternative finding in the former suit could not operate as *res judicata* in a subsequent suit between B and C; *Harpal Singh v. Sheo Mangal*, 14 Ind. Cas. 161. Where there were two findings in the former suit, of which the second was unnecessary for disposal of the case, such finding does not operate as *res judicata* in a subsequent suit; *Misri Lal v. Md. Fida Hasan*, 11 Ind. Cas. 89; *Izzat-un-nissa v. Musst. Kaniz Fatima*, 19 O. C. 69; 3 O. L. J. 677; 36 I. C. 643; *Anand Kishore v. Daiji Thakurani*, 21 C. L. J. 296; 28 I. C. 580; *Peary Lal v. Jado Rai*, 20 A. L. J. 784.

**Matters Collaterally or Incidentally In Issue.**—According to explanation III of section 11, matters which are directly and substantially in issue, or matters which though not directly or substantially in issue but were constructively in issue, i.e., were really in controversy between the parties are treated as *direct* or *constructive res judicata* respectively, but not matters determined for collateral or incidental purposes. The test for determining whether a matter is directly or substantially in issue, or is only collaterally in issue is to see what was the relief claimed in the former suit. If in order to determine a matter in respect of which relief was claimed, it became necessary to go into some other matter incidentally, such other matter in respect of which no relief was claimed, is said to have been determined collaterally or incidentally. For instance, in a simple suit for rent if the tenant defendant denies the relation of landlord and tenant and sets up the title of a third party and alleges that he pays rent to him, and the court in order to determine whether the relation of landlord and tenant exists between the plaintiff and the tenant defendant, or between the third party and the tenant defendant incidentally enters into that question, in such a case the matter is said to be collaterally or incidentally in issue, and the determination of the matter cannot be treated as *res judicata*. But when the former decision was given on a question that went to the very root of the case and not on an incidental point and between the plaintiff, tenant-defendant, and third party, then the decision would operate as *res judicata*; see *Mane Mahomed v. Dhane Mahomed*, 17 C. W. N. 70; 17 C. L. J. 71; *Prabhu Narain v. Sundar*, 16 C. L. J. 41.

*Explanation I.*—The expression “ former suit ” shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

*Explanation II.*—For the purpose of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

*Explanation III.*—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

*Explanation IV.*—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

*Explanation V.*—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

*Explanation VI.*—Where persons litigate *bonâ fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating. [S. 13.]

### COMMENTARY.

**Distinction between the Present and the Old Section.**—This section corresponds with section 13 of the old Code. The following notes of the Special Committee will show the alterations made in the section:—

“ It is not possible to make a complete exposition of a subject so complex as that of *res judicata* within the limits of a section of an Act and the Committee think it better to re-enact section 13 as it stands with such modifications only as experience has shown to be necessary.

“ The Committee recognize that a proceeding does not come within the language of that section; but they think it better not to deal with this point in express terms for the reason that the applicability of the doctrine of *res judicata* to certain proceedings is not open to doubt, and they foresee that any express reference to proceedings in a crystallised definition might only lead to difficulties.—L. R. 11 I. A. 37 and 29 C. 707.

“ *Explanation I* is new, and it has been inserted on the suggestion of Sir Bhashyam Iyengar to remove a conflict of authority as to the meaning of the expression ‘ former suit.’ This explanation has adopted the principle laid down in 24 Mad. 350; 11 All. 148.

“ *Explanation II* is new and is intended to affirm the view that competence of the jurisdiction of a Court does not depend on the right of appeal from its decision.

See also *Ram Charan v. Reazuddin*, 10 Cal. 858; *Tajakhan v. Md. Khan*, 71 P. L. R. 1911; *Kundur v. Manurath*, 7 M. L. T. 354; 5 Ind. Cas. 262; *Bishnu v. Mohesh*, 3 Ind. Cas. 87; *Gobind Misser v. Behari Gope*, 47 I. C. 685; *Shamar v. Gurjo*, 6 P. W. R. 1918; *Haranarain v. Sridhar Panda*, 47 I. C. 2; *Jagadish Misser v. Rameswar*, (1920) Pat. 241; *Ayyaperumal v. Ramasami*, 29 M. L. J. 362; (1915) M. W. N. 614; 2 L. W. 650; 30 I. C. 983.

**Issues Not Decided Upon or Raised but Wrongfully Omitted to be Decided.**—In a prior suit between the parties, the question of the transferability of an occupancy holding, which was directly and substantially in issue, was not decided by the Court, which however decreed the Plaintiff's suit. In a subsequent suit between the same parties in which the same question was in issue, *held* that though the course adopted by the Court was not proper, yet its decision in the previous suit could not operate as *res judicata* on the question of the transferability of the holding; *Priya Sankar v. Jitendra Nath*, 41 I. C. 19.

The refusal of a Court to determine an issue which was raised does not operate as *res judicata*. It does not matter whether the Court was right or wrong in refusing to try the issue or in giving liberty to bring another suit. S. 11 of the Code lays down that the bar of *res judicata* will apply when the matter was "heard and finally decided," *Raja Dhakeswar Prasad Narain v. Pookhar Pandya*, (1918) Pat. 162; 4 Pat. L. W. 299; 45 I. C. 326 (11 A. 187, 24 C. 616, 10 C. 856, 7 C. 381, 8 C. 631, 21 A. 505, 5 C. L. J. 653, 24 M. L. J. 12 *refd. to*); *Tapazal Hussain v. Hira Lal*, 36 I. C. 650 (41 C. 69, 76; 40 C. 29; 18 C. 647, 12 C. W. N. 292; 7 M. 264; 20 C. 79 P. C. *ref. to*). Where a Court refuses to grant a relief on the ground that no such relief was claimed such refusal does not bar a subsequent suit for the relief; *Ratipal v. Bipin Chandra*, 4 O. L. J. 354, 41 I. C. 80.

In a suit by ryots against their landlord for measurement of land and ascertainment of rent, it appeared that in a previous suit between the parties the ryots had alleged that the area and the *jumma* of their lands had been overstated, but the courts held that the ryots were bound by the *Jummabandi* signed by them and refused to try whether the area had been overstated or not. *Held*, that the present suit was not barred as *res judicata*.—*Raghunath v. Juggut Bundhoo*, 7 Cal. 214; 8 C. L. R. 393.

**Plea of Res Judicata is to be Determined by Reference to Pleadings and Judgment, the Decree Alone is Insufficient.**—In order to determine whether a question is *res judicata* or not, whether a matter was directly and substantially in issue in the previous suit or not and whether it was actually decided in that suit or not, reference is to be made to the pleadings and judgment, the decree alone is usually insufficient for showing what had been heard and finally decided. In some of the earlier cases, it was held that it is by the decree and not by the judgment that the question of *res judicata* must be decided, but it seems to have been well settled by the Judicial Committee of the Privy Council that the pleadings and judgments must be looked at, the decree is usually insufficient for the purpose, as will appear from the following cases:—

To apply the law of estoppel by judgment, the judgment must be looked at; the decree is usually insufficient for showing what has been heard and finally decided.—*Kali Krishna v. Secretary of State*, 10 Cal.

the rule worked harshly on individuals (e.g. when the former decision was obviously erroneous) but its working was justified on the great principle of public policy. "*Interest rei publicæ ut sit finis litium*" (it is for the public good that there be an end of litigation). In other countries and notably in England, the doctrine has developed and expanded, and the bar is applied in a subsequent action not only to cases where claim is laid to the same property but also to the same matter (or issue), as was directly and subsequently in dispute in the former litigation. The earliest authoritative exposition of the law on the subject in England is by Chief Justice De Grey in the *Duchess of Kingston's Case* (2 Smith's L. C. 781) which has formed the basis of all subsequent judicial pronouncements in England, America and other countries, the jural systems of which are based on or inspired by British Jurisprudence. In that case a number of propositions on the subject were laid down, the first of them being that: "The judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another Court."

The main object of the doctrine of *res judicata* is to prevent multiplicity of suits and interminable disputes between litigants; *Per Mahmood, J.*, in *Balkishan v. Kishen Lal*, 11 A. 148 F. B. In other words, the principles on which the rule of *res judicata* is founded are two in number, viz., public policy, that it is in the interest of the State that there should be an end of litigation; and the other, the hardship on the individual that he should be vexed twice for the same purpose; *Lockyer v. Ferryman*, (1877) L. R. 2, A. C. 519. See *Chandi Prosad v. Mahendra Singh*, 24 All. 112; *Gokul Misra v. Bandec Ali*, 8 Ind. Cas. 9. The principle of *res judicata* is that neither courts nor parties should be permitted to be harassed by the same question being repeatedly brought up for adjudication; *Collector of Kishina v. Delika*, (1915) M. W. N. 467: 30 Ind. Cas. 178.

**The Doctrine of Res Judicata should be Liberally Construed.**—In applying the general principles of the rule of *res judicata* the Courts are not hampered by any technical rules of interpretation, such as govern the applicability of a statute (*per Tekchand J.*, in *Mt. Lachhmi v. Mt. Bhulli*, A. I. R. 1927 Lah. 289); As remarked by Sir Lawrence Jenkins, C. J., in *Sheoparsan v. Ramanandan*, 43 C. 694: 43 I. A. 91: 33 I. C. 914 (P. C.) "the application of the rule by Courts in India should be influenced by no technical consideration of form but matter of substance within the limits allowed by law." In England the same view was expressed by Brett M. R. in *In re May*, 28 Ch. D. 516, when he said that "the doctrine of *res judicata* was not a technical doctrine but was a very substantive one." In India some Judges have gone to the extent of laying down that in interpreting the sections of the Civil Procedure Code relating to *res judicata*, the fundamental principles of the rule embodied in it should not be ignored (*per Mahmood J.* in *Sitaram v. Amir Begum*, 8 A. 824 and *per West, J.*, in *Bholabhai v. Adesong*.) "What we have, therefore, to do is to ascertain the *raison d'être* of the doctrine and then to apply to it the facts of a particular case, unfettered by any technicalities. It is law and not its letter which is to be the governing factor, the tone of the rule rather than its outward form." (*Per Tekchand J.*, in *Mt. Lachhmi v. Mt. Bhulli*, A. I. R. 1927 Lah. 289, 294).

**Whether the Rule of Res Judicata is a Rule of Substantive Law or a Rule of Procedure.**—The preponderance of judicial authority seems to

barred by *res judicata*.—*Devarakonda v. Devarakonda*, 4 Mad. 134. (2 All. 497; 6 Cal. 319, dissented from). See also *Avala v. Kuppu*, 8 Mad. 77; *Jamaitunnissa v. Latfunnissa*, 7 All. 606; *Rakhal Das v. Must. Sheobai*, 45 A. 466; 21 A. L. J. 393; *Anusuavai v. Sakharan*, 7 Bom. 464; *Indrajit Prasad v. Richha Rai*, 15 All. 3; *Ram Krishna v. Vithal Ramji*, 15 Bom. 89; *Runbahadur Singh v. Luchko Koer*, 11 Cal. 301, P. C.; and *Ghela Ichha Ram v. Sankal Chand*, 18 Bom. 597. Although a finding may be unnecessary yet if it is embodied in the decree it will be *res judicata*; *Sankara Mahalinga Chetti v. Muthu Lakshmi*, 38 M. L. J. 740; 43 I. C. 860; *Mota Holiappa v. Vithal Gopal Habbu*, 40 B. 662; 18 Bom. L. R. 712; 86 I. C. 74.

**Explanation III.**—This explanation lays down that the matter above referred to (i.e. referred to in the body of the section) must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other. In other words, to constitute *res judicata* under this explanation, the matter must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly by the other in their pleadings, and according to their allegations a direct and formal issue must have been framed under Or. XIV, rr. 1 and 3 of the C. P. Code. A matter cannot be said to have been “directly and substantially in issue” in the former suit unless it was alleged by one party, and either denied or admitted, expressly or impliedly by the other. See *Shama Churn v. Prosonna Coomar*, 5 C. L. R. 251; *Sheo Ratan v. Sheo Shahai*, 6 All. 358; 14 Bom. 31; 28 Bom. 338. A decision in the former suit on the issues framed according to the allegations of the parties, operates as direct *res judicata* in a subsequent suit in which those issues arise.

The expression, “denied or admitted, expressly or impliedly” which occurs in this explanation is to be read with rules 2, 3, 4 and 5 of Or. VIII of the C. P. Code, 1908, which lay down the English doctrine of admission by non-traverse with some modifications.

To constitute *res judicata* under this explanation the following conditions are necessary; viz., (1) there must be a formal issue directly upon the point; (2) where no express or formal issue was raised, the matter must really be in controversy.—The former is called *direct res judicata*, and the latter *constructive res judicata*.

A matter which was actually and formally in issue and was adjudicated upon must be treated as *direct res judicata*; and the matter which though not expressly or formally in issue, but was really in controversy in the former suit, must also be treated as *constructive res judicata*.

The doctrine of constructive *res judicata* has been fully explained in the leading case of *Soorjomoner v. Sudanund*, 12 B. L. R. 304 P. C.; 20 W. R. 377 P. C., where it has been authoritatively laid down, that according to the general law relating to *res judicata* where a question has been necessarily decided in effect, though not in express terms between parties to the suit, they cannot raise the same question as between themselves in any other suit in any other form. This Privy Council case has been followed in several other cases, noted under this explanation. Therefore in order to decide the question of constructive *res judicata* under this explanation the Court has to look to the pleadings and judgment, to ascertain what the matter in controversy really was and what was the decision actually given. It is not necessary that an issue should be formally raised. An

**Condition (2).**—There must be identity of parties in both the suits, i.e., the former suit must have been between *the same parties* as in the subsequent suit or *between parties under whom they or any of them claim*. Explanation VI should be read with this condition.

**Condition (3).**—The parties in the subsequent suit must have litigated under the same title in the former suit.

**Condition (4).**—The court which decided the former suit must have been a court *competent to try the subsequent suit* or the suit in which such issue has been subsequently raised. Explanation II elucidates the meaning of the words "Competent Court" occurring in s. 11 and is to be read with this condition.

**Condition (5).**—The matter directly and substantially in issue in the subsequent suit must have been *heard and finally decided* by the Court in the former suit. Explanation V is to be read with this condition.

We shall now proceed to discuss the above essential conditions separately.

**Condition (1).**—"Matter directly and substantially in issue" and "Explanation III."

"No Court shall try any suit or issue."—The principle of *res judicata* is not confined to the trial of suits only but it also applies to the trial of issues. The opening words of the section clearly lay down that "no court shall try any suit or issue," that is, the plea of *res judicata* is a bar not only to the trial of suit, but also to the trial of any one of the issues in a suit which may have been finally heard and determined or which may form the ground or one of the grounds of the decision, and that it may bar the trial of such an issue although the ground of action in the second suit is not the same as the first. In other words, an issue which has once been raised and finally determined in a former suit, cannot again be litigated in a subsequent suit. It is the "matter in issue" not the subject matter of the suit that forms the essential test of *res judicata*; *Pahlman v. Risal*, 4 All. 55. *Ananta v. Damodhar*, 18 Bom 25; 15 Mad. 294; 23 All. 5; 24 All. 112; *Patrachariar v. Alamelumangai*, A. I. R. 27 Mad. 273.

This section applies to two classes of cases, in one of which a subsequent suit is wholly barred by the decision in a former suit by reason of the subject matter of the two suits being the same, and in the other the trial of one issue in a subsequent suit is barred by adjudication upon the same issue in a former suit, though the subject matters of the two suits are different; *Rai Charan v. Kumud Mohan*, 25 Cal. 571; 2 C. W. N. 297.

To bar the trial of any particular issue or issues in a suit, it is not necessary that the subject matter, causes of action and the reliefs claimed in the two suits must be the same, it is sufficient if the issue or issues raised in the former suit are the same in subsequent suit. Identity of subject matter of a suit is not an essential condition to the applicability of the rule of *res judicata* (see 8 Mad. 219 P. C.; 16 Cal. 103 P. C. and 11 All. 148 p. 157). For instance, when in a suit for rent an issue as to question of title to property was raised and determined such determination will bar the trial of the same issue in a subsequent suit brought for declaration of title to such property, notwithstanding the fact that the subject matters, causes of action and the reliefs claimed in the two suits are different, that is, the



*Ramamurti*, 16 Mad. 198. See also *Pran Nath v. Mohesh Chandra*, 24 Cal. 546 affirmed in 28 Cal. 475; 5 C. W. N. 757 P. C.; see also *Nanda v. Ram Jiban*, 41 Cal. 990; 18 C. W. N. 681. See however, 37 All. 485 P. C. noted above. Distinguished in *Naidarmal v. Raunak Hussain*, 29 All. 666; 4 A. L. J. 665; and in *Puran Chand v. Shadat Rai*, 29 All. 212; 4 A. L. J. 151; See also *Mancharam v. Kalidas*, 19 Bom. 821.

A defendant-respondent cannot avoid the application of the principle of *res judicata* by saying that he did not appear at the trial of the suit—*Behari Lal v. Majid Ali*, 24 All. 128; *Burn v. Keymer*, 20 Ind. Cas. 971.

An *ex parte* decree in a rent suit in which the defendant did not appear and file any written statement cannot operate as *res judicata*. If the defendant appeared and filed a written statement upon which an issue was or could have been raised between the parties, the fact that the defendant subsequently did not appear to contest the suit with the result that an *ex parte* decree was passed against him, would not prevent the operation of the principle of *res judicata*; *Maharaja of Darbhanga v. Younus Momin*, 57 I. C. 48.

An *ex parte* decree for arrears of rent cannot be used as estoppel, and does not operate so as to render the question of rate of rent as *res judicata* between the parties—*Modhusudan v. Brae*, 16 Cal. 300, F. B. *Nafar Chandra v. Bhusi Malla*, 65 I. C. 581 (16 C. 300 F. B. referred to). See also *Vishnu v. Ramling*, 26 Bom. 25; *Bhugirth Patoni v. Ram Lochun*, 8 Cal. 275; 10 C. L. R. 159; *Nilmoney Singh v. Heera Lal*, 7 Cal. 23; 8 C. L. R. 257 unless there was a prayer in the plaint for a declaration as to the rate of rent as part of the substantive relief claimed; *Brojendra Kumar v. Sarajendra Nath*, 45 I. C. 416.

An *ex parte* decree on a bond against two joint-debtors does not operate as *res judicata* as between those two debtors, when the question of their respective liability is raised in a contribution suit brought by one of them against the other; *Prasanna Kumar v. Kuladhar*, 57 I. C. 252.

From the above cases it would appear that the *ex parte* decree in the absence of fraud and collusion is *res judicata* only so far as it decides an issue; in other words, its conclusive effect is confined to the points actually decided. See 16 Cal. 300 F. B. noted above.

**Decree Conditional on Payment of Money and Res Judicata.**—A decree in a former suit for possession of property conditional on the payment of a sum of money to the defendant is no bar to a subsequent suit for possession after the expiration of the period within which he might have obtained possession by execution of the decree; *Maina Bibi v. Tahir Ahmad* 47 A. 250; A. I. R. 1925 P. C. 63; 86 I. C. 579; *Musst. Nurani Begam v. Mt. Dulfaroz*, 24 A. L. J. 910; A. I. R. 1927 A. 89.

**Decision on Issue in Rent Suit, When Res Judicata.**—The essence of the doctrine of *res judicata* is that where a material issue has been tried and determined between the same parties in a proper suit and in a proper Court as to the status of one of them in relation to the other or as to the right or title claimed by one of them against the other, the same question cannot be agitated by them again in another suit. In the case of suits for rent or other recurring liability, the causes of action for suits for successive periods are different. In the case of such suits for the doctrine

98 I. C. 341; A. I. R. 1926 Bom. 481; *Debi Prasad v. Jaldhar*, 94 I. C. 553; A. I. R. 1926 Pat. 288; *Kub Lal v. Guljari Lal*, 100 I. C. 601; A. I. R. 1927 All. 297.

An erroneous decision on a pure question of law does not operate as *res judicata* in a subsequent suit between the same parties, where the cause of action is not identical, but recurring. A claim for interest at the stipulated rate of 24 per cent. per annum upon arrears of rent was disallowed in a previous suit upon the authority of an overruled decision. Held that the question as to rate of interest was not *res judicata*.—*Alimunnissa v. Shama Charan*, 32 C. 749; 1 C. L. J. 176; 9 C. W. N. 466. See also *Gopu Kolandavelu v. Sami Royer*, 28 M. 517; 15 M. L. J. 466; *Mangalathammal v. Narainaswami*, 30 M. 461; 17 M. L. J. 250; *Aitamma v. Naraina*, 30 M. 504; *Chaman Lal v. Bapubhai*, 22 B. 669 and *Partha Saradi v. Chinna Krishna*, 5 M. 304; *Natasan v. Vengu*, 6 M. L. T. 313.

An erroneous decision on a question of law in a previous suit is no bar to a subsequent suit between the same parties, but the findings of facts and the relief given in a previous suit may operate as *res judicata*; *Veera-raghava v. Krishnaswami*, 31 I. C. 269.

The decision on question of law in one proceeding is not *res judicata* in any later proceeding except to this extent, namely, that the right which was the subject matter of the former proceeding and was established in favour of one party cannot be questioned in the subsequent proceeding; *Ayasamier v. Venkatachela Mudali*, 31 M. L. J. 513. 20 M. L. T. 391; (1916) 2 M. W. N. 296; 4 L. W. 507; 40 M. 989. 37 I. C. 741 (30 M. 461; 18 M. L. J. 548 relied on).

**Decision on an Abstract Question of Law.**—Where there has been a decision on an abstract question of law, *viz.*, what was the proper construction to be placed on s. 216 of the Bombay Land Revenue Code and not a concrete question such as the construction of a document as between parties to a suit, it is no longer a question of *res judicata*, as a court can form its own opinion as to what the law is, but a question whether the principle of *stare decisis* should be adopted (per Fawcett & Macleod, JJ., Shah, J. dissenting); *Sitaram Sakharan v. Lazman Vishnu*, 23 Bom. L. R. 749.

A decree on a compromise cannot be impeached on the ground that it was erroneous in law, because it is open to parties to decide both questions of law and fact; *Raja Kumara v. Thatha*, 35 M. 75; 21 M. L. J. 709; 9 Ind. Cas. 875.

An erroneous decision as to the maintainability of an appeal is no bar so as to preclude an appeal in another proceeding. *Kuppanna Gavundan v. Kumara Gavundan*, 20 M. L. J. 961; 34 M. 450; 8 M. L. T. 240; (1910) M. W. N. 574; 7 I. C. 418.

**Decision of Mixed Question of Fact and Law.**—So far as an issue of mixed law and fact is concerned, it stands on the same footing as an issue of fact, and a decision thereon operates as *res judicata*. Cases of construction of wills fall within this class; *Aghore Nath v. Kamini Devi*, 11 C. L. J. 461 (28 C. 318; 29 Mad. 225 followed). *Abdul Qadir v. Ilahi Bakhsh*, 92 I. C. 769; A. I. R. 1926 Lah. 251. See also *Rambhahari v. Surendra*, 19 C. L. J. 34; *Jagga Row Bahadur v. Gouher Bibi*,

In a rent suit if the defendant denies the relationship of landlord and tenant with the plaintiff on the ground that he himself is the owner of the property and that consequently he is not bound to pay any rent to the plaintiff who sets himself up as a landlord, the question as to title is directly and substantially in issue. But where the defendant denies the relationship on the ground that although he is a tenant he is the tenant not of the plaintiff but of a stranger to the suit or pleads that the tenancy has terminated or alleges any further similar ground in answer to the claim for rent, the question of title is only collaterally and incidentally in issue so that the decision on it does not bar subsequent suit based on title; *Mahomed Osman v. Hyder Khan*, 42 I. C. 785; *Parchu Mandal v. Chandra Kant*, 14 C. L. J. 220; 12 I. C. 9; *Gobar Sheikh v. Alipuddin Sheikh*, 80 C. L. J. 13; 51 I. C. 356.

In a previous rent suit the defendant denied relation of landlord and tenant and the suit was dismissed. Held that in a subsequent suit for possession the defendant cannot plead tenancy; *Annada v. Sham Sunder*, 13 Ind. Cas. 688 (34 Cal. 922 relied on); *Ekabar v. Hira Bewah*, 13 C. L. J. 1; 15 C. W. N. 335; 8 I. C. 660; (17 C. 196; 20 C. 101; 9 C. W. N. 928 distd.; 14 C. W. N. 339 reld. to). *Kali Kumar v. Bidhu*, 16 C. L. J. 89; *Becharam v. Chamru*, 15 Ind. Cas. 837; *Mrigendra Nath v. Krishna Chandra*, 33 C. L. J. 334; 61 I. C. 201.

In a suit brought by an occupancy ryot to eject an under-ryot it was found that the former was not the sole landlord. Another suit was brought by the same plaintiff against the under-ryot and the alleged co-sharer landlord for a declaration of right to the full share of the holding. Held that the suit was not barred by *res judicata* though the question whether plaintiff was the sole landlord was *res judicata* between him and the under-ryot, *Neamatullah v. Baiyullah*, 26 I. C. 619.

**Decision in Rent Suits as to Amount or Rate of Rent When Operates as Res Judicata.**—The decree in a previous rent suit for a certain sum claimed for a certain period, which did not decide the question of the rate of rent, is not *res judicata* in a subsequent suit; *Manindra v. Upendra*, 36 Cal. 604; 9 C. L. J. 343; 12 C. W. N. 904. See also *Jotindra Mohun v. Shumbhu Chunder*, 4 C. W. N. 43. *Ayyaperumal v. Ramasami*, 29 M. L. J. 362; (1915) M. W. N. 614. 30 Ind. Cas. 993; *Maharani Beni Pershad v. Rajkumar*, 16 C. L. J. 124; *Balaram v. Kartick*, 4 C. W. N. 161; and *Kali Roy v. Pratap Narain*, 5 C. L. J. 92 (32 Cal. 336, dissented from). *Baldeo Baksh v. Pahlad Singh*, 5 O. L. J. 67, 45 I. C. 218; *Hara Kumar v. Raj Kumar*, 47 I. C. 173; *Brojendra Kishore v. Sheikh Somar Ali*, A. I. R. 1923 Cal. 282. But a decision in a previous rent suit as to the amount of *jumma* payable by the tenant will operate as *res judicata* in a subsequent suit for arrears of rent of subsequent years, when the question of *jumma* was raised and determined in the former suit.—*Hurry Behari v. Pargun Ahir*, 19 Cal. 656. Followed in *Bakshi v. Nizamuddi*, 20 Cal. 505; *Kasimuddi v. Shib Prosad*, 16 Ind. Cas. 590; *Sarjug Prosad v. Ajodhy Rai*, 15 Ind. Cas. 863. See however, *Nil Madhub v. Brojo Nath*, 21 Cal. 236; *Bani Madhub v. Sarbananda*, 43 C. L. J. 135; A. I. R. 1926 Cal. 698. In *Joges Chandra v. Ram Kamal*, it was held that such a decision will operate as *res judicata* unless it is shown that the rent has been subsequently changed.

Where the Court had in a previous suit definitely determined the area of the land in the defendant's possession and the annual rent payable

O. W. N. 76; 17 C. L. J. 71; 16 I. C. 22; *Kali Kumar v. Bidhu Bhusan*, 16 C. L. J. 89; 10 I. C. 382.

A widow sued for possession of properties on the ground that they were her husband's self-acquisitions and that the defendant and her husband were divided. The Court decided that they were not but granted her possession by right to maintenance. In a subsequent suit by her daughter for possession on that very ground, held, that the question whether the properties were her father's separate property was barred by *res judicata*; *Ghelabai v. Bai Javar*, 37 B. 172; 14 Bom. L. R. 1142; 17 I. C. 866.

For the application of the principle of *res judicata*, it is not necessary to show that the subject matter of both the suits is the same, but the matter directly and substantially in issue is the same in both the suits; *Sitanath v. Basudeb*, 2 C. L. J. 540.

Where a suit for redemption has been instituted and a decree for redemption has been passed but not executed a subsequent suit is barred for the redemption of the same mortgage.—*Vedapuratti v. Vallabha Valiya*, 25 Mad. 300, F. B., *Aghore Kumar v. Md. Mussa*, 2 Ind. Cas. 662, *contra*, *Sita Ram v. Madho Lal*, 24 All. 44, F. B. See also *Rama v. Bhagchand*, 39 Bom. 41; *Sheoraj Bahadur v. Gajadhar*, 5 O. L. J. 698; 48 I. C. 922.

Where a mortgagor brings a suit for redemption and obtains a conditional decree but omits to fulfil the condition imposed upon him, he is not debarred from bringing a second suit for redemption unless the decree lays down that if he fails to fulfil these conditions the property will be sold or he will be debarred of all rights to redeem; *Naktaram v. Chiranjil Lal*, 32 All. 215.

The plaintiff, the only daughter of a testator, brought the present suit claiming that the Court should determine "those provisions of the will which were valid and lawful, and those which were invalid and illegal." She also claimed possession, and to be the *shebait* under the will. In a previous suit the present *shebait* had obtained a decree to which the daughter was a defendant, affirming the validity of the will and the rights of the members of the family to be maintained under it. Held that the question of the validity of the provisions of the will having been substantially decided in the former suit, the present suit was barred by *res judicata*.—*Kamini Debi v. Ashutosh*, 16 Cal. 103 (P. C.).

A competent court having decided upon an issue directly raised in a suit brought by a person alleging himself to have been adopted, that this adoption had not taken place, such decision would be *res judicata* in a subsequent suit brought by his son claiming through his father, to establish the same adoption although the suit related to different properties.—*Venkata Mahipati Gangadhara v. Fuchi Sitayya*, 8 Mad. 219 (P. C.) See also *Uttam Singh v. Hira*, 17 Ind. Cas. 365.

In a previous suit plaintiff based his claim on a personal contract with the defendant for the supply of boats at an agreed rate and on failing to prove that agreement brought a second suit for recovery of the same money as compensation for services rendered. Held that the second suit was barred by *res judicata*; *P. L. Christensen v. K. Sathia*, 5 Bur. L. T. 95; 15 I. C. 374.

In a rent suit if the defendant denies the relationship of landlord and tenant with the plaintiff on the ground that he himself is the owner of the property and that consequently he is not bound to pay any rent to the plaintiff who sets himself up as a landlord, the question as to title is directly and substantially in issue. But where the defendant denies the relationship on the ground that although he is a tenant he is the tenant not of the plaintiff but of a stranger to the suit or pleads that the tenancy has terminated or alleges any further similar ground in answer to the claim for rent, the question of title is only collaterally and incidentally in issue so that the decision on it does not bar subsequent suit based on title; *Mahomed Osman v. Hyder Khan*, 42 I. C. 785; *Parchu Mandal v. Chandra Kant*, 14 C. L. J. 220; 12 I. C. 9; *Gobar Sheikh v. Alipuddin Sheikh*, 30 C. L. J. 18; 51 I. C. 356.

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Where the Court had in a previous suit definitely determined the area of the land in the defendant's possession and the annual rent payable

as *res judicata* in a subsequent suit.—*Raman v. Shahanathan*, 14 M. 312; *Raji Krishnayya v. Ganga Bai*, (1918) M. W. N. 380; *Bhai Muljibhai v. Patel Lakshidas*, 36 Bom. 127; 13 Bom. L. R. 1034, *Sethurama Sahib v. Chotta Raja Sahib*, (1917) M. W. N. 327; 40 I. C. 820.

Where an issue in the former suit was not finally heard and decided by the Court, the rule of *res judicata* does not apply.—*Dhani Ram v. Bhagirath*, 22 Cal. 692; *Kailash Monaul v. Baroda Sundari*, 24 Cal. 711, and *Drobomoyi v. Davics*, 14 Cal. 323. See also *Umesh Chunder v. Sharbessur*, 5 C. W. N. 304.

A question not put directly in issue ought not and cannot be treated as *res judicata* unless there has been a judicial determination express or implied in the matter; *Dattatraya v. Kawadji*, 42 I. C. 508 (28 C. 17; 24 C. 711, Rfd. to).

Upon alienation by a Hindu widow, a relation of the husband brought a suit for pre-emption, which was dismissed on the ground that no right of pre-emption was proved. Held that a suit brought by him as reversioner upon the widow's death for the recovery of the property was not barred as *res judicata*.—*Deputy Commissioner of Kheri v. Khanjan Singh*, 5 C. L. J. 344, P. C.; 11 C. W. N. 474; 4 A. L. J. 232; 29 A. 331; 17 M. L. J. 233; 9 Bom. L. R. 591. See also *Muljibhai v. Lakshmidas*, 13 Bom. L. R. 1034.

Where there is no identity of the substantial issue in the two suits, the rule of *res judicata* does not apply. Dismissal of former suit to recover possession for failure to prove defendant's tenancy does not bar a subsequent suit for ejectment.—*Aranda Raman v. Paliyil Vittu*, 5 M. 9.

The plaintiff sued to recover certain land on the ground of ownership, alleging that she had made an oral lease to the defendant. Issues, both as to title and as to the letting were framed, but the suit was dismissed on the ground that the oral lease was not proved. Held that the second suit for possession on the ground of title was not barred.—*Thyila Kandi v. Thyila Kandi*, 4 Mad. 305 (3 Cal. 23; 2 Cal. 152, dissented from).

Where it appeared that no opinion was expressed in the decision of the former suit as to the construction of an ancient document, the question of construction cannot be *res judicata* in a subsequent suit.—*Krishnan v. Veloo*, 14 Mad. 301.

The decision in a prior suit to which the predecessors-in-interest of the defendant in a subsequent suit regarding the same property were parties is not *res judicata* in the subsequent suit as against the defendant, if there was no real contest in the prior suit with regard to the title of the defendant's predecessors; *Ashutosh v. Ananta Ram*, 50 I. C. 727.

Where the questions raised in the previous suit are not in dispute in the subsequent suit, the principle of *res judicata* does not apply.—*Naba Krishna v. Hem Lal*, 2 C. L. J. 144.

Where a former suit for arrears of rent brought by the plaintiff against the defendant was dismissed on the ground that the plaintiff had failed to prove the defendant to be tenant-at-will: Held that it did not operate as *res judicata* to bar a subsequent suit for recovery of rent for

In an action for rent, the tenant admitted the sum claimed, but contended that the rent was due for a larger area than that specified in the plaint. An issue was framed and decided against the tenant, who subsequently sued for a declaration that the amount of the rent decreed in the former suit is the rent for all the lands comprised in holding.—*Held* that the suit was barred.—*Bissun Lal v. Chundee Das*, 4 Cal. 686.

Decision in a previous rent suit as to amount of rent payable by a tenant in which he (tenant) claimed abatement, and the question of abatement was raised and decided, bars a subsequent suit for permanent abatement.—*Nabo Doorga v. Foyzbux*, 1 Cal. 202; 3 Cal. 313; 1 C. L. J. 248. But see *Ekram Mundul v. Holodhua*, 3 Cal. 271; 21 Cal. 236, and *Rash Mohini v. Nafar Chandra*, 27 Ind. Cas. 285.; *Bengaram v. Bejoy Govinda*, 91 I. C. 738; A. I. R. 1926 Cal. 513.

A decision in a previous rent suit in which the defendant pleaded uniform payment of rent for more than 20 years, and his contention was supported by the Court, does not bar a subsequent suit for enhancement of rent.—*Gopee Mohun v. Hills*, 3 Cal. 789.

Previous decrees for cesses at a certain rate obtained by a landlord against a tenant, do not operate as *res judicata* in subsequent suit for cesses claimed at a higher rate, although they are admissible as evidence in the suit, and may raise a presumption in favour of the tenant.—*Ricketis v. Rameswar Malia*, 28 Cal. 109, (25 Cal. 725, followed); *Pitamber v. Rahmat Ali*, 1 Pat. 218; 3 Pat. L. T. 282.

A decree by a co-sharer landlord is not admissible as evidence as to the rate of rent in a suit brought by another co-sharer, *Abdul Ali v. Raj Chandra*, 10 C. W. N. 1084 (13 Cal. 352; 25 Cal. 522, referred to). But see *Ramadhin v. Dhanwantari*, 13 Ind. Cas. 624.

A dismissal of a suit for enhancement of rent is no bar to the filing of a fresh suit in a subsequent year; *Badri Prasad v. Ramcharan*, 31 I. C. 866.

**Finding as to validity of Kabuliat When Res Judicata.**—The question whether the decision in a rent suit can operate as *res judicata* on matters other than the relationship of landlord and tenant depends upon what were the issues raised and decided between the parties in the rent suit. Where in a rent suit, a *Kabuliat* has been held on a judicial determination to be valid and effective as against the tenant and to have been properly executed, a subsequent suit by the tenant for a declaration that the *Kabuliat* is null and void is barred by *res judicata*; *Beni Madhab v. Bholanath*, 47 I. C. 8; *Abu Mahomed v. Bachhani Bibi*, 40 I. C. 477.

Where the question whether the defendant executed a certain *Kabuliat* in favour of the plaintiff was a material fact in issue in a previous suit and it was decided then that the plaintiff failed to prove the same there, *held*, that in a subsequent suit, plaintiff is not entitled to prove and rely on admission contained in the *Kabuliat*; *Keramat Ali v. Krishna*, 97 I. C. 291; A. I. R. 1926 Cal. 513.

The fact that in a former suit between the parties the amount mentioned in the *patta* was taken as the basis of the amount of the rent payable in kind, cannot operate as *res judicata* in a subsequent suit by the landlord claiming the market value of the rent payable in kind; *Sarat Chandra v. Abbas Ali*, 41 I. C. 833.

*Muthu Pillai v. Veda Vyasa Chariar*, 12 L. W. 277 (10 Mad. 102; 9 L. W. 180 followed; 11 C. 301, 18 C. 647, 40 B. 602 referred to; 37 M. 25, 2 L. W. 101, 9 L. W. 84; 86 C. 193 and 12 B. L. R. 394 distd.); *Fazil v. Hari Kishore*, 33 I. C. 620; *Miltan Poddar v. Jadab Chandar*, 33 I. C. 159; *Har Gobind v. Jaurala Prasad*, 55 I. C. 938; *Har Shahi v. Hon'ble Raja Ali Muhammad Khan*, 16 O. C. 178; 20 I. C. 266. See also *Shib Charan v. Raghu Nath*, 17 All. 174; *Har Sahai v. Ali Mahommed*, 16 O. C. 178; 20 Ind. Cas. 266; *Parbati v. Mathura*, 40 C. 29; 16 C. L. J. 9; 18 C. W. N. 877; *Jiva Ram v. Kalyan*, 8 A. L. J. 409; 9 Ind. Cns. 983; *Abdulla Khan v. Khanmia*, 32 B. 315; 10 Bom. L. R. 380; *Irawa Lazmana v. Satyappa*, 35 B. 38; 12 Bom. L. R. 766; *Harihar v. Karamat*, 9 C. L. J. 403. But see *Peary Mohun v. Ambika Churn*, 24 Cal. 900; *Modukare v. Masina*, (1918) M. W. N. 775; *Rambahari v. Surendra*, 19 C. L. J. 34; *Ramji Shah v. Gululam*, 22 P. W. R. 1918; 44 I. C. 983.

Where a finding has been arrived at on a matter which is not necessary for the disposal of the suit and is not made the basis of the decree which is given in spite of it, the matter cannot be said to have been substantially in issue between the parties and consequently the finding cannot operate as *res judicata* in a subsequent suit; a finding on a question in an appealable suit when the decree is in favour of the party against whom that finding is given, is not final so as to constitute *res judicata* under s. 11 O. P. Code; *Dhanna Mal v. Lala Moti Sagar*, A. I. R. 1927 P. C. 102; *Meethala Veetil Kaitheri v. Naricott Chathan*, 25 M. L. T. 66; 9 L. W. 84; (1919) M. W. N. 34; 52 I. C. 258 (11 C. 301; 12 C. 647; 40 C. 29; 17 M. L. T. 85; 2 Pat. L. J. 155 refd. to; 23 M. L. T. 291 disstd. from); *Manindra Chandra v. Panchanan*, 49 I. C. 248; *Parmeshar Din v. Debi Prasad*, 5 O. L. J. 647; 48 I. C. 386; *Midnapore Zemindary Co. v. Narresh Narayan*, 48 I. A. 49 (P. C.) 48 C. 460; *Parbati v. Mathura*, 40 C. 29; 16 C. W. N. 877; 16 C. L. J. 9; 15 I. C. 453; *Kausalya v. Nabin Chandra*, 49 I. C. 518; *Daudhai v. Daya*, 43 B. 568; 21 Bom. L. R. 363; 51 I. C. 169; *Bai Nath v. Narshi Dullabh*, 22 Bom. L. R. 64; 55 I. C. 322; 44 Bom. 321; *Sohan Singh v. Jawala Singh*, 73 I. C. 854. A. I. R. 1923 Lah. 248.

Decision of irrelevant matter in earlier suit does not operate as *res judicata*; *Lala Soniram v. Kahaiya Lal*, 35 All. 227 P. C.; 17 C. W. N. 605 17 C. L. J. 488; 15 Bom. L. R. 489; 25 M. L. J. 181; *Satyad Ghazanfar v. Lala Ram Ratan*, 20 Ind. Cas. 17; *Vasudeva v. Thathadi*, 9 M. L. T. 450; 9 Ind. Cas. 787; (1911) M. W. N. 188; *Nurbaksh v. Ahmad Baksh*, 120 P. L. R. (1911); 101 P. W. R. (1911); *Ahmedbhoy v. Dinshaw*, 11 Bom. L. R. 366; 6 M. L. T. 200; *Dhanapalu v. Anantha*, 24 M. L. J. 418; 13 M. L. T. 805; 18 Ind. Cas. 973; *Abdur Rahman v. W. O'Brien*, 257 P. L. R. 1914; 146 P. W. R. 1914; 25 I. C. 357; *Kirparam v. Nawab*, 141 P. L. R. 1917; 43 I. C. 754.

Where the lower Court had decided a case both on the question of title and possession but the Appellate Court had dealt only with the question of possession, held that the question of title had not been heard and finally decided by a Court of competent jurisdiction and was still open between the parties. Where the decision of a lower Court is appealed to a superior tribunal, which for any reason the question is left open, and *hoo Nath*, 7 Cal. 381; 9 C. L. J. 34; *Nilraru v. Nilraru*, 6 Bom. 110; *Ghurpheknai v. Parmeshar Dayal*, 5 C. L. J. 653; *Baldeo Singh v. Hira Lal*, 9 A. L. J. 67; *Alagori v.*



decided first, and not the one instituted first. The word "decided" means decided finally; the decision in the suit pending in appeal is not final decision. For instance, if two suits are instituted by the same parties, in the same or in different courts, one in January 1914 and another in March next, and the suit which was instituted in March was decided first, and the suit which was instituted in January was decided afterwards, then the "former suit" according to the explanation would be the one decided first, irrespective of the date of institution of the suits. In *Balkishan v. Kishanlal*, 11 A. 48, it was held that the doctrine of *res judicata* so far as it relates to the prohibiting the re-trial of an issue, refers not to the date of the commencement of the litigation, but to the date when the Judge is called upon to decide the issue. See also *Beni Madhav v. Indar Sahai*, 32 All. 67: 6 A. L. J. 991; *Raman Chetty v. Mutuvēcrappa*, 6 L. B. R. 93: 5 Bur. L. T. 199: 17 Ind. Cas. 860; *Gururajammah v. Venkatakrishnama*, 24 M. 350; *Itar Singh v. Umrao*, A. I. R. 1927 All. 189: 99 I. C. 299. Explanation I gives legislative sanction to the principle laid down in *Balkishan v. Kishanlal*, 11 A. 148 and *Gururajammah v. Venkatakrishna*, 24 M. 350 and also to the principle that the doctrine of *res judicata* applies equally to the trial of appeals.

Where in both of the cross-suits between the same parties, the question at issue arising out of the same transaction is the same and one is decided before the other, the decision in the suit decided first is *res judicata* against the other; *Sunderlal Kapoorchand v. Bawan Prosad*, 96 I. C. 894.

**The General Principles of Res Judicata Apply to Appeals.**—S. 11 applies to suits only and not to appeals.—"It is no doubt true that in the body of the Civil Procedure Code as well as in other enactments, the word "suit" is often used as including proceedings before an Appellate Court and also other proceedings of a Civil nature. But having regard to the phraseology used in s. 11 and more particularly to Explanation II, which, it might be noted, was for the first time added in 1908 to the present Code, the word "Court" and "suit" signifies proceedings beginning with the plaint and ending with the decree in that Court. No other interpretation is possible. If the word "suit" is to be taken as including "appeal," the section becomes inconsistent with Explanation II. This view is confirmed by the language of Explanation II. In *Mt. Fakharannissa v. Malik 'Rahim Bakhsh*, 23 P. R. 1897 and *Mahk. Rahim Bakhsh v. Mt. Fakharannissa*, 31 P. R. 1898; Chatterji and Stogdon, J. J., were also inclined to take the same view and in *Ramlal v. Chhab Nath*, 12 A. 578: (1890) A. W. N. 184, Edge, C. J. and Brodhurst, J., definitely laid down that s. 13 of the Code of 1882 (s. 11 of the present Code) did not apply to appeals but the principle of *res judicata* did, as s. 13 is not exhaustive." This view is further strengthened by the fact that after the above cases had been decided under the Code of 1882 the legislature deliberately enacted Explanation II for the first time in 1908 which read with the main clause of the section leaves no doubt whatever that "suit" does not include "appeal."—Per Tek Chand, J., in *Mt. Lachmi v. Mt. Bhuli*, A. I. R. 1927 Lah. 280, 294.

**Two Suits Tried Together: One Judgment but Two Decrees: Appeal from One Decree Only but No Appeal from the Other: Whether Appeal Barred by Res Judicata.**—Where the same property is the subject of two contemporaneous suits between the same parties, in which

Where a point is incidentally decided against a party, that finding does not operate as *res judicata* in a subsequent suit; *Jagannath v. Suraj Buxsh*, 30 Ind. Cas. 502.

A matter which is directly adjudicated upon by a court can be treated as *res judicata* but not matters determined for collateral or incidental purposes only.—*Jardine Skinner & Co. v. Dwarka Nath*, 14 W. R. 412; *Dahoo Munder v. Gopce Nund Jha*, 2 W. R. 79; *Salahmunnessa v. Mohes Chunder*, 16 W. R. 85; *Shib Nath v. Nabo Kishen*, 21 W. R. 189. Incidental decision of title in a suit for damages does not bar a subsequent suit for declaration of right and recovery of possession.—*Mahima Chandra v. Rajkumar*, 1 B. L. R. 1; 10 W. R. 22; *Doorga Ram v. Kally Kristo*, 8 C. L. R. 549.

A Court having tried and determined an issue arising in a suit on which the suit might have been disposed of, proceeded to try and determine other issues, the determination of which in that suit was not necessary for its disposal. Held, that the determination of such issues will be *res judicata* and cannot be reopened in a subsequent suit.—*Man Singh v. Narayan Das*, 1 All. 480. But see *Shib Charan v. Raghu*, 17 All. 174; *Harsahi v. Hon'ble Raja Ali Muhammed Khan*, 16 O. C. 178; 20 I. C. 266.

In order to constitute the bar of *res judicata*, it is not sufficient merely that an issue on the same point should have been raised, and may have been incidentally decided in the former suit; but it must appear that the matter referred to was alleged by one party, and either denied or admitted expressly or impliedly by the other.—*Shama Churn v. Prosonna Kumar*, 5 C. L. R. 251. See also *Sheo Ratan v. Sheo Sahai*, 6 All. 358. But see 25 Bom. 189. See also 26 Mad. 760 and 31 Mad. 385.

Where in a former suit for some land the question of boundary between two villages was decided, and in a subsequent suit for some other land the former decision was relied upon Held that the finding in the former suit was incidental and was conclusive only as to the land in dispute in that suit, but did not make the former decision conclusive as to the boundary line itself.—*Moni Roy v. Rajbunsee Koer*, 25 W. R. 393.

An incidental finding as to the boundary of a plot of land not on a question directly and substantially in issue in a previous suit is not *res judicata* as regards the question of title that arises in a subsequent suit between the same parties; *Muhammad Abdul Kadir v. Jnan Chandra*, 32 I. C. 738.

The question whether a person should be admitted as the legal representative of a deceased plaintiff to continue a suit cannot be regarded as one of the questions arising for the decision in the suit itself. It is really a matter collateral to the suit and one that has to be decided before the suit itself is proceeded with; *Samsari Vasa Sarathi v. Pathuma*, 25 M. L. J. 279; (1913) M. W. N. 673. 14 M. L. T. 176; 20 I. C. 650.

**Issues Left Open.**—A fresh suit for determination of an issue or issues advisedly left undecided in the former suit either by the original or by the Appellate Court is not barred as *res judicata*—*Emamooddeen v. Fatteh Ali*, 3 C. L. R. 447, [3 B. L. R. (P. C.) 91; 12 W. R. 43, distinguished].

the decree in his own suit. *Held*, that this appeal by D was barred by *res judicata* since he did not appeal from the decree in his own suit, *Gangadhar v. Mt. Sekali Telini*, 34 C. L. J. 281: 64 I. C. 574.

The explanation however has not solved the question as to which of the two suits will be deemed "former suits" when both the suits are decided on one and the same day.

**Sult.**—The word "suit" in s. 11 wherever it occurs always means suits in the Court of first instance. The clue to this is furnished by the expression "in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised" occurring in s. 11 (*per Dalip Singh, J.*, in *Mt. Lachhmi v. Mt. Bhulli*, A. I. R. 1927 Lah. 289, 310). Although the word "suit" in this section does not include proceedings, the applicability of the doctrine of *res judicata* to certain proceedings has been long recognized; *see* 6 All. 269 P. C., 29 Cal. 707 P. C. and *Notes on Clauses, Part I*.

The word "suit" in this section must be understood to mean such a matter as might have formed the subject of a separate suit independently of the special provisions of the Code of 1882 such as s. 45 (now Or. II, r. 3) which enables the plaintiff to unite several cases of action in one and the same suit, *Sheoraj Rai v. Kashinath*, 7 All. 247, F. B.

An application for review is not a suit within the meaning of this section; *Srich Chandra v. Triguna*, 40 Cal. 541; *Langat Singh v. Janki Koer*, 14 C. L. J. 481, p. 485; 39 Cal. 265 (3 Cal. 343, referred to). An application under section 105 of the B. T. Act is not a suit; *Chiodith v. Tulsi*, 40 Cal. 428; 17 C. W. N. 467. Proceedings under the Land Acquisition Act are not suits; *see* 34 Cal. 466; 20 Mad. 269, and 7 Cal. 406. A proceeding for probate or letters of administration is not a suit, *Nirod Barani v. Chamat Karni*, 19 C. W. N. 205. *See also* 20 Cal. 888; 25 Cal. 354; 19 All. 458; 28 Bom. 644. *See also* the cases noted under the heading "Decision under the Land Acquisition Act," and notes under section 2 under the heading "*In the suit*."

**Expl. IV: Any Matter which Might and Ought to have been Made Ground of Defence or Attack.**—Explanation IV deals with matters constructively in issue in the former suit. Or. XIV, rr. 1 and 3 of the C. P. Code prescribe that plaintiff must allege all material propositions of law or fact in order to show his right to sue; and the defendant also must allege all such material propositions in order to constitute his defence; and that each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. Therefore, each and every matter which is alleged by one party and either denied or admitted expressly or impliedly by the other, forms the subject of a distinct issue in every suit, and the final determination on the issues thus raised or framed operates as *res judicata* according to the section itself. But it sometimes happens that a plaintiff has two or more alternative claims for relief regarding the same subject matter, and instead of asking relief based upon all the claims, he sets up only one claim in his plaint and asks relief on that ground alone, keeping back the other claims for future litigation, in case his present suit fails. Here the matter which the plaintiff might set up in the former suit, if he had so pleased, but did not do so, shall according to this explanation, by fiction of law, be

173, P. C. Followed in *Magniram v. Mehdi Hossain*, 81 Cal. 95: 8 C. W. N. 30, and in *Sri Raja Rau Lakshmi v. Sri Raja Inuganti*, 21 Mad. 344, P. C.: 2 C. W. N. 337, P. C. See also *Niamut Khan v. Phadu Buldia*, 6 Cal. 319; 7 C. L. R. 227; *Shib Charan v. Raghu Nath*, 17 A. 174, and the cases therein referred to; *Jagatjit Singh v. Sarabjit Singh*, 19 Cal. 159 P. C.; *Secretary of State v. Durbijoy Singh*, 19 Cal. 312 P. C.; *Bhikabhai Ratanchand v. Bai Bhuri*, 27 Bom. 418; *Jalasutram v. Venkata Narasimha*, 29 Mad. 42; 16 M. L. J. 35; *Hope Mills Ld. v. Cowasji*, 13 Bom. L. R. 162; *Panchu Mandal v. Chandra Kant*, 14 C. L. J. 220: 12 I. C. 9; *Babu Lal v. Hari Baksh*, 122 P. W. R. 1917: 41 I. C. 479: 13 P. R. 1818; *Indu Bala v. Atul Chandra*, 31 C. L. J. 507: 57 I. C. 344 (16 C. 173; 19 C. 159; 33 C. 116 referred to); *Venkattasubban v. Ayyathurai*, 37 M. L. J. 554: 26 M. L. T. 364: 54 I. C. 202; *Muhammad Maruf v. Sultan Ahmed*, 34 I. C. 344; *Beni Madhab v. Sorbananda*, 43 C. L. J. 135: A. I. R. 1926 Cal. 698.

For purposes of *res judicata* it is not essential that the subject-matter of litigation should be identical with the subject-matter of the previous suit. The scope of the former litigation and the question raised and decided therein must be determined by reference not merely to the decree, but also to the judgment, and if need be, to the pleadings.—*Ranjit Singh v. Basanta Kumar*, 12 C. W. N. 739; 9 C. L. J. 597 (9 C. W. N. 938, P. C. referred to). See *Rakhmini v. Dhando*, 36 Bom. 207: 14 Bom. L. R. 128; *Panchu Mandal v. Chandra Kant*, 14 C. L. J. 220; *Mittan Poddar v. Jadab Chandra*, 2 Pat. L. J. 159: 1 Pat. L. W. 221: 38 I. C. 211.

Where the Court after a consideration of all the evidence in the case gives findings on all the issues as against the defendant those findings will operate as *res judicata* though the suit is itself dismissed and the findings might have been unnecessary for the dismissal of the suit provided the findings are not inconsistent with the decree itself; *Rama Krishna v. Krishnaswami*, 36 M. L. J. 641: 25 M. L. T. 58 (1919) M. W. N. 7: 9 L. W. 180: 52 I. C. 34 (1 C. 14 and M. 10 102, followed; 11 C. 301 and 17 M. L. T. 85, referred to).

A summary dismissal of the suit on the ground of *res judicata* is bad if all the conditions requisite for the application of the rule are not stated in the plaint. A decision on an issue not based on the pleadings of parties cannot be *res judicata*; *Mani Chand v. Skeekri*, 75 P. W. R. 1913: 194 P. L. R. 1913: 18 I. C. 1007.

A judgment operates by estoppel as regards all the findings which are essential to sustain the judgment. If in a suit a question is raised by the pleadings and argued, and if both the parties to the suit invoke the opinion of the Court thereupon, the judgment of the Court upon it is not *ultra vires*, merely because an issue was not framed which strictly construed, embraces the whole of it; regard must be had rather to the substance than to the form of action which would by no means prevent the operation of the general law relating to *res judicata*; *Midnapore Zemindari Co. Ltd. v. Jogendra*, 62 I. C. 491.

It is by the decree, and not by the judgment, that the question of *res judicata* must be decided. The findings in a judgment not embodied in the decree amount to no more than *obiter dicta*, and do not constitute a final decision of the kind contemplated by s. 11. Reservation in a judgment, and not in the decree, would not save the second suit from being

Where a plaintiff brings two suits based on different causes of action with regard to the same property, it is not obligatory on a person who is defendant in both the suits, to plead as a defence to each suit what is properly a defence to the other; see *Kailash Chandra v. Ram Narain*, 4 C. L. J. 211; *Mahabir Tewari v. Purbhunath*, 7 C. L. J. 504; 12 C. W. N. 292; dist. in *Nawa Zish v. Murtaza*, 14 O. C. 117, in which it has been held that the fact that the causes of action in two suits are different is no ground for holding that a matter is not *res judicata*.

Where the subject-matter of the former litigation and the relief claimed therein were the same as those claimed in the subsequent litigation, the plaintiff cannot bring two suits on what is put forward by him as two different causes of action, and the courts should try their best to hold that the causes of action in such cases are substantially the same; *Bommidi Bayyan v. Bommidi Surjanarayana*, 23 M. L. J. 543: 37 M. 70 F. B.: 12 M. L. T. 500: (1913) M. W. N. 1; *Masilamania v. Thiruvengadam*, 31 Mad. 385; *Takarunnissa Chowdhurani v. Tarinicharan*, 43 I. C. 221.

The applicability of Explanation IV depends upon the question whether the plaintiff is now suing in a capacity in which he is a stranger to the capacity in which he sued in the former suit. If a plaintiff is suing in a capacity in which he is a stranger to the capacity in which he sued in a former suit, his claim has no proper connection with that former suit, and the Explanation IV does not apply. If he is not so suing, then the claim which he is now putting forward is a claim which might and ought to have been put forward in the previous suit; *Hargovan v. Mulji*, 34 B. 416: 11 Bom. L. R. 921 (25 B. 189: 23 B. 215, *followed*.)

It is not always easy to determine when and under what circumstances a party would be bound to put forward all his grounds of defence or attack in the former suit and when it would be optional to him to do so, as the decisions of the High Courts are not unanimous on the point. The only possible means of determining it, is by reference to the provisions of Or. II, rr. 1-5 relating to the frame of suits, that is, whether the causes of action in the two suits are identical or different. This explanation in substance directs a party to include in one suit the whole of the claim which he is entitled to make in respect of the same cause of action, and if he omits to do so, he will be precluded from bringing forward in a subsequent suit, the claim so omitted, and it is virtually a case of omission expressed in another form.

**Matters Constructively In Issue.**—According to the general law relating *res judicata* where a question has been necessarily decided in effect, though not in express terms between parties to the suit, they cannot raise the same question as between themselves in any other suit in any other form. The words "causes of action" in this section must be constructed with reference to the substance rather than the form of the action.—*Soorjomonee v. Suddanund*, L. R. I. A. Sup. Vol. 212: 12 B. L. R. (P. C.) 304: 20 W. R. 377. Referred to in *Dakhyani v. Dol Gobind*, 21 C. 430 and in *Lilabati v. Bishun Chohay*, 6 C. L. J. 621, p. 629. *Apurba Krishna v. Shyamacharan*, 24 C. W. N. 223: 54 I. C. 952 where the same point was decided. Distinguished in *Sarkam Abu Torab v. Rahaman Buksh*, 21 C. 83. See also *Krishna Behari v. Bunwari Lal*, 1 C. 144 P. C.: 25 W. R. I. Followed in *Bunbahadur v. Luchu Kaer*, 11 C. 301 P. C.; in *Ghela Ichha Ram v. Sankal Chand*, 18 B. 597, and in *Ram Krishna Jagannath v.*

estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps or ground work, and the judgment operates by way of estoppel as regards all the findings which are essential to sustain the judgment, see *Panchu Mandal v. Chandra Kant*, 14 C. L. J. 220; *Aghore Nath v. Kamini Debi*, 11 C. L. J. 461.

It should however be borne in mind that the doctrine of constructive *res judicata* does not apply unless the identity of the subject-matter of the two suits is clearly established. To determine this, reference must be made not merely to the decree but also to the judgment, and if need be, to the pleadings in the previous suit; see *Surjiram Marwari v. Barmadeo*, 1 C. L. J. 337; *Dalip Narain v. Chait Narain*, 16 C. L. J. 394; *Golab Koer v. Badshah* 13 C. W. N. 1197 p. 1220; C. L. J. 420 *Gurudeo Singh v. Chandrika Singh*, 36 Cal. 193; 5 C. L. J. 611; *Uttam Ishlok v. Ramnarain*, 28 All. 365. The doctrine of constructive *res judicata* must be applied strictly and cannot be extended beyond the strict limits of s. 11 of the C. P. Code; *Tafazul Husain v. Hira Lal*, 36 I. C. 650 (24 C. 711), 1 C. L. J. 248, 1 C. L. J. 337 *refd. to*.

**Ex parte Decree When Operates as Res Judicata.**—Where an issue was raised on the points now called in question and was heard and finally decided by the court on the previous occasion, the rule of *res judicata* applies although the suit was decided *ex parte*; *Hara Chandra v. Bepin*, 13 C. L. J. 38; *Md. Gauhar Ali v. Samiruddin*, 18 C. W. N. 33; *Goloka v. Shafar Ali*, 9 Ind. Cas. 363; *Gobindram v. Sabghatallah*, 8 S. L. R. 218; 27 I. C. 990

In the absence of fraud or irregularity, a decree obtained *ex parte* is as binding for all purposes as a decree in a contested suit—*Bir Chunder v. Hurriah Chunder*, 3 Cal. 383; 1 C. L. R. 585. Approved in *Rajkumar v. Alimoddi*, 17 C. W. N. 627. See also *Hiranmoy v. Ramjan Ali*, 20 C. W. N. 48; *Lala Gobind Lal v. Rao Baldeo Singh*, 226 P. L. R. 1914; 128 P. W. R. 1914; *Rajwant Prosad v. Ram Ratan*, 37 All. 485 P. C.; 20 C. W. N. 35; *Govind Ram v. Sabghatalla*, 8 S. L. R. 218; See also *Madhu Munjari v. Jhumar Bibi*, 1 C. W. N. 120. (20 Cal. 505, followed) and *Moti Lal v. Nripendra Nath*, 2 C. W. N. 172.

A decision in a previous suit for rent, whether *ex parte* or *inter partes* operates as *res judicata* in a subsequent suit for rent, even for different periods, if it decides any question which arises in the suit or it omits to decide any question which ought to have been decided, if objections were taken by a party; *Shib Chandra v. Lakhipriya*, A. I. R. 1925 Cal 427; *Maheswari v. Gaurhari*, 91 I. C. 380; A. I. R. 1926 Cal 767. An *ex parte* decree for rent is conclusive upon the question as to the existence of the relationship of landlord and tenant between the parties at the time of the decree; *Hiranmoy v. Ramjan Ali*, 43 C 170 20 C W N. 48

An *ex parte* decree in a suit for rent in which the relationship of landlord and tenant was neither raised nor decided cannot operate as *res judicata* in a subsequent suit for rent upon the question of relationship. The effect of an *ex parte* decree does not depend on the question whether the decree has or has not been executed, *Choudhury v. Jafar Muhammad*, 24 I. C. 739, *Ayyaperumal v. Ramasami*, 29 M. L. J. 362; (1915) M. W. N. 614; 2 L. W. 650; 30 I. C. 983.

No question of *res judicata* arises in the case where a party seeks to set aside a decree on the ground of fraud and collusion—*Krishnabhupati v.*

cannot be allowed to litigate his title over again, unless his claims are mutually destructive or there is any embarrassment in joining the rights. Where the plaintiff did not set up the title which he could have brought forward as an alternative basis of his claim on the last occasion, he cannot be allowed to litigate it in a second suit, *Rangaswamy v. Apala-swamy*, (1916) 1 M. W. N. 286; *Gobinda Variar v. Veetil Appu*, (1919) M. W. N. 677. But he ought not to be compelled to add a ground which he could not, without the addition of some other party as co-plaintiff or as additional defendant. In other words, where the combination of two inconsistent claims in the former suit would have led to confusion and embarrassment, such a claim is not one which ought to have been joined in the former suit. Again if in consequence of the combination of two such inconsistent claims it would have been necessary to add some other party as co-plaintiff or as additional defendant, then such action is not one which ought to have been joined in the former suit. See *Daya Shankar v. Ganga Sahai*, 12 O. C. 347; 4 I. C. 763; *Suraj Bikram Singh v. Chandrabhan Singh*, 17 I. C. 334.

The test for determining whether any matter alleged in the subsequent suit ought to have been matter of attack in the former suit in respect of the same property, is whether the matters are so dissimilar that their union might lead to confusion. If it would not have led to any confusion, it would be *res judicata* of the matter in a subsequent suit, *Guddappa v. Tirkappa*, 25 B. 189; *Kameswar Prasad v. Rajkumari Ratan Koer*, 20 C. 79 P. C.; *Mohabir Tewari v. Purbhoonath*, 12 C. W. N. 292; 7 C. L. J. 504, *Solimunnissa v. Sheikh Jinabali*, 1 I. C. 808; *Maung Ba Thaw v. Ma Hrit*, 1 Bur. L. J. 34; 72 I. C. 14; *Soundara Rajalu v. Donaisami*, 24 L. W. 453; A. I. R. 1926 Mad. 1128.

The question whether any matter might and ought to have been made a ground of defence or attack in a previous suit must depend upon the facts of each case. One important test is, whether the matters in the two suits are so dissimilar that their union might lead to confusion; *Mahomed Ibrahim v. Sheikh Hamja*, 35 B. 507; 18 Bom. L. R. 895; 12 I. C. 387; *Gokul Chand v. Ganga Bukhsh*, 8 A. L. J. 936; 11 I. C. 257; *Hanuman v. Mannulal*, 6 N. L. R. 156; *Naffar Chander v. Munshi*, 8 C. L. J. 303; *Shamumal v. Rijhumal*, 10 S. L. R. 29; 36 I. C. 92; *Girdhari Lal v. Musst. Umadajan*, 3 Lah. L. J. 215; 63 I. C. 717.

It should also be noted here, that the word "might" in this explanation presupposes that the person defending or attacking in the former suit, had knowledge of the matter at the time of that suit, and could have made it a ground of defence or attack therein; *Manikbai v. Virchand*, 9 Bom. L. R. 1020; *Mohabir v. Purbhoo*, 12 C. W. N. 392; 7 C. L. J. 504; *Masilmania v. Thiruvengadam*, 31 M. 895, p. 392; *Moosa Goolam v. Ebrahim*, 40 C. 1 P. C.; 16 C. W. N. 937; 14 Bom. L. R. 1211, *Akhi v. Hazragul*, 71 I. C. 1009. It is no doubt reasonable that unless a party had knowledge of the matter, it is not possible for him to make it a ground of defence or attack in the suit.

The word "might" here denotes option or choice of the party and the word "ought" denotes advisability. The combined effect of the two words is, that although a party had the liberty of choosing either to put forward a claim in the former suit or not, but in doing either of them he should consider whether it was advisable for him to do so or not.

to apply, it will have to be shown that the question of right or liability, not merely for the period in the previous suit but that for all times or once for all, was directly and substantially in issue and was tried and determined. If a direct issue on the point was raised and decided, the decision would be *res judicata* in respect of any suit for a subsequent period. If the decision falls short of that requisite and if the general question was gone into and decided merely for the purpose of deciding the right or liability for the period involved in the suit, then the issue was raised not directly or substantially but collaterally or incidentally. In a suit for rent, no issues need be framed, but where issues are framed, the non-existence of a direct issue of this character has to be seriously taken into account in determining whether the question of right or liability for all times was really directly and substantially in issue; *Gnanada Gobinda v. Nalini Bala*, 30 C. W. N. 593: 43 C. L. J. 146: 94 I. C. 837: A. I. R. 1926 Cal. 650.

**Decision in a Rent Suit When Operates as Res Judicata on Question of Title.**—A decision in a rent suit brought by the plaintiff against his tenant for arrears of rent when the question of title was not directly and substantially in issue, does not operate as *res judicata*, in a subsequent suit brought by the same plaintiff for establishment of his title to the land, not only against the tenant, but also against the person whose title as landlord the tenant-defendant had set up in the rent suit.—*Dwaraka Nath v. Ram Chand*, 26 Cal. 428, F. B.: 3 C. W. N. 266, (12 C. L. R. 38, overruled). See also *Nittya Nand v. Ram Narain*, 6 C. W. N. 66; See *Mahomed Afsaruddin v. Beer Chunder*, 8 Cal. 470; *Run Bahadur Singh v. Lucho Koer*, 11 Cal. 301 (P. C.): (reversing 6 Cal. 406), *Harhar v. Karamat*, 9 C. L. J. 493, and *Sri Hari v. Maharajah Khitish Chunder*, 24 Cal. 569: 1 C. W. N. 509. *Khater Mistri v. Sadruddi Khan*, 84 Cal. 922: *Bammidi Bayya v. Bammidi Paradesi*, 35 M. 216; 21 M. L. J. 344; 10 I. C. 75; 10 M. L. T. 533; *Palki Pandey v. Dwarka Pandey*, 1 Pat. L. W. 634; 40 I. C. 530; *Pranhari v. Chandra Kumar*, 25 I. C. 204; *Baldeo Prasad v. Narain Halwai*, 34 I. C. 123; *Durgapada v. Manindranath*, 63 I. C. 762; *Totta v. Jaggu*, 21 A. L. J. 476. But where the question of title was directly and substantially in issue the decision operates as *res judicata*: *Panchu Mandal v. Chandra Kanta*, 14 C. L. J. 220; *Sreenath v. Kaser*, 18 C. W. N. 116; *Parbati v. Mathura*, 16 C. W. N. 877: 16 C. L. J. 9: 40 Cal. 29; *Nanji Koer v. Umatul*, 13 Ind. Cas. 40; *Gobind Chunder v. Taruck Chunder*, 3 Cal. 145 (F. B.); *Bemola v. Panchanun*, 3 Cal. 705; *Kartick v. Sridhar*, 12 Cal. 563; *Radha Madhab v. Monohur*, 15 Cal. 756 (P. C.), followed in *Kasiswar v. Mohendra Nath*, 25 Cal. 136; and in *Sahadeb Dhali v. Ram Kudra*, 10 C. W. N. 820; *Rahimunnessa v. Karam Ali*, 19 Ind. Cas. 632; *Fykali Chowdhury v. Hemangini Debi*, 10 I. C. 63; *Ramanuja Das v. Janki Das*, 29 I. C. 415; *Jatindranath v. Mahomed Malik*, 40 I. C. 659; *Sheo Charan v. Bansu Singh*, 44 I. C. 129; *Shyam Lal v. Brindaban*, 72 I. C. 655.

In all such suits where questions of *res judicata* arise, what is necessary to see is this, namely, whether the decision in the former rent suit was given on an incidental point, or on a question that went to the very root of the case; *Mane Mahomed v. Dhane Mahomed*, 17 C. W. N. 76: 17 C. L. J. 71; *Prabhu Narain v. Sundar*, 16 C. L. J. 41; *Srinath v. Chhabi Lal*, 20 Ind. Cas. 700 and *Ncamutullah v. Baijullah*, 26 Ind. Cas. 619; *Sonaullah v. Durga Kanta*, 50 I. C. 598. The test of *res judicata* in cases of these kinds is whether the issue of title was directly and substantially raised in the rent suit, *Ram Chandra v. Girish Chandra*, 7 Ind. Cas. 15.



The same effect must be given to a matter which might and ought to have been but has not been made a ground of defence in the former suit, as must be given to it if it had been made a ground of defence in the former suit; *Abdulla Khan v. Khanmia*, 32 B. 315. But the Madras High Court in the Full Bench case of *Bommidi Bayyan v. Bommidi Suryanarayana*, 23 M. L. J. 543 F. B.: 37 M. 70 F. B.: 12 M. L. T. 500: (1913) M. W. N. 1, seems to have taken a different view. In that case it has been held that any ground of attack or defence which by virtue of the explanation is deemed to have been directly and substantially in issue in a suit must also be deemed to have been heard and finally decided adversely to the party who failed to raise it; and that the proposition that failure to raise grounds of attack or defence which might and ought to have been raised, does not make such grounds *res judicata* unless there is an express decision by the court upon them, which is wholly untenable. It has further been held in that case that, if a court is bound under Explanation IV to adopt and act upon the fiction that a matter which might and ought to have been made a ground of defence or attack in the former suit should be deemed to have been a matter directly and substantially in issue in such suit, that same explanation necessarily imposes the duty of acting upon the further fiction that that matter was also heard and decided and adjudicated upon in the former suit. Similar view seems to have been taken in *Srigopal v. Pirthi Singh*, 20 A. 110: in *Jamadar Singh v. Serazuddin*, 35 C. 979: 12 C. W. N. 862: 8 C. L. J. 82; in *Mohm v. Anil Bundhu*, 13 C. W. N. 513; 9 C. L. J. 362; in *Nawazish v. Murlaza*, 14 O. C. 117. The view taken by the Full Bench of the Madras High Court in 37 M. 70 F. B. seems to lay down a reasonable and sound principle, because where a matter has not been actually in issue but has been constructively in issue, how can it be actually heard and finally decided unless the Court acts upon the fiction of implied decision? it is only by virtue of this explanation that the matter must also be deemed to have been heard and finally decided adversely to the party who failed to raise it. If the court is bound under this explanation to assume that a matter which might and ought to have been made a ground of defence or attack in the former suit, was directly and substantially in issue in that suit, there is no reason why the court acting upon the same explanation should not assume that that matter was also heard and finally decided in the former suit.

**The Duty of Court to Adopt and Act Upon the Fiction of Implied Decision.**—According to section 11 of the C. P. Code, the court is forbidden to try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties. The rule applies subject to the other provisions of the section, not only to a suit tried before, but to an issue decided in a previous suit, provided the matter directly and substantially in issue in the later suit was raised in the previous suit or in a substantial and direct issue in the previous suit. The section requires that the matter or issue *should have been heard and finally decided* by such Court. It does not say that it should have been decided in explicit terms. It cannot be doubted that if an adjudication on a matter is necessarily involved in the decision in a prior suit, the section must be understood to lay down that it *must be deemed to have been heard and finally decided*. The principle of an implied decision is equally applicable to a suit as well as to an issue in a suit. The language of the section does not warrant any distinction between a suit and an issue in such a suit.

for the same, it might be said that the determination can be said to be general and not limited to the particular years for which rent was claimed. In such a case, the defendant can only succeed in a subsequent suit by proving that the area and rent have since altered; *Sivadas v. Birendra*, 43 C. L. J. 116; 94 I. C. 844; A. I. R. 1926 Cal. 672; *Nilmadhab v. Brojonath*, 21 C. 236.

The bar of *res judicata* may arise in a rent suit just as much as in any other suit. Where in a suit for rent an issue is raised as to what was the *jumma* payable and adjudicated upon, the decision on that issue operates as a bar on that question in a subsequent suit; *Midnapore Zemindary Co. v. Jogendra Kumar*, 41 I. C. 584; *Kali Kumar v. Bidhu Bhusan*, 16 C. L. J. 89; 10 I. C. 382; *Amzad Ali v. Naimuddin*, 42 I. C. 583; *Kiranchandra v. Bono Behari*, 59 I. C. 752; *Brojendra Kishore v. Sk. Somar Ali*, 68 I. C. 298.

Where a suit for rent of a particular year was dismissed on the ground of defect in plaintiff's title, *held*, that a subsequent suit by the landlord for rent of a different period was not barred by *res judicata*; *Munna Lal v. Buchalal*, 22 I. C. 7.

A decision in a suit for rent instituted in a Civil Court by the lessee for a term of a Zemindari against the tenant is not *res judicata* in a subsequent suit for rent instituted by the Zemindar after surrender of the lease by the lessee even though the rent claimed in the latter suit was for a period covered by the original lease; *Raja of Ramnad v. Ramanath Swami*, 44 M. 514. 41 M. L. J. 288; 63 I. C. 205.

The general rule of law is that a decision in a previous rent suit as to the amount of rent annually payable does not operate as *res judicata* in a suit for the rent of the subsequent period although it may give rise to a presumption that the rent remains the same. Where, however, the previous suit was based on a contract between the parties and the question of the rate of rent under the contract was a point in issue in the previous suit, the decision in the previous suit operates as *res judicata*; *Shoo Prasad v. Bateswar Mahton*, 51 I. C. 56 (1 C. L. J. 248. 2 Pat. L. W. 146; 3 Pat. L. W. 360 *reid to*); *Keshwa Pershad v. Progas Kuar*, 39 I. C. 576; *Kishun Dayal v. Musst. Kalpati*, (1918) Pat. 238; 3 Pat. L. J. 372 45 I. C. 316; *Dakeshwar Prashad v. Ram Prasad Singh*, 4 Pat. L. W. 47; (1918) Pat. 218; 42 I. C. 753; *Maharaja of Darbhanga v. Younous Momin*, 57 I. C. 48; *Mannoo Lal v. Lalji Chaube*, (1922) Pat. 213.

A tenant whose defence that the landlord was entitled to rent in respect of a lesser area of land than was stated in his claim was dismissed on the merits in a previous rent suit, is precluded from raising the same defence in a subsequent suit by the rule of *res judicata* — *Upendra Kumar v. Sham Lal*, 11 C. W. N. 1001 34 Cal. 1020; *Srinaram v. Sundarabati*, 13 C. L. J. 38; *Badari Singh v. Labbi Singh*, 1 Pat. L. W. 418, 39 I. C. 551

In a suit for rent which accrued due after the final publication of the record of rights, at the rate stated in the settlement proceedings, the defendant relied upon a rent decree passed previous to those proceedings declaring a lower rate of rent. *Held*, that the former rent decree does not bar the plaintiff's claim for rent which is based upon subsequent settlement proceedings — *Raja Pudmanund Singh v. Ghanshyam Misser*, 6 C. W. N. 914.

suit, is to be assumed to have been directly and substantially in issue in the former suit, and similarly it must also be assumed that that matter has also, by implication, been heard and finally decided in that suit. These principles have been lucidly explained in the judgments of Sundara Ayyar and Sadasiva Ayyar, JJ., in the Full Bench case of *Bayyan Naidu v. Surya Narayana*, 37 M. 70 F. B.: 23 M. L. J. 543 (upholding the decision of Munro, J. in 33 M. 216). The case is a very instructive one and every reader should study it carefully.

The following principles have been laid down in the above Full Bench Case:—

(1) Any ground of defence or attack, which by virtue of Explanation IV is deemed to have been directly and substantially in issue in a suit, must also be deemed to have been heard and finally decided adversely to the party who failed to raise it.

(2) The proposition that failure to raise grounds of attack or defence which might and ought to have been raised does not make such matter *res judicata* unless there is an express decision by the Court upon them, is wholly untenable.

(3) That it is not necessary in such a case of failure to raise the available ground of defence or attack, that there should have been an express decision by the Court upon it in order to make it *res judicata*, (24 A. 429 P. C. affirming 20 A. 110 and followed in 39 C. 527 P. C.)

(4) There is no warranty either in principle or in the language of section 11 for restricting the scope of the rule of implied decision of an issue by former adjudication to cases where the question was explicitly decided.

(5) There is no foundation at all for making a distinction between an explicit decision and an implied decision of an issue in the application of the doctrine of *res judicata*, provided the matter raised in issue was directly and substantially in issue in the earlier suit.

(6) The doctrine of *res judicata* applies to suit, as well as to issues and the force of *res judicata*, with regard to an implied decision is applicable also to what ought to have been made ground of attack or defence with respect to an issue. The test is not whether the decision was explicit, but whether the issue was one on which the judgment of the previous suit was based quite apart from the question whether the decree itself would be affected by the matter being re-opened in the later suit.

(7) In order to constitute a decision on an issue of fact *res judicata*, it is not necessary that the cause of action and the subject-matter of the suits should be the same. Where the subject-matter of the former decision and the relief claimed therein were the same as those claimed in the subsequent litigation, the plaintiff cannot bring two suits on what is put forward by him as two different causes of action, and the courts should try their best to hold that the causes of action in such cases are substantially the same.

(8) If a court is bound by Explanation IV to section 11 to adopt and act upon the fiction that a matter which might and ought to have been made a ground of defence or attack in the former suit should be deemed to have been a matter directly and substantially in issue in such suit, that same explanation necessarily imposes the duty of acting upon the

for the same, it might be said that the determination can be said to be general and not limited to the particular years for which rent was claimed. In such a case, the defendant can only succeed in a subsequent suit by proving that the area and rent have since altered; *Sivadas v. Birendra*, 43 C. L. J. 116; 94 I. C. 844; A. I. R. 1926 Cal. 672; *Nilmadhab v. Brojonath*, 21 C. 236.

The bar of *res judicata* may arise in a rent suit just as much as in any other suit. Where in a suit for rent an issue is raised as to what was the *jumma* payable and adjudicated upon, the decision on that issue operates as a bar on that question in a subsequent suit; *Midnapore Zemindary Co. v. Jogendra Kumar*, 41 I. C. 584; *Kali Kumar v. Bidhu Bhusan*, 16 C. L. J. 89; 10 I. C. 382; *Amzad Ali v. Naimuddin*, 42 I. C. 583; *Kiranchandra v. Bono Behari*, 59 I. C. 752; *Brojendra Kishore v. Sh. Somar Ali*, 68 I. C. 298.

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The general rule of law is that a decision in a previous rent suit as to the amount of rent annually payable does not operate as *res judicata* in a suit for the rent of the subsequent period although it may give rise to a presumption that the rent remains the same. Where, however, the previous suit was based on a contract between the parties and the question of the rate of rent under the contract was a point in issue in the previous suit, the decision in the previous suit operates as *res judicata*; *Sheo Prasad v. Bateswar Mahton*, 51 I. C. 56 (1 C. L. J. 248; 2 Pat. L. W. 146; 3 Pat. L. W. 360 *referred to*); *Keshwa Pershad v. Progas Kuar*, 39 I. C. 570; *Kishun Dayal v. Musst. Kalpati*, (1918) Pat. 238; 3 Pat. L. J. 372. 45 I. C. 316; *Dakeshwar Prashad v. Ram Prasad Singh*, 4 Pat. L. W. 47; (1918) Pat. 218; 42 I. C. 753; *Maharaja of Darbhanga v. Yoonous Momin*, 57 I. C. 48; *Mannoo Lal v. Lalji Chaube*, (1922) Pat. 213.

A tenant whose defence that the landlord was entitled to rent in respect of a lesser area of land than was stated in his claim was dismissed on the merits in a previous rent suit, is precluded from raising the same defence in a subsequent suit by the rule of *res judicata*—*Upendra Kumar v. Sham Lal*, 11 C. W. N. 1001 34 Cal 1020; *Srinarain v. Sundarabati*, 13 C. L. J. 38; *Badari Singh v. Labhi Singh*, 1 Pat. L. W. 418; 39 I. C. 551.

In a suit for rent which accrued due after the final publication of the record of rights, at the rate stated in the settlement proceedings, the defendant relied upon a rent decree passed previous to those proceedings declaring a lower rate of rent. *Held*, that the former rent decree does not bar the plaintiff's claim for rent which is based upon subsequent settlement proceedings.—*Raja Pudmanund Singh v. Ghanshyam Misser*, 6 C. W. N. 914.

had previously sued the defendant for the same land claiming as the surviving members of the joint family to which the former owner belonged. That suit had been dismissed. *Held* that the present suit was barred by *res judicata*, as the plaintiff might and ought to have pleaded in the alternative the title now set up by him. *Guddappa v. Tirkappa*, 25 B. 189. Dissented from in *Ramaswami Ayyar v. Vythinatha Ayyar*, 26 M. 760. Referred to in 31 M. 385. See also *Maung Ba Thaw v. Ma Hrit*, 2 Bur. L. J. 34.

Where after the date of a document executed by defendants promising to pay a certain sum and grain, there was an oral agreement by some of the defendants to pay their quota, the dismissal of a suit based on the oral promise does not bar a subsequent suit on the original claim; *Muttu Chetty v. Muttan Chetty*, 4 M. 296.

Where in a suit for rent, the rent claimed expressly includes an item which is objected to as illegal cess, the mere fact that, in a previous rent suit, the defendant did not raise the same plea, would not preclude him from raising the plea in the subsequent suit.—*Woomesh Ghrudra v. Barada* 28 C. 17.

A simple money-decree obtained on a mortgage-bond bars a subsequent suit to enforce mortgage lien against the mortgaged properties.—*Doss Money v. Jonmejoy* 3 C. 363; 1 C. L. R. 446; *Emam Matazooddeen v. Raj Coomar* 14 B. L. R. (F.B.) 408; 23 W. R. 187; *Mothoora Mohun v. Pearce Mohun*, 23 W. R. 344; but see *Utshab Narayan v. Chittra Raka*, 8 B. L. R. (Ap.) 92; 17 W. R. 154; *Babu Lal v. Ishri Parsad*, 2 A. 582, and *Gobind v. Mana Vikraman*, 14 M. 284.

It is the policy of the Code of Civil Procedure, 1908, as it was the policy of the Code of 1892 that parties should not have the right to split up a cause of action against defendants and claim a decree on it in a later suit when they might have claimed the same on it in a previous suit. Where, in a previous suit on a mortgage-bond, the plaintiff omitted to claim relief against the person and no other property of the defendants—*held*, that they can not claim their relief in a subsequent suit relating to the same bond; *Sourendra Mohan v. Hari Prosad*, 5 Pat. 136; 7 Pat. L. T. 97; A. I. R. 1925 P. C. 280; 91 I. C. 1033.

Under the terms of a mortgage, interest was payable annually and was a charge upon the mortgaged property. The mortgagee sued for the interest due and obtained a personal decree against the mortgagor. Subsequently he sued to recover the principal and interest due on the mortgage by sale of the mortgaged property. *Held*, that the decision in the former suit did not bar the second suit.—*Ratan Rai v. Hanuman Das*, 5 A. 118. See also, *Nanu v. Raman*, 16 M. 335.

**Defendant is Bound to Set Up Every Matter which Might and Ought to have been Made a Ground of Defence in the Former Suit.**—Explanation IV to sec. 11 was meant to apply to a case where the defendant has a defence which, if he had so pleased, he might and ought to have brought forward, but as he did not bring it forward, the suit has been decreed against him. Under such circumstances the defendant is as much bound by the adverse decree as if he had set up the defence, and he is equally estopped from setting up that defence in any future suit under similar circumstances.—*Ghursobhit Ahir v. Ramdutt Singh*, 5 C. 923; 6 C. L. R. 537; *Doorga Pershad v. Doorga Konwari*, 4 C. 190 P. C.; 8 C. L. R. 81;

**Consent-decree and Compromise Decree When Operate as Res Judicata.**—A consent decree come to between parties touching matters substantially and directly in issue between them is *res judicata*, such a decree has, to all intents and purposes, the same effect as a decree passed *per invitum*; *Bhai Shankar v. Morariji*, 36 Bom. 283: 13 Bom. L. R. 950; 18 C. W. N. CXI. (111 n); *Sivadas v. Birendra*, 43 C. L. J. 116: A. I. R. 1926 Cal. 672: 94 I. C. 844.

In the absence of fraud or collusion, a consent decree, so long as it is not set aside, operates as an estoppel; *Cowasji v. Kishandas*, 35 Bom. 371: 13 Bom. L. R. 649; *Baikantha Nath v. Mohendra Nath*, 1 C. L. J. 65.

A judgment by consent raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter.—*Lakshmishankar v. Vissuram*, 24 Bom. 77; *Chelamanna v. Rama Row*, 36 Mad. 46, p. 49. A consent-decree is as binding between the parties as a decree made after a contentious trial.—*Nicholas v. Asphar*, 24 Cal 216. See also *Nelakadhen v. Padmanabha*, 18 Mad. 1 P. C., page 7. *Raja Kumara v. Thatha*, 35 Mad. 75; 21 M. L. J. 709: 9 Ind. Cas. 875; *Minalal v. Karsetji*, 30 Bom 395; *Mahalingha v. Krishna*, 27 Ind. Cas. 708; *Potla Subbarayudu v. Ravi Laksamaya*, 18 M. L. T. 93: 2 L. W. 605: 30 I. C. 260. The principle of law underlying s. 11 of the C. P. Code applies to interlocutory orders and a consent order raises an estoppel as much as a decree passed *per invitum*; *Hitendra Singh v. Rameswar Singh*, 2 Pat. L. J. 628. In *Rajalakshmi v. Katyayani*, 38 Cal 639, it has however been held that a consent decree cannot operate to the prejudice of persons not parties thereto (24 Cal. 216, Dist.). But where a compromise is not accepted by the Court it does not create any estoppel; *Ram Ratan v. Subhan*, 12 A. L. J. 672: 24 I. C. 93.

Section 11 is not strictly applicable to compromise decree, as it applies in terms to what has been heard and finally decided; *Gopala Sami v. Govinda Sami*, (1912) M. W. N. 1071: *Pirojshah v. Manibhai*, 13 Bom. L. R. 963.

The nature of compromise decrees and the applicability of the principle of *res judicata* to such decrees have been fully discussed in *Varadachariar v. Ramaswami Chetty*, 35 M. 75: 21 M. L. J. 709. See also the following cases, *Sita Ram v. Petia*, 14 N. L. R. 35: 43 I. C. 962; *Bholi Bai v. Chimmi Bai*, 23 P. L. R. 1918: 45 P. W. R. 1918: 44 I. C. 92.

A decree based on compromise is as much binding as a decree after contest; *Ganga Bishan v. Mehar Ilahi Khan*, 12 A. L. J. 1011: 25 I. C. 224.

For further cases, see notes under rule 3, Or. XXIII.

**"Former suit": Explanation I.**—Explanation I is new and has been inserted in the present Code to remove a conflict of authorities as to the meaning of the expression "former suit" and to give effect to the ruling in *Balkishan v. Kishanlal*, 11 A. 148. Section 11 of the Code provides that a final decision between the same parties in a "former suit" shall operate as *res judicata* in a subsequent suit. Now the question is, does the expression "former suit" refer to the commencement or the termination of the suit? According to *Explanation I*, it means the one

in his personal capacity. *Held* that the suit was not maintainable and was barred under s. 11 of the C. P. Code; *Ram Karan v. Ram Naranji*, 60 I. C. 74.

Where, to a suit by a mortgagee on a mortgage-bond of certain property, a prior mortgagee of the same property is made a party, and omits to set up his prior charge and claim to have it redeemed, a suit subsequently brought by him for that purpose is barred by *res judicata*. In the same way, if, being a party to a suit on a mortgage prior to his own, he omits to claim his right to redeem such prior mortgage, he cannot afterwards sue for that purpose on the mortgage he has omitted to plead.—*Srigopal v. Pirthi Singh*, 24 A. 429, P. C.: Followed in *Gopal Lal v. Benarasi Pershad*, 31 C. 428; see *Ibrahim Hossein Khan v. Ambika Pershad*, 39 C. 527 P. C.; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 468; 14 Bom. L. R. 280; 9 A. L. J. 332; (1912) M. W. N. 367; *Krishna Doyal v. Syed Mahamud*, 19 C. W. N. 942; *Hankar Ray v. Kamta Prasad*, 19 C. W. N. 947; *Mahabir v. Parbhu*, 9 C. L. J. 78; *Gajadhar v. Bhagwanta*, 34 A. 599; 10 A. L. J. 244; *Dhondo Ramchandra v. Vikaji*, 39 B. 138; 17 Bom. L. R. 144; *Rajendra v. Sheik Adenadi* 26 I. C. 860; *Baranashi Pershad v. Johori Lal*, 8 C. W. N. 285. Followed in *Bajinath v. Mahomed Ibrahim*, 2 C. L. J. 574 and in *Nattu Krishnama v. Anangaia Chariar*, 30 M. 353; 17 M. L. J. 301. Dist. in *Ajodhia v. Inayat*, 35 A. 111; 11 A. L. J. 57; *Mohiruddin v. Indra Kumari*, 18 C. W. N. 1013; *Gokulchand v. Ganga Baksh*, 8 A. L. J. 936; 11 I. C. 257; *Chandra Sekhar v. Balakdhar*, 10 A. L. J. 149; 15 I. C. 611.

Where in a suit to enforce the second mortgage, the first mortgagee is made a party but no relief is claimed against him, it is not necessary for him to set up his prior mortgage, and his omission to do so does not bar a subsequent suit to enforce his security.—*Surjiram v. Baramdeo Pershad*, 1 C. L. J. 337. (24 C. 429, P. C.; and 8 C. W. N. 385, explained); *Nithal Singh v. Hira* 82 P. L. R. 1913; 91 P. W. R. 1913; 87 P. R. 1913, 18 I. C. 787; *Dewan Chand v. Hira Chand*, 213 P. L. R. 1914; 185 P. W. R. 1914.

The puisne mortgagee sued for sale under s. 96 of the T. P. Act joining as a party the first mortgagee who did not appear. A decree was made and the property was bought by the second mortgagee. The first mortgagee afterwards sued for sale. It did not appear that in the former suit the puisne mortgagee attacked the first mortgage or sought to postpone it. *Held* that the decree in the former suit was not *res judicata* under s. 11 C. P. Code against the first mortgagee and that he was entitled to a decree for sale; *Radhakishun v. Khurshed Hussain*, 38 M. L. J. 424; (1920) M. W. N. 308; 47 C. 662; 55 I. C. 959; 18 A. L. J. 401; 47 I. A. 11 (P. C.).

There is nothing in the Code of Civil Procedure or in the Transfer of Property Act to prevent the holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale on each of them in a separate suit subject, however, to the reservation that he cannot sell the property twice over, nor sell it under the second decree subject to the first; *Nilu v. Asirbad Mandal*, 23 C. W. N. 129; 33 C. L. J. 232; 60 I. C. 809.

Where the defendant in a mortgage suit had a double capacity, i.e., purchaser of equity of redemption and also settlement-holder of a non-transferable occupancy holding, but he failed to set up the defence that the mortgage would not be enforced against the property in his hands, he will after-

common issues are involved and the two suits are tried together and disposed of by a single judgment but two separate decrees are passed and an appeal is preferred against one decree only, the question that arises in such a case is: "*whether the appeal is barred by res judicata in view of the fact that one of the decrees not being appealed against stands unreversed?*" The conflict of judicial pronouncements on this question is very great. The Calcutta and Madras High Courts have answered this question in the negative on the ground that there being but one judgment in both suits neither suit can be said to be a "former suit" in relation to the other; *Abdul Majid v. Jew Narain*, 16 C. 233; *Mariamnessa v. Joynab Bibi*, 33 C. 1101; 10 C. W. N. 934; 4 C. L. J. 149; *Punchanada v. Vaithinatha*, 29 M. 333; *Sinnanna v. Mutho Palani*, A. I. R. 1928 Mad. 378. The Allahabad High Court in *Zaharia v. Debia*, 33 A. 51, F. B.: 7 A. L. J. 861; 7 I. C. 156, answered this question in the affirmative and this decision was followed in *Dakhni Din v. Syed Ali*, 33 A. 151, *Anant Das v. Udai Bhan*, 35 A. 187. This question again came up before the same Court in *Ghansam Singh v. Bhola Singh*, 45 A. 506; 74 I. C. 411; A. I. R. 1923 All. 490 and the Full Bench held that *Zaharia v. Debia*, 33 A. 51 F. B. was rightly decided on its own merits and that *Dakhni Din v. Syed Ali*, 33 A. 151 and *Anant Das v. Udai Bhan*, 35 A. 187 must be treated as no longer law. They also held that *Damodar Das v. Sheo Ram Das*, 29 A. 730, which was treated in some cases as being overruled by *Zaharia v. Debia*, 33 A. 551 F. B. was rightly decided. The decisions of the Lahore Court on this point are not uniform. In *Jogul Kishore v. Chammo*, 85 P. R. 1905, the Full Bench took the same negative view as the Calcutta High Court following *Abdul Majid v. Jew Narain*, 16 C. 233 and *Mariamnessa v. Joynab*, 33 C. 1101. In *Mahomed Jan v. Duli Chand*, A. I. R. 1921 Lah. 255, *Ghania Lal v. Roshan Lal*, A. I. R. 1921 Lah. 271, *Bhan Singh v. Gokal Chand*, 1 Lah. 83; 53 I. C. 137 and in *Mahomed Din v. Mt. Zepunnissa*, 3 Lah. 215; A. I. R. 1922 Lah. 390, the same High Court took an affirmative view of the question following the Allahabad case of *Zaharia v. Debia*, 33 A. 51 F. B. This question again came up before the same Court in the recent case of *Mt. Lachhmi v. Mt. Bhulli*, A. I. R. 1927 Lah. 289 when the Full Bench again answered this question in the negative following *Jogul Kishore v. Chammo*, 85 P. R., *Abdul Majid v. Jew Narain*, 16 C. 233, *Mariamnessa v. Joynab*, 33 C. 1101 and overruling, 1 Lah. 83 and 3 Lah. 215. In this case all the case-laws on this subject have been fully discussed.

In *Midnapore Zemindari Co. v. Nityakali*, 24 I. C. 234, the Calcutta High Court has taken a contrary view, doubting *Abdul Majid v. Jew Narain*, 16 C. 333 and again in *Gangadhar v. Mt. Sekali Telini*, A. I. R. 1921 Cal. 291, following *Zaharia v. Debia*, 33 A. 51 and *Chajju v. Sheo Sahai*, 10 A. 123 and lastly in *Isup Ali v. Gour Chandra*, A. I. R. 1923 Cal. 496, relying on *Zaharia v. Debia*, 33 A. 51 and dissenting from *Abdul Majid v. Jew Narain*, 16 C. 333 and *Mariamnessa v. Joynab*, 33 C. 1101.

**Two Suits having Common Issue Tried Together: Separate Judgments.**—D brought a criminal charge against P for using abusive language. D's complaint was dismissed. P sued D for damages for malicious prosecution. D sued P for damages for using abusive language. The issue common in the two suits was whether P used abusive language to D. The trial Court in two separate judgments found that P did not use abusive language and decreed P's suit and dismissed the suit brought by D. D appealed from the decree in P's suit but did not appeal from



that they were barred by *res judicata* from setting them up in a separate suit having omitted to set up their rights in the prior suit; *Rungai Goundan v. Venkatammal*, 55 I. C. 30 (20 C. W. N. 675, distd.).

A person was impleaded as a subsequent mortgagee in a suit upon a mortgage. The subsequent mortgagee claimed a title to a portion of the mortgaged property as owner. He, however, did not enter appearance in that suit. The mortgagors asserted that he was entitled to as owner of a portion of the property. The Court held that the mortgagors were estopped from raising that plea and ordered the whole property to be sold. In a subsequent suit by the subsequent mortgagee for a declaration of his right in respect of the portion in controversy in the former suit, held that he was not precluded from raising the question inasmuch as in the former suit he filled two capacities, viz., (1) as a subsequent mortgagee in which capacity he was entitled to raise such defence as was open to the mortgagors and (2) as claiming a paramount title in which case he could not raise the question in that suit; *Gobardhan v. Manglal*, 40 A. 584: 16 A. L. J. 639: 46 I. C. 559.

A puisne mortgagee is not bound to set up his right of redemption in a suit against him for ejectment and his failure to do so does not preclude him from relying upon the right in a subsequent suit for possession upon resumption; *Balirma v. Narayan*, 54 I. C. 276.

Where in a suit for redemption the mortgagor paid into Court the amount mentioned in the preliminary decree within the time prescribed and a final decree was passed subsequently. Held, that a suit by the mortgagor for mesne profits between the date of payment and the date of the suit was maintainable and is not barred by *res judicata*. The mortgagor is not bound to claim a settlement of accounts in the passing of the final decree; *Vairappa Thevan v. Subbiah Thevan*, 23 M. L. T. 158: (1918) M. W. N. 207: 7 L. W. 269: 44 I. C. 251.

It is not necessary in a suit by a puisne mortgagee that the holders of prior mortgages should be made parties and questions relating to their mortgages be determined (1 C L. J. 331: 348, refd. to). Where the puisne mortgagee admitted the prior mortgage, the prior mortgagee can institute a suit on his mortgage, even though the decree in the puisne mortgagee's suit did not specifically reserve the prior mortgagee's rights; *Patchalai Mudali v. Kupanna Mudali*, (1912) M. W. N. 41: 19 I. C. 182 (21 M. L. J. 635, refd. to, 24 A. 429, distd.).

Where a decree for foreclosure is passed *ex parte* against a person joined as defendant on the sole ground that he is in possession of the mortgaged property, but no express adjudication on the question of title is given, though the final decree orders delivery of possession and possession is accordingly delivered, the aforesaid defendant is not barred by the rule of *res judicata* from setting up a paramount title in a subsequent suit; *Luzmi Narayan v. Vithoba*, 15 N. L. R. 114.

**Same Cause of Action.**—A plaintiff failing in his attempt to establish title by one means cannot establish the same title by other means which were equally at his command when the previous suit was instituted. In determining whether a question is *res judicata*, the Court will have regard to the substance of the previous suit rather than its form. If the cause of action is based on a right identical in both suits, or on the same group

deemed to have been directly and substantially in issue in such former suit.

For instance, a plaintiff having tried to establish his claim by one means and failed, cannot establish that claim by other means, which were equally at his command when the former suit was tried, and so connected with the grounds on which he in that case relied that they ought to have been submitted for consideration together.

Similarly when a defendant having several defences to make, sets up only one of such defences and keeps back others with similar object, the defences not put forward and kept back shall also, by fiction of law, be deemed to have been a matter directly and substantially in issue in the former suit. This is what is meant by constructive *res judicata*, as distinguished from express *res judicata*.—Thus a matter directly and substantially in issue may be either *expressly* in issue or may be *constructively* in issue.

This explanation makes it obligatory both upon the plaintiff and the defendant to put forward all sorts of titles or claims available at the time of the former litigation, otherwise he will be debarred from bringing forward the claims or titles so kept back, in a future suit. In other words, those matters which might and ought to have been made a ground of defence or attack in the former suit, but were kept back, will not be allowed to be put forward or urged in the subsequent litigation between the same parties or their privies on the ground that they were constructively in issue in the former suit.

There are however some exceptions to this rule. For instance, where several independent grounds are available, a party is not bound to unite them all in one suit, though he is bound to bring before the court all grounds of attack available to him with reference to the title which is made the ground of action; see *Allunni v. Kunju Sha*, 7 Mad. 264; *Sadya Pillai v. Chinni*, 2 Mad. 52; *Thandavan v. Villiamma*, 15 Mad. 336, p. 341; *Sarkum Abutarab v. Rahman*, 24 Cal. 83; *Mahabir Tewari v. Purbhunath*, 12 C. W. N. 292; 7 C. L. J. 504; *Kailash v. Barada*, 24 Cal. 711; 1 C. W. N. 594; *Nathu Pandu v. Budhu Bhika*, 18 Bom. 537; *Dhani Ram v. Bhagiratha*, 22 Cal. 692; *Dhanapabe v. Anantha*, 24 M. L. J. 318; 18 M. L. T. 305; *Dattatraya v. Kawadji*, 42 I. C. 508 (28 C. 17; 24 C. 711, referred to)

A party is not bound to join two or more alternative claims for relief based on inconsistent allegations, unless such joinder is possible without confusion or embarrassment and without impleading others as additional parties; see 12 O. C. 847; 4 Ind. Cas. 763; 17 Ind. Cas. 831, and *Dhanapalu v. Anantha*, 24 M. L. J. 418; 18 M. L. T. 305; *Gorinda Variar v. Vcetttil Appu*, (1919) M. W. N. 677; *Girdhari Lal v. Musst Umdajan*, 3 Lah. L. J. 215; 63 I. C. 717

A person defending or attacking in the former suit must have knowledge of the matter at the time of that suit, so that he could have made it a ground of attack or defence therein, see *Manikbai Jiraraj v. Virchand Ram Chandra*, 9 B. L. R. 1020; *In the Matter of Adija*, 11 I. C. 261; *Mohabir Tewari v. Purbhoo Narain*, 12 C. W. N. 292 p. 297; 7 C. L. J. 504

the other ground; *Thakore Becharji, v. Thakore Pujaji*, 14 B. 31. See also *Radhanath v. Land Mortgage Bank*, 6 C. 559: 8 C. L. R. 10.

In the *mofussil*, if a principal, in a suit against his agent, prays merely that the defendant be ordered to render accounts to plaintiff, a second suit by him for recovery of the money found due by the defendant on examining the accounts will not be barred as *res judicata*.—*Gobind Mohun v. Sheriff*, 7 C. 169; 6 C. L. R. 357. See also *Kunchunni v. Subramaniaer*, 33 M. 162; 7 M. L. T. 87.

Where a plaintiff's application for removal of attachment was rejected and he then brought a suit for a declaration of his right which was also dismissed, his subsequent application for removal of a second attachment was held not barred, as the second attachment after the first was a new and distinct act, giving rise to a new cause of action.—*Kasinath v. Ram Chandra*, 7 B. 408. Followed in *Ibrahimbahai v. Kabulabhai*, 13 B. 73 p. 74.

Plaintiff obtained a decree for restitution of conjugal rights which was never executed. Subsequently the wife returned to his house and stayed for two months. She again deserted, thereupon the plaintiff brought a second suit for restitution of conjugal rights. Held, that the suit was not barred. A second withdrawal from cohabitation constitutes a fresh cause of action.—*Keshav Lal v. Bai Parvati*, 18 B. 327.

A widow was dispossessed of her share in two tanks included in certain *debutter* properties by some of the reversioners, viz., A and B. Unable to assert her rights, she made a gift of her *shebaiti* rights in the whole of the *debutter* properties to certain other reversioners, C. D. F. who thereupon sued A and B and obtained a decree for possession of the two tanks. On the death of the widow, A and B, sued C. D. F. for recovery of whole of the properties covered by the gift, as reversioners of her husband. Held, that the second suit was not barred by the rule of *res judicata*.—*Nabakrishna Roy v. Hem Lal Roy*, 2 C. L. J. 144.

A suit for encroachment having been dismissed, the plaintiff sued to recover rent of the same year at the rate admitted by the defendant in the former suit. Held, that the rule of *res judicata* did not apply: *Khedaroonissa Bibee v. Boodhoo Bibee*, 13 W. R. 317. So also with regard to mesne profits, see *Naffor Chand v. Munshi*, 8 C. L. J. 300.

**Distinction Between Explanation VI and Or. II, rr. 1 and 2.**—The object of the rule of *res judicata* is always put upon two grounds: (1) public policy, that is, the interest of the State that there should be an end of litigation, (2) hardship on the individual, that he should not be vexed twice for the same cause. Both Explanation IV and Rule 2, Or. II are based on the maxim that no man should be vexed twice for the same case. One of the elements of Explanation IV is, that the cause of action in the two suits must be the same. If it is not the same, omission of a ground of attack or defence cannot take place. Another element is, that the ground must be such as could help success or failure in the previous suit. A third element is that it must have been known to the party who could advance such ground inasmuch as a party could not be barred from raising a ground which was not known to him. The element of the doctrine of *res judicata* that the matter must be heard and finally decided is no element of Explanation IV; for adjudication upon a ground which has been omitted is impossible. The bar created by the Explanation IV rests on the omission by a party and not on

*Vithal Ramji*, 15 B. 89; *Rampal Singh v. Ramprasad*, 27 A. 37 P. C. *Panchu Mandal v. Chandra Kant*, 14 C. L. J. 220; *Aghorenath v. Kamini Debi*, 11 C. L. J. 461; *Srinath v. Chhabil Lal*, 20 I. C. 700; *Arunachala v. Panchanadam*, 8 M. 348; *Pahalman Singh v. Moheshur Buksh*, 12 B. L. R. 391 P. C.: 18 W. R. 182; *Muthammal v. Secretary of State*, 27 M. L. J. 529 F. B.: 16 M. L. T. 432. The doctrine of constructive *res judicata* does not apply unless the identity of the subject-matter of the two suits is clearly established, see the cases noted under Explanation III.

**Former Decision relating to Validity or Otherwise of a Document Operates as Res Judicata in a Subsequent Suit between the Same Parties.**—A former decision as to the validity of otherwise of certain documents operates as *res judicata* in a subsequent suit between them.—*Raghoonandha Perya v. Kattamma Nachear*, 10 W. R. (P. C.) 1: 11 M. I. A. 50; *Ganga Ram v. Panch Cowree*, 25 W. R. 366; *Dhundi v. Ram Lal*, 7 N. W. 149; *Beni Madhab v. Bholanath*, 47 I. C. 8; *Alik Mahomed v. Bachhani Bibi*, 49 I. C. 477; *Kedarnath v. Sheo Shankar*, 45 A. 515: 21 A. L. J. 421. A finding with regard to genuineness is binding as *res judicata* in a subsequent suit between the same parties.—*Dakhyani Debea v. Dolgobind*, 21 C. 430. See also *Durga Prasad v. Sashibala*, 16 C. W. N. 603 P. C.: 15 C. L. J. 180: 9 A. L. J. 165: 14 B. L. R. 177: (1912) M. W. N. 73 *Srinarain v. Sudarabati*, 18 C. L. J. 38: 157 P. R. (1889) F. B.; *Md. Bukth v. Dewan Ajmon*, 19 C. W. N. 967.

**Question of Jurisdiction Wrongly Decided in Previous Suit, Whether Res Judicata.**—When a court has decided the question of jurisdiction, although wrongly, and no objection was raised to its jurisdiction, the question becomes *res judicata* between the same parties in a subsequent suit. A decided case can not be re-opened merely because the view that was taken on a question of law in that case is subsequently upset not in that case but in another proceeding between different parties by a superior court, or is superseded by some enactment of the legislature; *Rajaram v. Central Bank of India*, 28 Bom L. R. 879. 98 I. C. 341: A. I. R. 1926 Bom. 681.

**"Might and ought."**—The word "might" in this explanation gives option to a party to set up two or more alternative grounds of defence or attack in the former suit, that is, if he had so pleased he might have brought forward all his grounds of defence or attack in the former suit. The word "might" also presupposes plaintiff's previous knowledge of his right at the date of his plaint. But the word "might" must be read with the word "ought" which is connected with it by the word "and," as the former is controlled by the latter. Thus the option given by the word "might" is restricted by the word "ought" which follows it. The word "ought" in this explanation should be interpreted with reference to the array of the parties to the previous litigation, and the nature of the estate or claim then claimed or set up. Where the present claim is inconsistent with the former claim and their combination would have led to confusion and embarrassment, such a claim is not one which ought to have been joined in the former suit. Again a plaintiff ought to join all grounds on which he can claim the same relief against the same defendants, and such grounds may be cumulative, each entitling him to the relief claimed or may be urged in the alternative. A

The previous suit was filed by the father of the present plaintiffs 2 and 3 who were minors and who were not joined as parties, against the present defendants and the present plaintiff No. 1 as defendant No. 4. The relief claimed in the former suit was the same as that claimed in the present suit. The finding in that suit showed conclusively that the father of the present plaintiffs 2 and 3, who were then minors and were not parties, did not adequately represent them and the suit was not fully tried and the suit was accordingly dismissed. *Held*, that the bar of *res judicata* did not arise, as the present plaintiffs 2 and 3, were then minors and were not adequately represented; *Sundra v. Sakharam*, 39 B. 29: 16 B. L. R. 616.

The intervention of a minor, through his guardian, in proceedings to set aside a sale was held no bar to a suit on his behalf for possession of the property on the ground that it was joint family property and not that of the judgment-debtor, and could not be sold in execution of decree against a single member; *Collector of Monghyr v. Hardai Narain*, 5 C. 425: 5 C. L. R. 112. Suit by mortgagee against mother in her personal capacity.—Subsequent suit against her son is not barred; *Venkataraman v. Therunarayan*, 27 I. C. 930: 2 L. W. 212.

Decision in previous suit between same individuals but brought by plaintiff in another capacity, bars subsequent suit: *Md. Buksh v. Dewan Arjun*, 19 C. W. N. 567. To support the plea of *res judicata*, it must appear from the inspection of the record, that the person whose interest is sought to be bound, was in some way a party to the suit.—*Chaudhri Ahmad Buksh v. Seth Raghubor Dayal*, 2 C. L. J. 413: 10 C. W. N. 115: 28 A. 1 P. C.; *Ajodhya Koeri v. Ram Sunder*, 68 I. C. 240. Where a party had not been properly represented in a suit, the decision therein will not be *res judicata* against him in a subsequent suit; *Saw Lan v. Mung Lun*, 22 I. C. 673.

The decision in a previous suit between a tenant and his Zemindar's thikadar does not operate as *res judicata* in a subsequent suit between the tenant and the zemindar, for the previous suit was not between the same parties or between parties under whom they or any of them claim; *Partab Dubey v. Ajudhia Estate*, 58 I. C. 990.

A survey-officer held an enquiry under the Boundary Act, 1860, and demarcated certain land out of a zemindary. At the time of the enquiry the estate was under the Court of Wards, and the zemindar, who was a minor, was represented by the manager. *Held*, that the subsequent suit by the zemindar to recover the land was barred by the former decision of the Survey-officer, and the matter in dispute was *res judicata*.—*Kamaraju v. Secretary of State*, 11 M. 309. See also *Subramanya Pandya v. Siva Subramanya*, 17 M. 316.

A previous suit in which the plaintiff elected to sue the defendants as principals, bars a second suit on the same contract in which the defendants are charged as responsible agents.—*Devraj Krishna v. Halambai*, 1 B. 87.

Where a suit was brought by one of the five trustees of a *devasam* to recover property alleged to have been illegally alienated by three other trustees to a stranger and dismissed. *Held*, that the second suit brought for the same purpose by the fifth trustee, who had not been a party to the former suit, was barred.—*Madhavan v. Keshavan*, 11 M. 191.

To come within s. 11, Expl. IV. C. P. Code, it must be established to the satisfaction of the Court that the matter which is sought to be concluded on the principle of *res judicata* not only *might* have been made a ground of defence or attack in such former suit, but further it *ought* to have been so made. Where the evidence in support of one ground is such as might be destructive of the other ground, the two grounds need not be set up in the same suit; *Raman Chowdhry v. Bacha Misir*, 2 P. L. T. 285: 60 I. C. 393.

There is however a very simple test for determining whether a matter ought to have been made a ground of attack or defence in the former suit, and the determination depends upon the provisions of Or. II, r. 1. The first question to be considered in such cases is whether the provisions of Or. II, r. 1, required the plaintiff to join in the former suit the ground of attack in the subsequent suit. Thus the question of what "ought" to be made ground of attack or defence under this explanation must be determined by reference to the provisions of Or. II, r. 1. The construction of the word "ought" must also to a great extent depend on considerations of hardship and inconvenience caused to the parties. There is no hardship or inconvenience in requiring a plaintiff suing as heir to state all the facts on which he bases his heirship, even though it may result in the presentation of alternative case, while great inconvenience and hardship may be caused to the defendant by allowing the plaintiff to keep a ground in reserve, *Masilamania v. Theruvengadam*, 31 M. 385; and *Ramaswami v. Vythenatha*, 26 M. 760, where the authorities regarding the scope of explanation IV have been exhaustively considered and which has been subsequently followed in 27 M. 102 and in 29 M. 153 F. B. In 31 M. 385, the case in 26 M. 760 has not been expressly dissented from, but has been fully explained and the view taken in 25 B. 189, which has been expressly dissented from in 26 M. 760, has been approved.

**To Constitute Res Judicata Whether Explanation IV Should be Read With the Words "Heard and finally decided" In the Body of the Section.**—Explanation IV must be read in conjunction with and as part and parcel of the leading provisions of the section itself. According to those provisions several conditions are necessary to constitute a matter *res judicata*. Two of these conditions are: (1) that the matter must have been in the former suit directly and substantially in issue; (2) that it must have been heard and finally decided in that suit.

The explanation does no more than lay down that if a matter which might and ought to have been made a ground of defence or attack in the former suit is not made such a ground, it shall be dealt with as falling within the first of the abovenamed conditions. That is, the omission shall have the same effect given to it as it would have had if it had been made a ground of defence or attack. But to constitute *res judicata*, a second condition is necessary—it must have been finally decided and if the former suit went off on a preliminary ground not calling for adjudication on other grounds of defences or attacks whether raised or not, those grounds remain undecided. Explanation IV to s. 11 is not applicable to a case where the parties had in a previous suit, put forward all the grounds of attack and defence which were embodied in clear and distinct issues, but the Court not only did not decide them but expressed the exclusion of them from decision; *Madan Mohan v. Barooah & Co.*, 70 P. R. 1918; 11 P. L. R. 1918; 71 P. W. R. 1918; 44 I. C. 859.

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The intervention of a minor, through his guardian, in proceedings to set aside a sale was held no bar to a suit on his behalf for possession of the property on the ground that it was joint family property and not that of the judgment-debtor, and could not be sold in execution of decree against a single member; *Collector of Monghyr v. Hardai Narain*, 5 C. 425: 5 C. L. R. 112. Suit by mortgagee against mother in her personal capacity.—Subsequent suit against her son is not barred; *Venkataraman v. Therunarayan*, 27 I. C. 930: 2 L. W. 212.

Decision in previous suit between same individuals but brought by plaintiff in another capacity, bars subsequent suit: *Md. Buksh v. Dewan Arjun*, 19 C. W. N. 567. To support the plea of *res judicata*, it must appear from the inspection of the record, that the person whose interest is sought to be bound, was in some way a party to the suit—*Chaudhri Ahmad Buksh v. Seth Raghubor Dayal*, 2 C. L. J. 413: 10 C. W. N. 115: 28 A. 1 P. C.; *Ajodhya Koeri v. Ram Sunder*, 63 I. C. 240. Where a party had not been properly represented in a suit, the decision therein will not be *res judicata* against him in a subsequent suit; *Saw Lan v. Mung Lun*, 22 I. C. 673.

The decision in a previous suit between a tenant and his Zemindar's thikadar does not operate as *res judicata* in a subsequent suit between the tenant and the zemindar, for the previous suit was not between the same parties or between parties under whom they or any of them claim; *Partab Dubey v. Ajudhia Estate*, 58 I. C. 990.

A survey-officer held an enquiry under the Boundary Act, 1860, and demarcated certain land out of a zemindary. At the time of the enquiry the estate was under the Court of Wards, and the zemindar, who was a minor, was represented by the manager. *Held*, that the subsequent suit by the zemindar to recover the land was barred by the former decision of the Survey-officer, and the matter in dispute was *res judicata*.—*Kamaraju v. Secretary of State*, 11 M. 309. See also *Subramanya Pandya v. Sira Subramanya*, 17 M. 316.

A previous suit in which the plaintiff elected to sue the defendants as principals, bars a second suit on the same contract in which the defendants are charged as responsible agents.—*Devraj Krishna v. Halambai*, 1 B. 87.

Where a suit was brought by one of the five trustees of a *devasam* to recover property alleged to have been illegally alienated by three other trustees to a stranger and dismissed. *Held*, that the second suit brought for the same purpose by the fifth trustee, who had not been a party to the former suit, was barred.—*Madhavan v. Keshavan*, 11 M. 191.

The suit and the issue put forward for trial in the second suit are treated on exactly the same footing in the section, and the test of *res judicata* with regard to each is whether the matter directly and substantially in issue in the later suit, was the matter directly and substantially in issue in the suit or in an issue in the earlier suit. The word "issue" in the expression "suit or issue" must be distinguished from the use of the words "in issue" in the expression "the matter directly and substantially in issue." The latter expression is made applicable to both the later suit and an issue raised in it. "Directly and substantially in issue" obviously means directly and substantially in question which would include everything necessarily involved, whether that expression is applied to the suit itself or to an issue in it. It speaks of "any matter which might and ought to have been made a ground of defence or attack." The phrase "directly and substantially in issue" in the principal clause of the section is spoken of with reference to both the suit and issue. Clearly therefore, what ought to have been made ground of defence or attack with respect to any issue in the earlier suit must be taken to have been a matter directly and substantially in issue therein, when the question is whether an issue in the earlier suit can be tried again in the later suit. The language of Explanation IV is applicable equally both to the previous suit itself and to an issue in the suit. For if a Court is bound by Explanation IV to section 11 to adopt and act upon the fiction that a matter which might and ought to have been made a ground of defence or attack in the former suit *should be deemed to have been a matter directly and substantially in issue in such suit*, that same explanation necessarily imposes upon the court the duty of acting upon the further fiction that that matter was also heard and finally decided in the former suit. In other words, under Explanation IV to section 11, the court is bound to make two assumptions, viz., (1) that a matter which might and ought to have been made a ground of defence or attack in the former suit is *to be deemed to have been directly and substantially in issue in the former suit*, and (2) and that such matter *shall also be deemed to have been heard and finally decided in that suit*; because, if it were necessary in cases covered by the explanation that the matter should have been expressly decided and finally heard in the former suit, then the explanation would be practically unworkable. The proposition that failure to raise grounds of attack or defence which might and ought to have been raised does not make such grounds *res judicata* unless there is an express decision by the court upon them seems to be wholly untenable. Courts of justice are not in the habit of deciding points not raised before them; and to say that the explanation only takes effect when they happen to do so, appears to be to defeat the policy of the section and to render the section meaningless as held in *Sri Gopal v. Pirthi Singh*, 20 A. 110, confirmed by the Judicial Committee in 24 A. 429 P. C. which has been subsequently followed in *Mahomed Ibrahim v. Ambika Pershad*, 89 C. 527 P. C. How can a matter which might and ought to have been made a ground of defence or attack in the former suit, be possibly decided by court when such matter is kept back by the parties and is not brought before the court in pleadings? The Court cannot by supposition or guess expressly decide a matter, when that matter is not known to the Court. Thus the explanation dispenses with the necessity of an express finding upon a matter which might and ought to have been made a ground of defence in the former suit and imposes upon the Court to act upon the fiction that the matter which might and ought to have been made a ground of defence or attack in the former



is said to claim under another who derives his title through that other in any of the abovementioned modes.

A lessor does not claim under his lessee, but a lessee claims under his lessor. Therefore, dismissal of ejectment suit brought by lessor against a trespasser, does not bar a subsequent suit brought by the lessor against the same person for ejectment; *Rombrohm v. Bansi Karmakar*, 11 C. L. R. 122; *Shripadbhat v. Rama Babaji*, 29 Bom. L. R. 274; A. I. R. 1927 B. 270.

Where there are several reversioners successively entitled to succeed to property for the time being in the possession of a Hindu female, a decree in a suit by some of such reversioners seeking to set aside alienations made by the female will not constitute *res judicata* in respect of a similar suit brought by other reversioners, as no one of such reversioners can be said to claim through or derive his title from another; *Chhidu Singh v. Durga Dei*, 22 A. 382 Ref. to in 27 M. 588; distd. in 6 C. W. N. 178. See also *Bhagwanta v. Sukhi*, 22 A. 33 F. B.; *Abinash v. Harinath*, 32 C. 62. 9 C. W. N. 25; *Kailash v. Giriya*, 39 C. 925; 16 C. W. N. 658. A reversioner does not derive his title from a female heir holding a limited interest; *Shibshankar v. Soni Ram*, 32 A. 33; 6 A. L. J. 931. See however *Arunachala v. Panchanadam*, 8 M. 348.

Plaintiffs claiming as reversioners of H brought a suit for a declaration that an adoption by the widow shall not affect their reversionary rights in the estate of H and obtained a decree. Subsequently the widow made a gift to a stranger. Plaintiffs again brought a declaratory suit contesting the validity of the gift. Held that the question of plaintiff's relationship to H was *res judicata* in the subsequent suit inasmuch as the defendant was claiming under the widow who was party to the previous suit and was bound by the decree passed in that suit; *Indraj v. Ramji Lal*, 59 I. C. 808.

During the continuance of a widow's life estate adverse possession, which begins in and runs its course before that life estate terminates, will be no bar to reversioners. Nor will litigation by the widow in the enjoyment of such a life estate whether she be plaintiff or defendant, represent the estate fully so as to give rise to a bar of *res judicata* against the reversioner if such litigation is qualified and personal to the widow or has arisen out of such acts of her own affecting the estate during her own life estate therein; *Subbi Ganapati Bhatia v. Ram Krishna Bhatta*, 19 Bom. L. R. 919. 42 B. 69. 43 I. C. 233.

A Hindu son in a joint Mitakhara family does not claim under his father within the meaning of this section; he becomes entitled by reason of his birth and in his own right. Therefore, the dismissal of a suit for redemption brought by the father, does not bar a subsequent suit for redemption by his sons. *Sundar Lal v. Chibittar Mal*, 29 A. I. See also *Sohan Lal v. Sardar Khan*, 25 P. R. 1916; 16 P. W. R. 1916. But where, according to a defendant's own case, he claims through his father and not as a co-parcener of his father, he is bound by the former decision against his father; *Mowar Kali Churn v. Mowar Shco Buksh*, 16 C. W. N. 783; 17 C. L. J. 93.

The principle of *res judicata* applies when the later litigant occupies by succession the same position as the former litigant. A decree, therefore, against a *saranjamidar* may operate as *res judicata* against his heir and successor; *Madhav Rao v. Anusuya Bai*, 40 B. 606; 18 Bom. L. R. 768; 36 I. C. 505.

further fiction that that matter was also heard and decided and adjudicated upon in the former suit.

The above Full Bench case of the Madras High Court seems to be opposed to the case in 82 B. 312 and some other cases noted above.

See the following cases on the question of *res judicata* by implied decision:—*Onclal v. Radhanath*, 95 P. L. R. 1916; 86 I. C. 267; *Bisheshwar Baksh Singh v. Raja Rameshr Baksh Singh*, 21 O. C. 1; 4 O. L. J. 648; 44 I. C. 368.

**Plaintiff Is Bound to Put Forward Every Matter which Might and Ought to have been Made a Ground of Defence or Attack in the Former Suit.**—A party who brings a suit to recover property under one title and is defeated, is barred from recovering the same property in another suit under different title of which he might have availed himself at the time the former suit was brought.—*Denobundhoo v. Kristomonee*, 2 C. 152, F. B. Followed in *Bheeka Lall v. Bhuggu Lall*, 3 C. 23. See also *Hasan Ali v. Siraj Husain*, 16 A. 252; *Iman Khan v. Aykub Khan*, 19 A. 517 (F. B.); *Kesar Singh v. Asa Singh*, 86 P. R. 1913; 324 P. L. R. 1913; *Radhia v. Beni*, 1 A. 560; *Moosa Goolam v. Ibrahim*, 40 C. 1. P. C.: 16 C. W. N. 937. *Woomatara v. Unnopoorna*, 11 B. L. R. 158 (P. C.) and *Pigou v. Mahomed Abou Syed*, 3 C. L. R. 253; *Gobind Lal v. Rao Baldeo Singh*, 12 P. R. 1915; 226 P. L. R. 1914; 128 P. W. R. 1914; 24 I. C. 931; *Sheopher Singh v. Bhola Singh*, 11 I. C. 87.

A litigant is bound to raise every title on which he can succeed, and to obtain a decision upon every part of his case. He cannot be allowed to keep back one, and then years after to bring a fresh suit on the grounds that he had still a right in reserve.—*Brojo Lall v. Khettur Nath*, 12 W. R. 55; *Dudsar Bibee v. Shakir*, 15 W. R. 168; *Sree Kristo v. Joy Kristo*, 24 W. R. 304; *Girija Dayal v. Brij Bhukhan*, 10 I. C. 29; *Musst. Umrao Bibi v. Himmathi*, 2 Lah. L. J. 215; 54 I. C. 200; *Thora Sina v. Abdul Rahman*, 46 M. 135; 72 I. C. 207.

Where a plaintiff who is fully aware of the facts which constituted his cause of action mismanages his litigation and fails to obtain from the Courts the full reliefs to which he is entitled, neither he nor his transferee is entitled to maintain any further suit on the same cause of action; *Ram Nagar Pande v. Bhagirathi*, 27 I. C. 808.

Dismissal of previous suit based on a contract with the defendant for the supply of boots at an agreed rate, bars a second suit for recovery of the same money as compensation for services rendered; because the ground in the second suit ought to have been as an alternative in the first suit; *Cristensen v. Sattia*, 15 I. C. 374.

Suit for land based on plaintiff's title—Previous suit as lessor—Omission to make title a ground of attack in previous suit—No denial of plaintiff's title as landlord. Held that the claim for arrears of rent under the old written agreement was *res judicata* by reason of the former suit, but the plaintiff's omission to sue on the strength of his general title in the former suit was no bar to the present suit, inasmuch as his title as landlord had never been disputed—*Kutti Ali v. Chindan*, 23 M. 629. (22 M. 323, referred to).

The plaintiff sued to recover certain land, alleging that on the death of the widow of the former owner they became entitled as reversioners. They

brought by the judgment-debtor against the same defendant, to recover possession of the same property, inasmuch as the judgment-creditor was not a representative of the judgment-debtor within the meaning of this section; *Shivappa v. Dod Nagaya*, 11 B. 114.

A purchaser of a *patni* under the Patni Regulation VIII of 1819 does not claim through the defaulting *patnidar*; therefore, the decision in the previous rent suit dismissing the defaulter's claim for arrears of rent on the ground that no relation of landlord and tenant exists between him and the tenant, does not operate as *res judicata* in a subsequent rent suit brought by the auction-purchaser against the same tenant; *Satish Chandra v. Munjanali Debi*, 17 C. W. N. 340: 15 I. C. 839.

**Res Judicata as Between Co-Plaintiffs.**—As between co-plaintiffs a finding to become *res judicata* must have been essential for the purpose of giving relief to the plaintiff in the previous suit; *Rukhmini v. Dhondo*, 86 B. 207: 14 Bom. L. R. 128: *Hub Ali v. Mammuri*, 8 A. L. J. 807. A decision to be *res judicata* between co-plaintiffs, the same conditions that are required in the case of co-defendants, are essential; *Ram Chandra v. Narayan*, 11 B. 216; *Krishnan v. Kavan*, 21 M. 8; *Maharaja Pratab Udai Nath v. Ganesh*, 70 I. C. 232.

A judgment in a suit cannot be *res judicata* between the co-plaintiffs therein in respect of a point on which there was no active contest between them; *Mokhan v. Naga Pillai*, (1917) M. W. N. 14: 38 I. C. 213.

**Res Judicata between Co-Defendants and Pro-forma Defendants.**—A decision in a former suit cannot operate as *res judicata* between co-defendants in that suit or parties claiming under them unless there was conflict of interest between them; *Saroda v. Kailash Bashini*, 17 C. W. N. 128: 18 I. C. 117 *Nazir Khan v. Mangli*, 220 P. W. R. 1912: 231 P. L. R. 1912; *Zamindar of Pattapuram v. Proprietors of Kolanka*, 2 M. 23 (P. C.); *Jumna Singh v. Kumarunnissa*, 3 A. 152; fol. in *Dhian Singh v. Belas Kaur*, 42 P. R. 1912; 123 P. W. R. 1912; 154 P. L. R. 1912. See also *Mir Khan v. Rahman*, 35 P. L. R. 1914: 23 I. C. 381; *Chittar Mal v. Ram Narain*, 12 A. L. J. 603. *Bhagwat Singh v. Tej Kaur*, 8 A. 91: *Ram Chandra Narayin v. Narayan Mahader*, 11 B. 216; *Ramanuja v. Narayana*, 18 M. 374; *Gobind Chunder v. Srigobind*, 24 C. 330; *Bapu v. Bhawani*, 22 B. 245. But where there is a conflict of interest amongst the defendants, claiming under different titles and there is an adjudication between the defendants *inter se* defining the real rights and obligations; the decision in the former suit will operate as an estoppel between co-defendants.—*Venkayya v. Narasamma*, 11 M. 201; *Shadal Khan v. Amanulla Khan*, 4 A. 92; *Gobinda v. Taruck*, 3 C. 145; *Bissorup v. Gora Chand*, 9 C. 120; *Chunder v. Kunhamed*, 14 M. 324; *Madhavi v. Kelu*, 15 M. 264; *Abdul Kadeer v. Aishamma*, 16 M. 61; *Latchanna v. Saravayya*, 18 M. 164; *Ahmed Ali v. Najabat Khan*, 18 A. 65; *Narasimma v. Srinivasa*, 33 M. 112: 7 M. L. T. 89; *Ram Chandra v. Narayan*, 32 B. 300; *Hari Annaji v. Vasudev*, 38 B. 438: 16 Bom. L. R. 233; 23 I. C. 944; *Golab Singh v. Net Singh*, 10 I. C. 324; *Ramaswamy v. Abboy*, (1911) 2 M. W. N. 306: 11 M. L. T. 71; 11 I. C. 17; *Purshotama v. Lakhpati*, 7 I. C. 67; *Md. Hussain v. Qamarul Zaman*, 143 P. L. R. 1915: 57 P. W. R. 1915; *Syed Mohideen v. Syed Osman*, (1919) M. W. N. 580: 8 L. W. 473: 49 I. C. 369; *Abhe Singh v. Binodi Lal*, 2 L. L. J. 605; *Khanam v. Hussara Bigam*, 57 I. C. 594; *Mannu v. Musst. Patia*, 65 I. C. 932.

*Mahabir Pershad v. Macnaghten*, 16 C. 682 (P. C.); *Satyabadi v. Harabati*, 34 C. 223; 5 C. L. J. 192; *Shayma Charan v. Mrinmoye*, 31 C. 79; *Bidhumukhi v. Jitendra*, 10 C. L. J. 527; *Sultan Ahmad v. Maula Baksh*, 4 A. 21; *Dinomoyi v. Anungamoyi*, 4 C. L. R. 599; *Hari Narain v. Ganpatrav*, 7 B. 272; *Amritrav Krishna v. Bal Krishna*, 11 B. 488; *Woomatara v. Unnoporna* 11 B. L. R. 158 (P. C.); *Kameswar Pershad v. Rajkumari Rutton Koer*, 20 C. 79 (P. C.) followed in *Akaji Kunhi v. Ayisa Bi*, 26 M. 645, and explained in *Ramaswami Ayyar v. Vythinath Ayyar*, 26 M. 760, followed in *Veerana Pillai v. Muthu Kumara*, 27 M. 102, and in *Thrikailat Madathil v. Thiruthiyil Krishnen*, 29 M. 153; 16 M. L. J. 48; (22 M. 259 overruled); *Moosa Golam Ariff v. Ebrahim*, 40 C. I. P. C.: 16 C. W. N. 937; 16 C. L. J. 642; 10 A. L. J. 486; 14 B. L. R. 1211; 23 M. L. J. 215; 6 L. B. R. 119; *Mohabir Tewari v. Purbhoo Nath*, 12 C. W. N. 292; 7 C. L. J. 504; *Lal Singh v. Khaliq*, 31 A. 323; *Md. Abdul Hamid v. Hedayetunnissa*, 12 A. L. J. 751; *Imam Khan v. Aykub Khan*, 19 A. 517; *Dost Muhammad v. Said Begam*, 20 A. 81; *Arunachelam Chetty v. Meyyappa Chetty*, 21 M. 91; *Rampal Singh v. Ramprasad*, 27 A. 37, P. C.: 1 C. L. J. 46. See, however, *Thandavan v. Valliamma*, 15 M. 336; *Muttuvaduganatha Tevar v. Periasami*, 16 M. 11; *Atchayya v. Bangarayya*, 16 M. 117; *Kailash Mondul v. Baroda Sundari*, 24 C. 711; *Sankaran v. Parvathi*, 19 M. 145; *Dhani Ram v. Bhagirath*, 22 C. 629; *Sarkum Abu Torab v. Rahaman Buksh*, 24 C. 83; *Deputy Commissioner of Kheri v. Khanjan Singh*, 29 A. 331, P. C.: 5 C. L. J. 344; 11 C. W. N. 474; 4 A. L. J. 232; 17 M. L. J. 103; *Akhilsundari v. Nanibala*, 12 C. L. J. 486; *Kuppuswami Mudali v. Subba Naidu*, 13 L. W. 307; 62 I. C. 501; *Ameenammal v. Minakshi*, 12 L. W. 178; 60 I. C. 226

Plea which a party might and ought to have raised in a prior suit between the parties will not be allowed to be raised in the subsequent suit. The same rule applies to a plea (non-joinder in this case) which was actually raised in the previous suit, but was rejected as being too late; *Karunamoy v. Tinkari*, 91 I. C. 683; A. I. R. 1926 C. 511.

In a defence which might and ought to have been taken in a previous litigation but was not taken with the result that the suit was allowed to be decreed *ex parte*, the position of the defendant is the same as if he had raised the defence directly and substantially and had been defeated; *Bidhumukhi v. Jitendra*, 10 C. L. J. 527 (31 C. 79 followed); *Mahabir v. Prabhu*, 9 C. L. J. 78; *Lal Singh v. Khalik*, 31 A. 323; 6 A. L. J. 259; *Gobind Lal v. Rao Baldeo Singh*, 12 P. R. 1915; 226 P. L. R. 1914; 128 P. W. R. 1914; 24 I. C. 931.

Expl. IV, s 11 is applicable only when the subject of the two suits or of the issue raised therein is identical.—*Rajendra Nath v. Tarangini*, 1 C. L. R. 248. *Bishahar Baksh Singh v. Raja Rameshar Baksh*, 21 O. C. 1; 4 O. L. J. 648; 44 I. C. 368. See also *Zinatunnissa v. Rajan*, 27 A. 142 and *Jamadar Singh v. Serajuddin*, 12 C. W. N. 862; 8 C. L. J. 82; 35 C. 979, where it has been held that either the subject of the two suits or the issues raised therein should be identical. The explanation does not require that both the issues and the subject matter of the two suits must be the same

Defendant was sued as trustee and manager of an idol in respect of the income of certain property of the endowment. He did not defend the suit in his fiduciary character but asserted his own personal rights to the property and was unsuccessful. He then brought the present suit again

distinguished); *Sundra v. Sakharan*, 16 Bom. L. R. 616; 39 B. 29; 26 I. C. 444.

Where a person is impleaded as a *pro-forma* defendant in a suit, he would be concluded by the decision therein as much as any other defendant. A person who has been brought in to defend his rights in respect of one of the properties in a suit ought to set up his rights, if any, to the other properties as well and cannot evade the bar of *res judicata* in a subsequent suit by pleading that he was not called upon to assert his right in respect of the other properties in the first suit; *Sethuram Iyer v. Ramchandra Iyer*, (1917) M. W. N. 336; 5 L. W. 659; 38 I. C. 184 (8 W. R. 366; 39 C. 527 (P. C.); 24 A. 429 P. C.; 34 A. 599 folld.; 2 M. 23 P. C., distd.

In a suit for declaration of title to certain property, where the Court makes a declaration in favour of the plaintiff as to a certain share of property, and a declaration of certain other shares in favour of some of the defendants, the latter declaration is not binding on the other defendants.—*Raj Narain v. Khobdari Rai*, 5 C. W. N. 724.

The principle of *res judicata* does not apply to persons who were merely *pro-forma* defendants in the former suit.—*Brojo Behari v. Kedar Nath*, 12 C 580 (F. B.), (9 C. 120, overruled). Followed in *Malhi Kumar v. Imamuddin*, 27 A. 59 and in *Surendra Nath v. Brojo Nath*, 18 C. 352 (F. B.), qualified in *Tipu Khan v. Rajani Mohun*, 25 C. 522 (F. B.); *Tara Das v. Jnanendra Nath*, 50 I. C. 802; *Gokul Chand v. Milkhi*, 65 P. R. 1916; 157 P. W. R. 1916; 35 I. C. 543; 1 P. L. R. 1917; *Sugriv Misser v. Jogi Misser*, 45 I. C. 318; *Bisheswar Dayal v. Bansropan*, 44 I. C. 546.

Where a defendant was made a party to a former suit for the purpose of discovery only, neither was any relief asked from him, nor was a decree made against him, he was therefore not a party to the former suit in such a way as to make the rule of *res judicata* applicable to the subsequent suit.—*Rohimbhoy v. Turner*, 17 B. 341, P. C. (14 B. 408, affirmed). Co-defendants do not fall within the category of same parties.—*Raman v. Charan*, 42 P. W. R. 1910.

**Mortgagee If Bound by the Decree against Mortgagor.**—Where there are two simple mortgages on certain property, the decision in a suit upon the first mortgage, in which the second mortgagee was not impleaded, does not operate as *res judicata* in a subsequent suit by the second mortgagee for sale of a part of the mortgaged property; *Musst. Shamdei v. Baljit Singh*, 32 A. 119; 7 A. L. J. 29.

A mortgagee is not bound by a decision relating to the mortgaged property in a suit instituted after his mortgage, and to which he was not a party. After a mortgage has been created, the mortgagor no longer possesses any such estate as would entitle him to represent the rights and the interests of the mortgagee in a subsequent litigation, so as to render the result of such litigation binding upon and conclusive against such mortgagee.—*Sita Ram v. Amir Begum*, 8 A. 324; referred to in *Sorshi Bhushan v. Gogan Chunder*, 22 C. 364; followed in *Ram Chandra v. Malkapa*, 40 B. 679; 18 Bom. L. R. 757; 36 I. C. 443. See also *Bonomal v. Koylash*, 4 C. 692, folld. in *Surja Prasad v. Raj Mohan*, 8 C. L. J. 478; 13 C. W. N. 281.

wards be barred by *res judicata*. A question of paramount title can be investigated in a mortgage suit in certain cases; *Saimanta Seal v. Bindu Basini*, 38 C. L. J. 183.

Failure of mortgagee to set up his right of pre-emption in a suit by the purchaser from the mortgagee for redemption, does not bar the trial of the mortgagee's right of pre-emption in respect of the sale by the mortgagee; *Prasad*, 26 A. 61 F. B. (1 A. 75 and 2 A. 75).

Where an issue arising out of the execution of a decree has not been raised and determined under section 244, C. P. Code, 1882, (S. 47), there is nothing in that section to prevent a defendant in a separate suit subsequently brought, from raising that issue in that suit. The distinction between ss 47 and 11 pointed out.—*Nilkamal v. Jahanabi Chowdhurani*, 28 C. 946. (26 C. 335: 1 C. W. N. 396, followed).

The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time—*Vinayak v. Dattatraya*, 26 B. 661. Ref. to in *Bhura v. Ghure*, 8 A. L. J. 352 and in *Kashi v. Bajrang*, 30 A. 86: 4 A. L. J. 763.

If the effect of the decision in a former suit is necessarily inconsistent with the defence that ought to have been raised, but has not been raised, that defence must under this explanation be deemed to have been finally decided against the defendant who ought to have raised it; *Mohim v. Anil Bundhu*, 9 C. L. J. 362: 18 C. W. N. 518.

Omission to put forward counter-claim or a claim to set-off, does not debar a person from bringing a subsequent suit for that amount; *Pichu Aiyar v. Subramania*, 28 M. L. J. 513: 29 I. C. 34; *Amritsar National Banking Co. v. Fasedlahi*, 74 P. R. 1919: 52 I. C. 850; *Draksharam v. Gunda*, 24 L. W. 282: A. I. R. 1926 M. 1020.

Where a statute authorizes a defendant to set up in the same answer as many defences as he has, if a judgment is entered in his favour, which contains no provision that it will be without prejudice or any other limitation or restriction, the estoppel raised by it will extend to every matter or fact in issue actually found by the Court in favour of the defendant; *Rambehari v. Surendra*, 19 C. L. J. 34.

**Explanation IV and Its Applicability to Mortgage Suits.**—A person claiming adversely to the mortgagor and mortgagee is not a necessary party to a mortgage suit but if he is made a party, the Court has discretion whether to adjudicate on his title or not and therefore if such party fails to assert his title, he is not barred by s 11, Expl. IV from doing so in a subsequent suit; *Ramanna v. Venkatanarayana*, 52 M. L. J. 52: A. I. R. 1927 M. 301.

In a suit on a mortgage, persons who had not joined in the mortgage were impleaded not only as the representatives of the mortgagor but also as liable in their personal capacity. They did not plead that their shares in the hypothecation were not properly mortgaged and should be exonerated but subsequently brought a suit for a declaration that the decree in the mortgage suit was not binding as against their interest in the property. *Held*—

W. N. 658: *Sheo Narain v. Khurgo*, 10 C. L. R. 337; *Bhaiji v. Jharula*, 18 C. W. N. 1029, P. C.: 20 C. L. J. 360, P. C. (89 C. 887, reversed); 42 C. 244; 27 M. L. J. 100; 16 Bom. L. R. 845; 42 I. A. 501; 24 I. C. 501; *Bramomoye v. Kristo Mohun*, 2 C. 222; *Jhandu v. Tarif*, 21 C. L. J. 26 P. C.; 19 C. W. N. 197; 17 Bom. L. R. 44; 37 A. 45; 21 M. L. J. 453; 17 M. L. T. 10.

A testator bequeathed his property to his widow for life with remainder to his daughter. A stranger sued the widow alone to recover the property, basing his claim on an earlier will. He was granted a decree and obtained possession of the property. After that decision the widow and her daughter transferred the property to the present plaintiff who sued A to recover possession of the property. *Held*, that the suit was not barred by the rule of *res judicata* inasmuch as the widow did not fully represent the estate, and that, therefore, the decision in the suit was not binding on her daughter nor on the plaintiff who claimed through her; *Achhaibar Singh v. Hargobind Singh*, 22 O. C. 156; 6 O. L. J. 355; 52 I. C. 845.

Where during the pendency of a suit or appeal against a widow as representing the estate, she adopts a son, the adopted son is bound by the result of the suit or appeal and a fresh suit by the adopted son is barred by *res judicata*; *Ganpatrao v. Lazmi Bai*, 15 N. L. R. 24; 43 I. C. 64.

A decree in a suit on the mortgage executed by a Hindu widow and the then reversioner, made by a competent court in their presence, binds the entire inheritance, and, as long as that decree stands and until it is set aside for good reason, the actual reversioner cannot go behind it and maintain a suit for recovery of possession of the mortgaged property from a third party auction-purchaser in execution of that decree; *Ganga Narayan v. Indra Narayan*, 25 C. L. J. 391; 22 C. W. N. 350; 35 I. C. 49.

A decree for maintenance in favour of the daughter against the widow is binding on the reversioners inasmuch as in that previous suit for maintenance by the daughter against the widow, the widow represented the estate of her deceased husband; *Atulchandra v. Mirtunjay*, 3 Pat L. J. 426; 46 I. C. 62.

A decree against a Hindu widow in a suit instituted under the Limitation Act, 1877, on the ground of limitation is not *res judicata* as against the reversioners; *Somasundaram v. Vaithilinga*, 40 M. 846; 6 L. W. 253. 41 I. C. 516; (21 C. 8 P. C. *distd.*). Where a suit instituted by a Hindu widow after the Limitation Act of 1877 came into force for the recovery of possession of her husband's property was dismissed on the question of limitation; *held* that a suit by the reversioners for the recovery of the same property, after the death of the widow, was not barred by *res judicata*; *Vutcharu Ramachandra v. Kahlur Audemma*, 32 M. L. J. 627; 42 I. C. 228.

When the estate of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heirs. Where, however, the decree relates to a matter personal to her, it is not so binding; *Risal Singh v. Balvant Singh*, 37 A. 406; 19 A. J. 594; 30 I. C. 657; *Bireswar v. Kamal Kumar*, 17 C. W. N. 337; 16 I. C. 437; (16 C. 511; 26 C. 285; 30 C. 550 *folld.*); *Nachi Kalai v. Aiya hannu* 43 M. L. J. 95.

of facts infringing the right and there is no allegation of a wholly different right or of a wholly different group of facts, the second suit is barred.—*Hasan Ibrahim v. Mancharam*, 3 B. 137. Refd. to in 14 B. 36 p. 38 and in 1 I. C. 808: 9 C. L. J. 75-n.

A decision in a prior suit may bar a subsequent suit on the same cause of action, though the reliefs claimed in the two suits may be different; *Ramasami v. Veerappa*, 33 M. 423; see also *Gobind v. Jijibai*, 36 B. 189; 14 Bom. L. R. 9. If the causes of action in the two suits are substantially the same, the mere differences in the form in which they are stated or in the relief prayed for can make no difference in law; *Naganada v. Krishnamurti*, 34 M. 97; *Ramdas v. Mehr. Dad*, 124 P. L. R. 1914: 22 I. C. 296; and *Ramnagar Pande v. Bhagirathi*, 27 I. C. 808.

A decision in a previous suit for possession of property, that an agreement to sell executed by the owner of such property in favour of the defendant and a tender of performance by the defendant, disentitled the plaintiff (who was found to have purchased with knowledge of the agreement and tender), will operate as *res judicata* in a subsequent suit between the same parties on the same cause of action. The fact that at the time of the subsequent suit, such contract of sale had become time-barred, will not prevent the operation of the bar.—*Adakkalam Chathar v. Ramalinga*, 29 M. 320.

Dismissal of former suit for dissolution of partnership on the ground that no partnership was proved, bars a subsequent suit for money due for losses in partnership business; *Samarapuri v. Shanmuga*, 5 M. 47.

**Distinct Cause of Action.**—A prior suit determining a question of title regarding a certain land does not bar a subsequent suit between the same parties involving a question as to its boundaries; *Anantaram v. Hem Chandra*, 50 C. 475: 72 I. C. 1041. The plaintiffs sued to eject the defendants alleging that the defendants held the land under certain leases. The suit was dismissed because the leases were not proved. The plaintiffs afterwards sued as owners to eject the defendants from the land. *Held*, that the suit was not barred. The fact of both the suits being against the defendants as tenants of the plaintiff did not imply that the suits were on the same cause of action.—*Girdhar Monordas v. Dayabhai Kalabhai*, 8 B. 174. Refd. to in 14 B. 31: 10 B. 24: 2 N. L. R. 94 96. *Abdur Rahman v. W. O'Brien*, 257 P. L. R. 1914: 146 P. W. R. 1914: 25 I. C. 357; *Gobind v. Figibai Sahu*, 14 Bom. L. R. 9: 36 B. 189: 13 I. C. 849; *Gavarayamma v. Dandi Seetharamaswami*, 1 L. W. 821: 25 I. C. 615.

Plaintiff sued for possession of the suit property on the basis that the defendant was his tenant. It was dismissed as the Court found that the relationship of landlord and tenant did not subsist. Plaintiff again brought the present suit alleging that he was a reversioner and as such entitled to the suit property. *Held*, that the second suit was not barred by *res judicata* as the cause of action in the two suits are different; *Mangalathammal v. Veerappa Goundan*, (1919) M. W. N. 287: 52 I. C. 813 (8 M. 520 *folld.*).

A person having two separate claims against the same defendant regarding the same property is not bound to include both in one suit. If the two grounds were not so connected as properly to admit of investigation and adjudication together, then it cannot be said that a former adjudication based upon one of the grounds constitutes a *res judicata* as regards



*Mehar Chand*, 15 C. 70 (P. C.); *Sheo Shankar v. Juddo Kunwar*, 18 C. W. N. 968 P. C. (affirming 33 A. 71) *Bindhachal v. Gaya Rai*, 17 I. C. 290. *Ram Ratan v. The Firm of Harsukh Roy*, 43 P. L. R. 1922. See however, *Ram Narain v. Bishessar* 10 A. 411; *Ram Lingam v. Thirugnana*, 12 M. 312. *Sunder Lal v. Chhitar Mal*, 29 A. 1 and 215; 4 A. L. J. 17: and *Kunj Behari v. Khand Prashad*, 34 C. 491; 6 C. L. J. 362; 11 C. W. N. 487.

**Decision Between Decree-Holder and Judgment-Debtor if Binding on Auction-Purchaser.**—An auction-purchaser who purchases in execution of a money decree is bound as between himself and the decree-holder by any previous litigation between the decree-holder and the judgment-debtor whose interests he has purchased. S. 11 of the Civil Procedure Code applies to the facts of the case; *Kali Dayal v. Umesh Prasad*, A. I. R. 1922 Pat. 33: 65 I. C. 266 (22 C. 909; 10 C. L. J. 150 *folld.*, 14 M. I. A. 101; 7 C. 107 P. C. *distd.*; 14 C. 401 *disstd. from*).

**Decree Against a Registered Tenant.**—A decree against a registered tenant binds an unregistered tenant and unregistered transferees.—*Soski Bhusan v. Gagan Chander*, 22 C. 364; *Netayi Behari v. Hari Gobinda*, 26 C. 677 (10 C. 996 *followed*). See also *Modhusudan v. Hiru Ram*, 25 C. 396; *Radha Pershad v. Ram Khelawan*, 23 C. 302: 2 C. W. N. 172; *Azgar Ali v. Asaboddin Kazi*, 9 C. W. N. 134. *Surendra Narain v. Gopi Sundari*, 32 C. 1031: 9 C. W. N. 824 and *Gopi Nath v. Sajani Kanta*, 10 C. W. N. 240; *Jagat Tara v. Daulati*, 13 C. W. N. 1110: 37 C. 75 (9 C. W. N. 843 *discussed*). But in *Rupram v. Iswar*, 6 C. W. N. 302, it has been held that in a sale in execution of a certificate under the Public Demands Recovery Act, the right, title and interest of the recorded tenant alone and not the entire holding passed. See *Afraz Mollah v. Kulsu-mannessa*, 10 C. W. N. 176, p. 179: 4 C. L. J. 68; *Manurattan Nath v. Hari Nath*, 1 C. L. J. 500. So also in a sale in execution of a money decree; *Durgadhar v. Huro Mahinee*, 13 C. W. N. 270; or in a sale of co-sharer landlord's decree, *Bejoy v. Rajendra*, 9 C. L. J. 479: 18 C. W. N. 746.

**Decree Against Karnavan of Malabar Tarwad.**—In the absence of fraud or collusion, a decree against a karnavan of a Malabar tarwad, as such, is binding upon the members of that tarwad, though not parties to the suit.—*Varanakot Narayana v. Varanakot Narayanan*, 2 M. 328; *Subramanyan v. Gopala*, 10 M. 223; *Pydel v. Chathappan*, 14 M. 150; *Chathappan v. Pydel*, 15 M. 403; and *Vasudevan v. Shankaran*, 20 M. 129 (F. B.). See, however, *Kunnathurillath v. Narayanan*, 6 M. 121; *Elayachandathil v. Kenatumkora*, 5 M. 201; *Moidin Kutti v. Krishan*, 10 M. 322, and *Sridevi v. Kelu Eradi*, 10 M. 79. Followed in *Shankaran v. Keshavan*, 15 M. 6, and in *Kamappan v. Ukkaran*, 17 M. 214.

**Decree Against Benamidar When Binds the Beneficial Owner.**—The decision in a suit instituted by the benamidar with the knowledge and consent of the real owner will operate as *res judicata* as against the real owner.—*Nand Kishor Lal v. Ahmad*, 18 A. 69: (10 C. 697: 15 M. 267 *followed*; and 16 C. 364 *dissented from*). See also *Kanze Fatima v. Walilullah*, 30 A. 30: 4 A. L. J. 689 and *Rambehari v. Surendra*, 19 C. L. J. 34, where all the cases on the point have been referred to, discussed and explained. *Nageshar v. Raja Pateshri Partab*, 20 C. W. N. 205 P. C. But the decision will not operate as *res judicata* unless the previous litigation was carried on with the knowledge, consent and au-

adjudication by a competent Court. As the omission has been dealt with under the rule of *res judicata*, the Courts have tried to explain it by holding that the matter is said to be constructively in issue. In some cases the opportunity of obtaining a decision is deemed tantamount to actual decision. If the parties have had an opportunity of controverting, that is the same thing as if the matter has been actually controverted and actually decided.

The question ought not to be and cannot be treated as *res judicata* under Explanation IV unless there is a judicial determination, express or implied, on the matter not put directly.

Rule 2, of Or. II, deals with an omission and is based on the maxim which prohibits vexing a defendant more than once for one cause. It bars a subsequent suit for a portion of the relief which is omitted in the previous suit on the same cause of action.

The points of agreement between Explanation IV and Rule 2 are, that both deal with an omission, that the cause of action under both must in two cases be the same and the bar in both is to avoid repeated vexation to the defendant, and is due to the omission of the party and not to adjudication by the Court.

The points of difference between them are, that the omission under Explanation IV is the omission of attack or defence in respect of the relief, while under Rule 2, it is the omission of the relief itself, that the omission under the former may be either by the plaintiff or by the defendant, but that under the latter it must always be by the plaintiff.

The determination of the question of omission or relinquishment, according to both the above provisions of law, depends upon the following considerations, *viz.*, whether the cause of an action or transaction on which the two suits are based is the same or different. The following cases will illustrate the meanings of the expressions "same cause of action" and "distinct causes of action."—The cases bearing upon this Explanation and Or. II, rr. 1 and 2 have been exhaustive noted under Or. II, rr. 1 and 2.

There is nothing in ss. 16 and 17 of the Code of Civil Procedure to give a person power to bring two suits in two Courts for the partition of properties under different jurisdictions so as to contravene the principle involved in s. 11, Expl. 4 and O. 2, R. 2 C. P. Code; *Bankara Basarana v. Bankara Dodda* (1923) M. W. N. 294; 72 I. C. 480.

Condition (2).—"Between the same parties"—Explanation VI.

"Between the same parties."—A decree obtained in a suit to which the parties litigating a subsequent suit were not parties, is not conclusive and binding as against them; *Niratan v. Abdul Gafur*, 32 C. L. J. 75; 59 I. C. 3.

There is no bar of *res judicata* when the parties in both the suits are not the same; *Muhammad Hassan v. Yusuf*, 11 P. L. R. 1915, 246 P. W. R. 1915; 27 I. C. 642.

A decree for partition made in a suit brought by a member of a joint Hindu family is *res judicata* as between all co-sharers who are parties to the suit. A co-sharer who was a party to the suit is estopped from alleging that the property left unpartitioned is less than the share to which he is entitled; *Nalini Kanta v. Sarnamoyi*, 21 C. L. J. 23 P. C.; 27 M. L. J. 10; 19 C. W. N. 531; 17 B. L. R. 1.

the real owner of the property; *Mata Prasad v. Muhammad Abdul Hasan Khan*, 4 O. L. J. 463: 42 I. C. 57.

A Court can treat as nullity the decree of another Court obtained by fraud.—*Barkatunissa v. Fazal Haq*, 26 A. 272, and *Nizarini v. Nund Lal*, 3 C. W. N. 670: 26 C. 891, on appeal 7 C. W. N. 353: 30 C. 369 and 9 C. W. N. 961, P. C.: 2 C. L. J. 189: 33 C. 180, P. C.

If evidence not originally available comes to the knowledge of a litigant, that the decree was obtained against him by fraud on the evidence of perjured witnesses, his remedy lies in seeking for review. The rule of *res judicata* prevents him from re-agitating the matter on the same materials or on materials which might have been laid before the court in the first instance: *Munshi v. Surendra*, 16 C. W. N. 1002: 15 I. C. 892.

A decree passed by a Court having jurisdiction is not void but voidable when it is passed under a misapprehension or is brought about by fraudulent proceedings. The party against whom the decree is passed has only an equity to set aside the proceedings.—*Shaik Ismail v. Rajab*, 30 M. 295: 17 M. L. J. 165.

An order made without jurisdiction is absolutely null and void, such an order may be shown to be a nullity in any proceeding when reliance is placed upon, it, although no formal and direct proceeding has been taken to have it vacated or reversed.—*Golab Sao v. Choudhury Madho Lal*, 2 C. L. J. 384: 9 C. W. N. 956

**Res Judicata Against Intervenors.**—A suit to recover possession of lands, on the ground of purchase from the admitted owners, is not barred by *res judicata*, simply because the plaintiff's claim as against the same defendant was dismissed in a suit in which he (defendant) appeared as an intervenor.—*Tukhea v. Deo Narain*, 24 W. R. 248: See also *Bukah Ali v. Nittya Nund*, 5 W. R. 227. But see *Sheo Churn v. Eakera Doobay*, 6 C. 91; 7 C. L. R. 69; *Umbica Churn v. Prosonno Coomar*, 9 C. L. R. 365, in which it seems to have been held that the intervenors are barred.

**Judgments not Inter Partes Though Not Res Judicata, are Admissible in Evidence.**—Judgments not *inter partes*, though not conclusive as *res judicata*, are admissible in evidence under section 13 of the Evidence Act (I of 1872) to show the conduct of the parties, or the particular instances of the exercise of a right, or admissions made by the parties, or their predecessors in title, or to identify property, or to show how it has been previously dealt with. *Lakshman v. Amrit*, 24 B. 591; *Mahamad Amin v. Hasan*, 31 B. 143; 9 Bom. L. R. 65; *Gadadhar v. Radha Charan*, 34 C. 868, p. 872 and *Ranjit Singh v. Basanto Kumar*, 12 C. W. N. 739: 9 C. L. J. 597; *Amar v. Shankar*, 105 P. W. R. 1912; 142 P. L. R. 1912.

A former judgment which is not a judgment *in rem*, nor one relating to matters of a public nature, is not admissible in evidence in a subsequent suit either as *res judicata* or as a proof of the particular point which it decides, unless between the same parties or those claiming under them.—*Gujju Lal v. Futteh Lal*, 6 C. 171 (F. B.): 6 C. L. R. 439. Distinguished in *Jiaullah Sheikh v. Inu Khan*, 23 C. 693. In the Full Bench case of *Tepu Khan v. Rajani Mohan*, in 25 C. 622: 2 C. W. N. 501, it has been held that the rule laid down in *Gujju Lal v. Fatch Lal*, 6 C. 171, has been materially qualified by the decisions of the Privy Council, in the cases of *Ram Ranjan v. Ram Narain*, 22 C.

The karnam in a certain *mitta* sued to recover certain land as part of the *mirasi* property attached to his office. It appeared that the plaintiff's father and predecessor in office had brought a suit for the same land, and his suit had been dismissed. Held, that the plaintiff's claim was *res judicata*.—*Venkayya v. Suramma*, 12 M. 235.

The words "legal representatives" have been defined in clause 2 (11)

"Under whom they or any of them claim."—In order to estop a party in a subsequent suit by the decision in a former suit against another party on the ground that the former claims under the latter, it must be shown that the party in former suit represented the interest claimed in the latter suit. A party represents all interests owned by him at the time of the action as also interest belonging to others which are subordinate to his. A decision against him will bind interest acquired from him subsequently and all subordinate interest represented by him whensoever acquired. For the purposes of *res judicata*, the ground of privity is property and not personal relation. Though the words "under whom they or any of them claim" are wide, there seems to be no difficulty in the way of restricting them, so as to bind the party to the subsequent suit by the decision in the former suit only in respect of interests represented by the party to the former suit at the time of the suit. Other interests with which he had parted before the suit and which he had ceased to represent, could not properly be the subject of adjudication in the suit. As regards the interests represented, however, it does not matter whether they vested in the privy before or after the former suit. The test is whether the interest is represented and if it be possible that the party represents in the suit an interest already vested in some one else that person will be privy; *Seshappaya v. Venkatarama*, 5 M. L. T. 87; 83 M. 459.

The words "parties under whom they claim" are very wide and they include persons who dispute the existence of a trust and are made parties under sec. 92 of the Code of 1908; *Manohari v. Md. Ismail*, 8 A. L. J. 890.

This section contemplates a case where a party derives title from a party to the previous litigation subsequent to the previous litigation. There is nothing in the section to suggest that where the plaintiff has derived no title subsequent to the previous litigation, the subsequent suit should involve the consequence of being dismissed; *Surendra v. Dijendra*, 29 I. C. 464; 23 C. L. J. 215.

Persons who claim under the parties to the former suit are called privies to those parties. The term "privity" denotes mutual or successive relationship to the same rights of property. There are different classes of privies: (1) privies in estate, such as donor and donee, lessor and lessee; (2) privies in blood, as heir and ancestor; (3) privies in representation, as executor, administrator, manager of joint Hindu family. The ground of privity is property and not personal relation (*Sitaram v. Amir Begum*, 8 A. 324). To make the principle of *res judicata* applicable, there must be between the parties in the earlier and later suit some privity of estate, (*Ramchandra v. Malkapa*, 40 B. 670; 18 Bom. L. R. 757. 36 I. C. 443. (*Sitaram v. Amir Begum*, 8 A. 324, 338, *folld.*). A person who acquires any interest in the subject-matter of the suit either by inheritance, succession or transfer, or who holds property subordinately, is a person who claims under the parties to the former suit. In other words, a person

in section 91: (2) where persons litigate *bona fide* in respect of a private right claimed in common for themselves and others, as for instance, where the inhabitants of a village claim right of pasturage or a right to take water from a well or tank, etc. This clause has been fully explained in 6 C. 49. The most important elements in clause (2) are:—(a) that the persons named in the record of the former suit must claim the right in common for themselves and others who are not expressly named in the record; (b) that the persons not expressly named in the record of the suit must be interested in such right. These elements are however not necessary where suit is brought in respect of a *public right* in which the requirements mentioned in sec. 91 are to be complied with. Clause (1) of this explanation has no application where the procedure prescribed by section 91 is not followed; nor clause (2) has application where the procedure prescribed by Or. I, r. 8 of the C. P. Code, 1908 is not followed, and the consequence is, that the judgment in the former suit would not bind the persons whose names are not on the record. The following cases will illustrate the meaning of the second clause.

**Private Rights Claimed in Common with Others Interested.**—This explanation only applies to cases where several different persons claim an easement or other right under one common title as, for instance, where the inhabitants of a village claim by custom a right of pasturage over the same tract of land, or to take water from the same spring or well.—*Kalishunkur v. Gopal Chunder*, 6 C. 49; 6 C. L. R. 543. See also *Thanakoti v. Muniappa*, 8 M. 496.

A right to relief can be said to be "claimed in common" under Explanation VI, s. 11, only as between parties who would be benefited by such relief if granted and who have such an interest in the relief claimed that they could join as co-plaintiffs under Or. I. rr. 1, 4 (a). A suit cannot be maintained by one person on behalf of others standing in the same relation with him in the subject of the action, unless the relief sought by him is beneficial to those whom he seeks to represent and such others are necessarily interested in the relief sought.—*Somasundara Murai v. Kalandavelu*, 28 M. 457, F. B. (3 M. 217, 7 B. L. R. Ap. 88, and 13 C. 352 followed; 14 M. 324 overruled; 18 M. 16 not followed).

In the case of Hindu family where all have rights, it is impossible to allow each member of the family to litigate the same point over and over again, and each infant to wait till he comes of age and then bring an action, or bring an action by his guardian before; and in each of these cases, therefore, the Court looks to Expl. VI of s. 11 of the C. P. Code to see whether or not the leading member of the family has been acting either on behalf of minors in their interest, or if they are majors, with the assent of the majors; *Lingangowda v. Basangowda*, A. I. R. 1927 P. C. 56 (A. I. R. 1925 P. C. 272 *refd.*).

Explanation VI to s. 11 of the Code is not confined to cases in which the prior suit was brought with the permission of the Court under Or. I, r. 8, C. P. Code. The explanation does not become inapplicable because the prior suit was for the establishment of the plaintiff's individual right in addition to the right claimed by him in common to himself and others in so far as his claim in respect of the latter right is concerned. The fact that one of the plaintiffs in the subsequent suit was not a party to the prior suit and was allowed to come in as a co-plaintiff by order of

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in section 91: (2) where persons litigate *bona fide* in respect of a private right claimed in common for themselves and others, as for instance, where the inhabitants of a village claim right of pasturage or a right to take water from a well or tank, etc. This clause has been fully explained in 6 C. 49. The most important elements in clause (2) are:—(a) that the persons named in the record of the former suit must claim the right in common for themselves and others who are not expressly named in the record; (b) that the persons not expressly named in the record of the suit must be *interested* in such right. These elements are however not necessary where suit is brought in respect of a *public right* in which the requirements mentioned in sec. 91 are to be complied with. Clause (1) of this explanation has no application where the procedure prescribed by section 91 is not followed; nor clause (2) has application where the procedure prescribed by Or. I, r. 8 of the C. P. Code, 1908 is not followed, and the consequence is, that the judgment in the former suit would not bind the persons whose names are not on the record. The following cases will illustrate the meaning of the second clause.

**Private Rights Claimed in Common with Others Interested.**—This explanation only applies to cases where several different persons claim an easement or other right under one common title as, for instance, where the inhabitants of a village claim by custom a right of pasturage over the same tract of land, or to take water from the same spring or well.—*Kalishunkur v. Gopal Chunder*, 6 C. 49; 6 C. L. R. 543. See also *Thanakoti v. Muniappa*, 8 M. 496.

A right to relief can be said to be “claimed in common” under Explanation VI, s. 11, only as between parties who would be benefited by such relief if granted and who have such an interest in the relief claimed that they could join as co-plaintiffs under Or. I. rr. 1, 4 (a). A suit cannot be maintained by one person on behalf of others standing in the same relation with him in the subject of the action, unless the relief sought by him is beneficial to those whom he seeks to represent and such others are necessarily interested in the relief sought.—*Somasundara Murai v. Kalandaivelu*, 28 M. 457, F. B. (8 M. 217, 7 B. L. R. Ap. 88, and 18 C. 352 followed; 14 M. 324 overruled; 18 M. 16 not followed).

In the case of Hindu family where all have rights, it is impossible to allow each member of the family to litigate the same point over and over again, and each infant to wait till he comes of age and then bring an action, or bring an action by his guardian before; and in each of these cases, therefore, the Court looks to Expl. VI of s. 11 of the C. P. Code to see whether or not the leading member of the family has been acting either on behalf of minors in their interest, or if they are majors, with the assent of the majors; *Lingangowda v. Basangowda*, A. I. R. 1927 P. C. 56 (A. I. R. 1925 P. C. 272 *refd.*).

Explanation VI to s. 11 of the Code is not confined to cases in which the prior suit was brought with the permission of the Court under Or. I, r. 8, C. P. Code. The explanation does not become inapplicable because the prior suit was for the establishment of the plaintiff's individual right in addition to the right claimed by him in common to himself and others in so far as his claim in respect of the latter right is concerned. The fact that one of the plaintiffs in the subsequent suit was not a party to the prior suit and was allowed to come in as a co-plaintiff by order of

The principle of *res judicata* has no application in a dispute between parties all of whom claim under the person in whose favour the decision in the previous suit was given. In other words, if all the parties in the subsequent suit claim under one and the same party in the former suit, the principle of *res judicata* will not apply; *Asghar Raza v. Mahomed Mehdi*, 30 C. 556 P. C.: 7 C. W. N. 482.

The plea of *res judicata* will not prevail if the title under which the parties in the subsequent suit claim, had arisen subsequently to the commencement of the former suit. Where the title arose before the commencement of the former suit, then the plea of *res judicata* will prevail; See *Joy Chandra v. Sreenath*, 32 C. 357; *Niauuah v. Nazir*, 15 A. 108; *Abdul Ali v. Miakham*, 35 B. 297: 13 B. L. R. 268; *Govind v. Srimant*, 36 B. 189: 14 Bom. L. R. 9, and *Ma. U. v. Mg. L. U. Gale*, 32 I. C. 610: 9 Bur. L. T. 88.

Where a property claimed in the subsequent suit had been specifically awarded to plaintiff's predecessor by the decree of the former suit, and if that decree were not time-barred, possession of the property could have been obtained by plaintiff as his representative in execution of that decree; and the fact that the execution of the former decree had been time-barred, and possession could no longer be obtained under it, does not confer a fresh right to sue for the same estate or any part of it.—*Shivalingaya v. Nagalingaya*, 4 B. 247.

A privity exists between an execution creditor and a purchaser at a Court sale. Therefore, when a plea of *res judicata* is available to a decree-holder, it is likewise available to the auction-purchaser as his representative; *Krishnabhupati v. Vikrama*, 18 M. 13 (20 C. 296 P. C., (fold.)).

A lessee is not bound by the result of a suit against his landlord instituted after the lease and to which the lessee was not made a party; *Anak-karan-Puthiavalappil v. Thiyan Thavana*, 41 M. L. J. 392: (1921) M. W. N. 679: (8 A. 324; 32 C. 357; 35 B. 297; 45 B. 679 referred to).

An auction-purchaser derives his title by operation of law adversely to the judgment-debtor; he cannot be put on the same footing as the title of a mortgagee or of a person claiming under a voluntary alienation. Therefore, auction-purchaser is not the representative of the judgment-debtor within the meaning of this section; *Lala Parbhu Lal v. Mylne*, 14 C. 401; fol. in 20 C. 236; ref. to in 33 B. 311; 24 C. 62 F. B.; 35 C. 877; 10 C. L. J. 150; 30 A. I. P. C.; 12 C. W. N. 74; *Narayan v. Umbar*, 35 B. 275: 13 Bom. L. R. 307: 10 I. C. 913; *Chandi Dayal v. Ratanlal*, 14 O. C. 89; 10 I. C. 722.

An auction-purchaser of an entire estate at a sale for arrears of revenue, does not claim under the defaulting proprietor; *Kamta Prashad v. Abdul Jamir*, 8 C. W. N. 676; refd. to in 9 C. W. N. 383. See also *Gadadhar v. Radha Charan*, 34 C. 868. A decree for rent obtained by a proprietor of a revenue paying estate against a tenant is not *res judicata* in a suit for rent by a purchaser of the estate at a revenue sale as the purchaser does not claim under the ex-proprietor under s. 11, C. P. C.; *Nakul Chandra v. Shoshti Charan*, 24 C. W. N. 399: 56 I. C. 390.

Dismissal of a former suit brought by the judgment-debtor under Or. XXI, r. 63, to establish the title of his judgment-debtor to make the property liable in execution of his decree, does not bar a subsequent



When a suit was brought against certain wrong-doers in their individual capacity relating to a public property, the suit is not of a representative character, and its decision does not operate as *res judicata* and does not bind for all time either the property or the community interested therein. *Sadagopa Chariar v. Rama Rao*, 30 M. 185, P. C.: 11 C. W. N. 585: 5 C. L. J. 566: 17 M. L. J. 240: 9 Bom. L. R. 663: A. L. J. 833.

Where in a suit brought by two persons as members of the public for a declaration that certain property was *wakf* and it was held that the property was not *wakf*, a subsequent suit for similar purpose by other members of the public as such is barred by *res judicata*; *Md. Amir v. Sumitra*, 36 A. 424: 12 A. L. J. 643: 24 I. C. 97; *Ramchand v. Maula Baksh*, 21 A. L. J. 882.

The difficulty in identifying the parties in the previous suit as the predecessors-in-title of the parties to the present suit is no bar to the application of the doctrine of *res judicata*, for in both cases the whole body of proprietors was involved, and in the absence of fraud or collusion, the decision must be presumed to be *inter partes*; *Pirithi v. Pattan Ram*, 18 P. L. R. 1914: 21 I. C. 972: 19 P. W. R. 1914.

This explanation would not make a judgment obtained in a suit against one co-sharer binding on another co-sharer no party to such suit, in respect of the rights enjoyed in common by such co-sharer in their common property.—*Hazir Gazi v. Sonamonce*, 6 C. 31: C. L. R. 516. See, however, *Moti Lal v. Nripendra Nath*, 2 C. W. N. 172.

A decree obtained against the managing members of a joint Hindu family binds all the other members of the joint family whether they are impleaded or not; *Jirjodhan v. Madan*, 62 I. C. 610.

Where in a suit by the plaintiff for the declaration of a public right of way, alleging special damage, it appeared that a previous suit for a similar declaration had been dismissed on the ground that the plaintiff did not disclose any cause of action, there being no allegation that plaintiff had suffered special damage, but in dismissing the suit the Court had expressly stated that the plaintiff was not debarred from bringing a fresh suit properly framed. Held, that the second suit was not barred by *res judicata*; *Harihardas v. Chandra Kumar*, 23 C. W. N. 91: 40 I. C. 79.

B, the managing member of a joint Hindu family had brought a suit against certain persons in respect of a house belonging to the joint family. In the plaint however he did not say that he sued in his capacity as managing member. J, another member of the joint family, was made a *pro forma* defendant. The suit was dismissed on the merits. Then J instituted the present suit in respect of the same house against the same defendants and on the same cause of action. It was admitted by J in the present suit, that B had brought the first suit in his capacity as manager of the joint family and with the full knowledge and express consent of J. Held, that the suit was barred by the rule of *res judicata*; *Chaube Kunh Man v. Chaube Jagannath*, 18 A. L. J. 326: 55 I. C. 846: 42 A. 359.

In an action to recover fees claimed for services as an hereditary priest, it appeared that the deceased brother of the plaintiff had recovered judgment against one of the defendants and others in an action for similar fees. Held, that the former judgment was not conclusive in favour of the plain-

For the decision in a suit to operate as *res judicata* between co-defendants therein, it is necessary: (1) that there should be active controversy between the co-defendants and (2) that an adjudication *inter se* between the co-defendants should be necessary to give the appropriate relief to the plaintiff; *Sankara Mahalinga Chetty v. Muthu Lakshmi*, 33 M. L. J. 740: 43 I. C. 860; *Jassa v. Rangi Lal*, 17 A. L. J. 225: 49 I. C. 808; *Shwe Tha U v. Hla Rhi*, 8 Bur. L. T. 160: 30 I. C. 604; *Manjeswar Krishnayya v. Vasudeva Mallaya*, 7 L. W. 104: 40 I. C. 826; *Nandlal v. Nareesh Chandra*, 2 Pat. L. W. 108: 41 I. C. 468.

In a suit for money, where all the defendants denied the claim of the plaintiff, the Court decreed the suit against some and held others not liable. In a suit for contribution by those who paid against the others, held that the previous decision was not *res judicata*. To constitute *res judicata* between co-defendants three things are necessary: (1) that there should be a conflict of interest between them, (2) that it should be necessary to decide on that conflict in order to give to the plaintiff the relief appropriate to the suit and (3) that the judgment should contain a decision of the question raised as between co-defendants. Courts are generally unwilling to extend the doctrine of *res judicata* to co-defendants and where it has been applied to co-defendants, it has been applied with great caution; *Jadab Chandra v. Kaliash Chandra*, 21 C. W. N. 693: 25 C. L. J. 822: 34 I. C. 929 (*Cottingham v. Earl of Shrewsbury*, 3 Hare 627: 36 C. 193: 40 B. 210 *refd. to*); *Prasanna Kumar v. Kuladhar*, 57 I. C. 252; *Rajendra Kumar v. Biswarup Dey*, 35 C. L. J. 173 (31 C. 95; 25 C. L. J. 322 *refd. to*); *Konga Ramaswami Iyer v. Ponnuswami*, (1922) M. W. N. 526: 31 M. L. T. 370.

A judgment in a previous suit is not *res judicata* as between co-defendants, unless there was a conflict of interest between them and the judgment determines the real rights and obligations of the defendants *inter se*. Such previous judgment is not *res judicata* when the plaintiff in the subsequent suit was only a nominal party in the prior suit.—*Balam-bhat v. Narayanbhat*, 25 B. 74. See 8 A. 91: and 18 M. 374; *Mehra v. Devi Dutta Mal*, 2 L. 88: 3 L. L. J. 223: 62 I. C. 665 (12 C. 580: 25 B. 74 *relied on*); *Gangaram v. Vasudeo*, 47 B. 534: 25 Bom. L. R. 268; *Sukh Dial v. Musst. Bhopi*, 71 I. C. 481: 1923 L. 186; *Mahomed Ahmed v. Zahur Ahmed*, 44 A. 334: 20 A. L. J. 193. See also *Chajju v. Umrao Singh*, 22 A. 386; *Magniram v. Mehdi Hossein*, 31 C. 95; 8 C. W. N. 30; *Yusuf Sahib v. Durgi*, 30 M. 447; 17 M. L. J. 260; *Kandiyil Cheriya v. The Zamorin of Calicut*, 29 M. 515; *Gurdeo Singh v. Chandrikah Singh*, 36 C. 193; 5 C. L. J. 311; *Ghurphekni v. Purneshwar*, 5 C. L. J. 653; *Aghore Nath v. Kamini Devi*, 11 C. L. J. 461 (all the cases reviewed); *Ranganatham v. Lakshumulu*, 25 M. L. J. 379; 14 M. L. T. 189: 21 I. C. 15; *Dhanna v. Musst. Budhi*, 157 P. W. R. 1912: 188 P. L. R. 1912: 103 P. R. 1912: 16 I. C. 80; *Deviditta v. Nathu*, 56 P. R. 1912: 251 P. L. R. 1912: 15 I. C. 930; *Dewa Singh v. Gokal*, 3 L. L. J. 295; *Gangu v. Hari Singh*, 63 I. C. 735.

To constitute *res judicata*, it is not necessary how a party was described in the former suit, but what part he took in the litigation. If not only helping the defendant, he himself actively contested the claim of the then plaintiff, though he was merely described as a *pro-forma defendant*, he cannot escape the effect of an adverse decision, which he unsuccessfully resisted; *Mohendra v. Shamsunnnessa*, 21 C. L. J. 157 (14 B. 176, 408

This explanation is to be read with Or. I. r. 8, and the cases noted thereunder should be consulted.

**Condition (3)—“Litigating under the same title.”**—The expression means that the disputed title between the two parties must be the same in both cases—Where in a subsequent suit, the parties are not litigating under the same title, the decision in a previous suit is not *res judicata*. The words do not refer to the identity of the ground of action but mean that the question must have been raised and decided on the same right. (See *Ali Moidin v. Kombi*, 5 M. 239). The phrase *same title* means, (1) the same capacity, as also (2) the same common right. For instance, a previous decision against a person suing in one capacity will not debar him from suing in another distinct capacity. So also, a decision in a previous suit in which the plaintiff sued to recover certain property under the will of her deceased husband, will not bar her subsequent suit to recover a share of the same property by right of heirship to her husband, because the first suit was based upon one title and the second suit upon a distinct and separate title. It is the identity of title and not the identity of the subject matter of the suit on which the doctrine of *res judicata* is based. If the subject matters of the two suits are different, but the title is identical, then the principle of *res judicata* will apply. The section simply says “*litigating under the same title*,” it does not say anything about the subject matter of the suit; See *Pundit Ram v. Sham Chand*, 5 I. C. 278; *Chandi Prasad v. Mahendra Singh*, 24 A. 112. The meaning of the phrase “*litigating under the same title*” has not been defined with precision in any decision, as will appear from the observations of Jenkins, C. J. in *Surjya Kanto v. Fani Bhusan*, 18 C. W. N. 888, p. 889. The following illustrations, however, will explain the meaning of the expression.

Where, in a subsequent suit, the parties are not litigating under the same title, the decision passed in a previous suit is not *res judicata*. In order that the rule of *res judicata* may apply, the disputed title between the two parties must be the same in both cases; *Ganesh Dat v. Sukraj* 14 I. C. 12.

The dismissal of a former suit brought by A's father against his brother's widow on the ground that the brothers were separate, does not bar a subsequent suit brought by A as next heir to his uncle, to set aside an alienation made by his aunt, inasmuch as A in the subsequent suit did not claim the property under a title derived from his father, but as an heir to his uncle; *Ruder Narain v. Rup Kuar*, 1 A. 734. See also *Kura v. Madho*, 68 P. R. 1915: 151 P. W. R. 1915: 81 I. C. 159.

Estoppel by judgment cannot be avoided by suing on a new form or on a ground of relief which might have been, but was not raised in the former suit, if such claim or ground arises out of or depends upon the same right or title as that which was directly in question in the former suit; *Parambath v. Puthengatil*, 28 M. 406.

Certain persons alleging themselves to be trustees of a temple and its property sued to evict the founder's son from the premises, the suit was dismissed on the ground of limitation. Subsequently they brought a suit against the same defendant, alleging that he had refused to perform the trusts; held, that the suit was not barred by *res judicata*; *Lakshmandas v. Jugalkishore*, 22 B. 216.

An assignee is not estopped by judgment against his assignor in a suit by or against the assignor alone, instituted after the assignment was made though, if the judgment had preceded the assignment, the case would have been different.—*Surjiram Marwari v. Barhamdeo Persad*, 1 C. L. J. 337, p. 345. See also *Joy Chandra v. Srinath*, 1 C. L. J. 23; 32 C. 357.

A decision obtained against the mortgagee alone in respect of a question as to the proprietary title is not binding on the mortgagor; *Khunnu Singh v. Abbas Bandi Bibi*, 5 O. L. J. 121; 45 I. C. 810.

Mortgage executed during the pendency of suit in which mortgagor's title to the property is in question, is subject to the result of the suit. If the suit is decided against the mortgagor, any subsequent suit by the mortgagee on the basis of the mortgage would be barred as *res judicata*; *Kolpati Kaur v. Rajdhari*, 13 I. C. 614.

Plaintiff purchased a plot of land previously mortgaged to defendant and obtained a decree for redemption. In execution of the decree, on defendant's objection it was decided that plaintiff had purchased plot A only. In a subsequent suit for possession of plot B on the strength of the same sale, held that the suit was barred by *res judicata*; *Bobra Gajadhar v. Girdhari Lal*, 10 I. C. 453.

**Decree against Hindu Widow When Blinds the Reversionary Heirs.**  
—A decree fairly and properly obtained in a contested and *bona fide* litigation against a Hindu widow is binding by way of *res judicata* against all who in the order of succession came after her; *Katama Natchiar v. Raja of Sivagunga*, 9 M. I. A. 539; *Nagender Chunder v. Sm. Kaminee*, 11 M. I. A. 241; *Baikanku v. Bai Jadav*, 43 B. 869; 21 Bom. L. R. 837; 53 I. C. 164; *Pramatha Nath v. Bhuban Mohan*, 25 C. W. N. 585; 33 C. L. J. 421; *Kesho Prasad Singh v. Sheopargash*, 19 A. L. J. 749, F. B.; *Nachikalai v. Aiya Kannu*, 43 M. L. J. 95; (1922) M. W. N. 418; (43 B. 869, referred to.) *Mohendra v. Shamsunnissa*, 21 C. L. J. 157; *Sant Kumar v. Deo Narain*, 8 A. 885; *Sachit v. Budhna Khar*, 8 A. 429. See also *Nand Kumar v. Radha Kuari*, 1 A. 282; *Hari Nath v. Mothur Mohun*, 21 C. 8 (P. C.) and *Tika Ran v. Shama Charan*, 20 A. 42; *Pertab Narain v. Triloki Nath*, 11 C. 186, P. C. (9 M. I. A. 539, followed). *Harmanoji Narain v. Ram Prasad*, 6 C. L. J. 462; *Roy Radha Kishen v. Nauratan Lall*, 6 C. L. J. 490; *Subbammal v. Anudaiyammal*, 30 M. 3; *Madan Mohan v. Akbaryar Khari*, 28 A. 241; 2 A. L. J. 843; *Lilabati Misra v. Bishnu Chobey*, 6 C. L. J. 621; *Bhagarathi v. Baleshur*, 17 C. W. N. 877; 19 C. L. J. 155; 41 C. 69; 19 I. C. 686; *Dunichand v. Tunian*, 44 P. L. R. 1918; 32 P. W. R. 1918; 43 I. C. 523; *Ghelabhai v. Bai Javer*, 37 B. 172; 14 Bom. L. R. 1142; *Musst. Dhan Deir v. Gian Chand*, 9 P. R. 1919; 49 I. C. 177; *Sheshrao v. Maroti*, 55 I. C. 407; *Risal Singh v. Balwant Singh*, 40 A. 593; 23 C. W. N. 326; 28 C. L. J. 519; 36 M. L. J. 597; 48 I. C. 553; 46 I. A. 168 (P. C.); *Ramasanta v. Daji*, 43 B. 249; 20 Bom. L. R. 947; 48 I. C. 125.

Suit by the reversioners after the death of a Hindu widow is not barred by *res judicata* by the dismissal of a former suit brought by the widow claiming the estate—*Chukkun Lal v. Lalit Mohun*, 20 C. 906. See also *Brojo Lal v. Jiban Krishna*, 26 C. 285; *Rajalakshmi v. Katyayani*, C. 639; *Gobind v. Khunni Lal*, 29 A. 487; *Mahadei v. Baldeo*, 30 A. *Jeram v. Veerbai*, 5 Bom. L. R. 885; *Kailash v. Girija*, 39 C. 925;

becomes immaterial, and the second suit would be barred by *res judicata*; *Gobind Chunder v. Taruck Chunder*, 3 C. 145, F. B.: 1 C. L. R. 35; followed in *Sundhya Mala v. Dabi Churn*, 6 C. 715: 9 C. L. R. 216.

Where in a former suit, a party disputed a will on the ground that the properties willed belonged to the undivided Hindu family, which was found against him, a subsequent suit in which he seeks a declaration that the will gave only a life estate to the widow, and that he was the reversioner, is not barred by *res judicata*; *Dhanapalu v. Anantha*, 24 M. L. J. 418: 13 M. L. T. 305.

A reversioner by first suing to denounce a mortgage by the widow of her husband's immoveable property is not precluded from maintaining another suit on the ground that as her representative he is entitled to redeem the property. The principle of *res judicata* does not bar him from so doing; *Sham Singh v. Gaman*, 52 P. L. R. 1917; 172 P. W. R. 1916; 37 I. C. 447 (146 P. R. 1894; 4 P. R. 1903 *distd.*).

Plaintiff brought a suit for possession of certain property basing his claim on a gift of the property by his grandmother to his mother. The suit was dismissed. He then brought a suit for possession of certain other property as heir of his mother. *Held*, that the suit was not barred by *res judicata*; *Bhagwansa v. Maroti*, 43 I. C. 395.

The plaintiff sued the defendant for rent on the ground of a tenancy. It was found that the plaintiff had taken a mortgage and then let the property to defendant. The Court dismissed the suit on the preliminary ground that an earlier suit by the plaintiff for the recovery of the mortgage money had been dismissed as time barred: *Held*, that the plaintiff's right to recover rent was based on a contract made by him subsequent to the mortgage in his favour and that therefore the mere dismissal of the previous suit for the mortgage money could not debar him from claiming rent; *Sola Khar Mal v. Ali Baksh*, 50 I. C. 765.

Where a person sued as guardian *ad litem* of a minor claimant to certain property and subsequently set up a title by heirship to the same property. *Held*, that the second suit on personal capacity was not barred; *Ganga Ram v. Narain Das*, 1 P. R. 1914: 118 P. L. R. 1914: 22 I. C. 955.

A decision in a previous suit cannot operate as *res judicata* in a subsequent suit if the plaintiff was not litigating in the previous suit under the same title on the strength of which he has brought the present suit; *Saiduddin v. Hira Lal*, 12 A. L. J. 619: 24 I. C. 25.

Dismissal of suit under s. 9 of the Specific Relief Act is only conclusive as to possession of 6 months prior to the suit and does not preclude the plaintiff from recovering property in a regular suit, on the ground of prior possession without title; *Ganaji v. Dhan Singh*, 11 N. L. R. 31: 27 I. C. 207.

Condition (4).—"In a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised."—Explanation II.—The meaning of the above passage in the body of the section is, that in order to establish the plea of *res judicata*, the Court which decided the former suit must have jurisdiction to try the subsequent suit with reference to the value and the subject-matter of the suit; in other words, the former decision to be *res judicata* must have been passed by a Court which had jurisdiction not only

A Hindu widow and her son, the then presumptive heir to property claimed by the widow, obtained a decree against a more remote reversioner. The son predeceased his mother, and the said remote reversioner became the next reversionary heir. *Held*, in a suit for possession by him, that the decree in the previous suit did not operate as *res judicata*.—*Ram Chunder v. Hari Das*, 9 C. 463: *ref. to in* 30 A. 1 P. C.: 12 C. W. N. 74; 25 B. 129; 10 C. 225; 3 C. W. N. 207.

**Compromise Decree and Award Against Widow, How Far Binding on Reversioners.**—Where a decree is fairly obtained against the widow through compromise, it is binding on the reversioners if the compromise was for the benefit of the estate and not for the personal advantage of the widow. In regard to a decree obtained against a widow as the result of arbitration proceedings to which she agreed, a decree following an award, where the arbitration has been regularly and properly held and when the case has been properly fought out, ought to be just as efficacious as where there has been no such submission. As a general rule the principle applicable to a case decided after a fair contest in ordinary *bona fide* litigation would apply to decrees following an award in arbitration proceedings; *Musst. Dhan Dier v. Gianchand*, 9 P. R. 1919: 49 I. C. 117; *Amrit Narayan v. Gaya Singh*, 45 C. 590; 22 C. W. N. 409; 27 C. L. J. 290; 34 M. L. J. 298; 16 A. L. J. 265; 20 Bom. L. R. 546; 44 I. C. 408; 45 I. A. 35 P. C.

As to effect of compromise by a Hindu widow or daughter, *see* the cases noted under Or. XXIII, r. 3, under the heading "compromise by a Hindu widow and daughter."

**Decree Against Shebait When Binding Upon His Successors.**—When a suit is instituted in the name of an idol by the *shebait*, the idol must be regarded as a party to the suit, and not the individual *shebait*, who merely represents it. The decision in a suit brought by one *shebait* is binding on a succeeding *shebait*.—*Tulsidas v. Bejoy Kishore*, 6 C. W. N. 178. The same principle applies to executors or administrators.—*Bai Meherbai v. Magan Chand*, 29 B. 96.

A decree against the head of a *mutt* is binding on his successor.—*Mannikka Vasaka v. Bala Gopalkrishna*, 29 M. 553: 16 M. L. J. 415 (9 M. 80 followed).

A decree against former *shebait* is binding upon the succeeding *shebait*.—*Gora Chand v. Makhan Lal*, 11 C. W. N. 489; 6 C. L. J. 404. *Jharula Das v. Jalandhar*, 39 C. 887, *see* *Prosunno Kumari v. Golab Chand*, 14 Bom. L. R. 450 P. C.: 23 W. R. 253; *Maharane Shibeswaree v. Mathooranath*, 18 M. I. A. 270, p. 275; *Lilabati Misra v. Bishun Chobey*, 6 C. L. J. 621; *Pramada v. Purna*, 7 C. L. J. 514; 12 C. W. N. 550; 35 C. 691 and *Ranjit Singh v. Basanto Kumar*, 12 C. W. N. 739; 9 C. L. J. 597; *Nagendra Nath v. Prabal Chandra*, 17 C. W. N. 964; 18 I. C. 394.

**Binding Character of Decree Against Manager of Joint Hindu Family.**—In the absence of fraud or collusion, a decree by or against the manager of a joint Hindu family, as representative of the other members in respect of a right claimed in common for all persons, is binding upon all the members of the family.—*Gan Savant v. Narayan Dhond*, 7 B. 467; *Narayan Gop v. Pandurany*, 5 B. 685. *See also* *Khub Chand v. Narain*, 3 A. 812; *Hari Vithal v. Jairam Vithal*, 14 B. 597; *Daulat Ram v.*

I. C. 932; *Pedda Jiyangar v. Mahant of Tirupathi*, 21 M. L. J. 730: 10 M. L. T. 133: 2 M. W. N. 202: 11 I. C. 175.

Previous suit in Munsif's Court for rent and for compensation for breach of contract, when that Court had no jurisdiction to try rent suit. *Held*, that the former decision was *res judicata* so far as compensation was concerned in a subsequent suit for rent and compensation; *Bishnu Priya v. Bhaba Sundari*, 28 C. 318.

Where a claim is investigated under Or. XXI, r. 99, of the C. P. Code, 1908, by a Court of inferior jurisdiction in respect of property the value of which exceeds the pecuniary limit of its jurisdiction, the decision will not operate as *res judicata* in a subsequent title suit; *Kadambini v. Doyaram*, 11 C. L. J. 478.

**A Decision in a Former Suit may Operate as Res Judicata though Plaintiff Institutes the Subsequent Suit in a Court of Superior Jurisdiction by Joining New Causes of Action.**—A plaintiff cannot evade the provisions of the C. P. Code regarding *res judicata* by joining several causes of action against the same defendants in a subsequent suit and instituting it in a court of superior jurisdiction; *Sukhdeo v. Baulai*, 42 I. C. 557: 16 N. L. R. 91; *Velayuda v. Sundara*, 51 M. L. J. 630: A. I. R. 1926 M. 829.

A plaintiff cannot add causes of action for the purpose of swelling the amount of valuation and then say "the original court is incompetent to try the question" (28 M. 78 *folld.*). It is open to the Court to split up the causes of action in the subsequent suit and say that the second suit was barred in respect of the cause of action tried in the prior suit; *Ranganatham Chetti v. Lakshmi Ammal*, 25 M. L. J. 379: 14 M. L. T. 189: 21 I. C. 15: (1918) M. W. N. 691.

Although taking all the causes of action together, the second suit may be said to be outside the jurisdiction of the original Court, still if the specific question be within the jurisdiction of the original Court and was determined by the original Court, it is no answer to say that the whole suit was beyond jurisdiction. The principles of *res judicata* would apply to that part of the claim which was within the jurisdiction of the Court which tried the first suit; *Pattrachariar v. Alamelumangai*, A. I. R. 1927 M. 273: 100 I. C. 40 (29 C. 707 P. C., *dist*; 8 M. 83, 25 M. L. J. 379 *folld.*; 35 C. 353, not *folld.*).

**Competency of the Original Court and Not of the Appellate Court is to be Looked to.**—It has now been definitely settled by the following cases that in order to determine the plea of *res judicata*, it is the competency of the original Court which decided the former suit that is to be looked to and not that of the Appellate Court in which the suit was ultimately decided in appeal; *Shibo Raut v. Baban Raut*, 35 C. 353: 12 C. W. N. 350: 7 C. L. J. 470; *Raghubar v. Manners*, 18 C. L. J. 568; *Beni Madho v. Indar*, 32 A. 67; *Mambhai v. Sursanjji*, 30 B. 220: 7 Bom. L. R. 621; *Bharosi v. Sarat*, 23 C. 415; *Ramgopal v. Prasanna*, 10 C. W. N. 522; *Dalipa v. Rani Suraj Kuar*, 48 P. R. 1916; 142 P. W. R. 1916; 34 I. C. 581; *Rammoo v. Musst. Fathiman*, A. I. R. 1922 All. 445.

The words "competent jurisdiction" relate to the competency of the trial Court and the fact that the Appellate Court in the previous litigation would have been competent to try the subsequent suit does not make the previous adjudication *res judicata*, if the original Court in the prior

thority of the real owner. See *Mata Prasad v. Ram Charan*, 86 A. 416: 12 A. L. J. 701; and *Mohunt Das v. Nilkomul*, 4 C. W. N. 283 (10 C. 697; 14 M. 267 explained).

**Purchaser or Mortgagee Bound by His Lis Pendens.**—Where a person purchased certain property in the course of litigation and sued to recover possession of the same, held that the plaintiff having purchased the property *pendente lite* was bound by the decree against the persons through whom he claimed.—*Hukum Singh v. Zanki Lal*, 6 A. 506. See also *Jharoo v. Raj Chunder*, 12 C. 209; *Gobind Chunder v. Guru Churn*, 15 C. 94; and *Shirjiram v. Waman*, 22 B. 939; *Deno Nath v. Shama Bibee*, 4 C. W. N. 740. *Talari Korali Nagadu v. Visuranathan*, 16 M. L. T. 158; 1 L. W. 587; 25 I. C. 133. A mortgagee is also bound, *Kalpati Kuar v. Rajdhari*, 13 I. C. 641.

A purchaser of land cannot be estopped, as being a privy in estate by a judgment obtained in an action against his vendor commenced after his purchase.—*Joy Chandra v. Srinath*, 82 C. 357; 1 C. L. J. 23 (4 C. W. N. 283, followed). See also 1 C. L. J. 337, p. 345.

**Donee Whether Bound by Decree Against Donor After Date of Gift.** A donee of a house cannot be estopped as being privy in estate by a judgment obtained in an action against the donor commenced after the date of gift. *Abdulali v. Mian Khan*, 35 B. 297; 18 Bom. L. R. 268; 10 I. C. 890.

**Party to a Fraudulent and Collusive Decree and His Representatives are Bound by It.**—A party to a fraudulent and collusive decree is bound by it, and, upon general principles of *res judicata*, is estopped in a subsequent suit from raising the question of fraud.—*Chenvirappabin v. Puttappabin* 11 B. 708 (6 B. 703; 10 M. 17, followed; 1 A. 403, dissented from). See also *Rangammal v. Venkata Chari*, 18 M. 378, on appeal 20 M. 323; *Varadarajulu v. Srinivasulu*, 20 M. 333; *Yaramati v. Chundru*, 20 M. 326; *Goberdhan v. Ritu Roy*, 23 C. 962; *Rajib Panda v. Chowdhury Lakkan*, 3 C. W. N. 660; 27 C. 11; *Banka Behary v. Raj Kumar*, 27 C. 231; 4 C. W. N. 289. *Kondeti v. Nukamma*, 31 M. 485; *Petharpermal v. Munirandi*, 35 C. 551 P. C.; 12 C. W. N. 562; 7 C. L. J. 528; 10 Bom. L. R. 590; 5 A. L. J. 290; 18 M. L. J. 277. See however, *Sham Lal v. Amarendra*, 23 C. 460; *Mukand v. Hari Das*, 17 B. 23.

An heir of a party to a fraudulent and collusive decree is not estopped from setting up the plea that the previous decree had been obtained by fraud.—*Barkatunissa v. Fazal Haq*, 26 A. 272.

**Mode of Impeaching Fraudulent and Collusive Decree or Decree Passed Without Jurisdiction When Set Up as Res Judicata.**—A party against whom a decree is set up as constituting *res judicata* is competent to show in the same suit that such decree was obtained by fraud or collusion or that it was passed by a Court not competent to pass it and it is not necessary for the party to bring a separate suit to have the same set aside.—*Bansi Lal v. Dhapo*, 24 A. 242 (26 C. 891; 27 C. 11, and 20 A. 370, referred to). *Prabhu Narain v. Sundar*, 16 C. L. J. 41.

A decision obtained on the merits against a person who is subsequently found to be a trespasser, does in the absence of anything to show that the decision was obtained through fraud or collusion, bind



15 M. 494; *Panga v. Unnikutti*, 24 M. 275; *Giriya Chettiar v. Sabapathy*, 29 M. 65; *Ohuraman v. Ajudhya*, 3 I. C. 117; *Mohendranath v. Shamsunnessa*, 21 C. L. J. 157: 19 C. W. N. 1280; *Sukhdeo v. Baulai*, 42 I. C. 657: 16 N. L. R. 91; *Ranganathan Chetty v. Lakshmi Ammal*, 25 M. L. J. 379: 14 M. L. T. 189: 21 I. C. 15: (1913) M. W. N. 690; *Gopal v. Ram Harakh*, 22 O. C. 331: 6 O. L. J. 547: 54 I. C. 335; *Thekkamanengath v. Kakkasseri*, 28 M. L. J. 184: 2 L. W. 433: 27 I. C. 989.

In determining whether a decree operates as *res judicata* in a subsequent suit, the test is whether the Court which tried the former suit had jurisdiction to entertain the subsequent suit, if it had not, the decision in the previous suit does not operate as *res judicata* to bar the subsequent suit; *Mata Prasad Shukul v. Devi Shukulin*, 58 I. C. 576.

A Court which at the date of the institution of the first suit had jurisdiction to try the subsequent suit but was deprived of such jurisdiction before it pronounced judgment in the first suit is a "Court of jurisdiction competent to try such subsequent suit" within the meaning of s. 11 of the Code; *Venkatachalam Chetty v. Aiyam Perumal Thevan*, 42 M. 702: 37 M. L. J. 248: (1919) M. W. N. 768: 53 I. C. 33.

**The Former Court must have been Competent to Try and Decide not only the Particular Matter in Issue in the Subsequent Suit but also the Subsequent Suit Itself in Which the Issue is Subsequently Raised.**—A decree in a previous suit cannot be pleaded as *res judicata* in a subsequent suit, unless the judge by whom it was made had jurisdiction to try and decide, not only the particular matter in issue, but also the subsequent suit itself in which the issue is subsequently raised; *Gokul Mandar v. Pudmanund*, 29 C. 707 P. C.: 6 C. W. N. 825: *Ramgopal v. Prasanna*, 10 C. W. N. 529; *Shibo Raut v. Baban Raut*, 35 C. 353: 12 C. W. N. 359: 7 C. L. J. 470; *Behary Lal v. Narain Misra*, 29 C. L. J. 237: 51 I. C. 127. This section applies to class of cases, in one of which a subsequent suit is wholly barred by the decision in a former suit, by reason of the subject matter of the two suits being the same, and in the other the trial of an issue in a subsequent suit is barred by adjudication upon the same issue in a former suit, though the subject matter of the two suits are different; *Raicharan v. Kumud Mohun*, 25 C. 571: 2 C. W. N. 297.

**Preferential jurisdiction.**—The bar of *res judicata* arises where the court deciding the first suit was competent to try the same and its inability to entertain it arose not from incompetence but from the existence of another court with a preferential jurisdiction; *Ghulappa Bin v. Raghavendra*, 28 B. 338; 6 Bom. L. R. 77; *Madhorao v. Amritrao*, 14 N. L. R. 115: 48 I. C. 268.

**Court of Incompetent Jurisdiction and Effect of its Decision.**—The former decision of a Court without jurisdiction cannot be treated as *res judicata* in a subsequent suit to have the right decided by a Court of competent jurisdiction.—*Maharaja of Jeypore v. Gunupuram Deenabundhu*, 28 M. 42, P. C.: 9 C. W. N. 257, P. C.: 2 A. L. J. 135: 7 Bom. L. R. 97. See *Abdul Kadar v. Dulanbibi*, 37 B. 563: 15 Bom. L. R. 672 and *Baladeen v. Raghunath*, 6 I. C. 98: 7 A. L. J. 918; *Maqbul Fatim R v. Amir Husain Khan*, 37 A. 1: 12 A. L. J. 1074. 25 I. C. 193 (confirmed in appeal by the P. C. in 20 C. W. N. 1213: (1916) 2 M. N. 153: 36 I. C. 710); *Jet Singh v. Ram Baksh Singh*, 27 I. C. 537: 2 O. L. J. 44.

533, P. C., and *Bitto Kunwar v. Kesho Pershad*, 19 A. 277: 1 C. W. N. 265. See also *Golkhan v. Tetar Goola*, 4 C. W. N. 63; *Abinas Chandra v. Paresk Nath*, 9 C. W. N. 402; *Ram Prasad v. Lala Sham Narain*, 6 C. L. J. 22; *Madhub v. Rani Sarat Kumari*, 15 C. W. N. 120, p. 185; *Ramadin v. Dhunwanti*, 17 C. W. N. 1016.

Judgments and decrees recognising rights between parties to a suit or their representatives, although not conclusive under the Evidence Act (I of 1872), are yet admissible in evidence under section 13 of the Act, even if the parties in the former suit be entire strangers.—*Naranji Bhikubhai v. Dipa Umed*, 3 B. 3. See *Hera Lall v. Hills*, 11 C. L. J. 528; *Peary Mohun v. Drobomoyi*, 11 C. 745. *Collector of Gorakpur v. Palakdhan Singh*, 12 A. 1 (F. B.), affirmed by the P. C. in 15 A. 261; *Venkatasami v. Venkatarreddi*, 15 M. 12; *Krishna Shami v. Raja Gopala*, 18 M. 73; *Ram Banjan v. Ram Narain*, 22 C. 533 (P. C.); *Tepu Khan v. Rajani Mohan*, 25 C. 522 (F. B.); 2 C. W. N. 501 and *Bitto Kunwar v. Kesho Pershad*, 19 A. 277 (P. C.); 1 C. W. N. 265; *Mohesh Chunder v. Satrugan*, 29 C. 343, P. C.; 6 C. W. N. 459; *Syed Mahammad v. Ram Narain*, 7 C. L. J. 90; *Tantardhari v. Sundar Lal*, 7 C. L. J. 384. *Dinamoni v. Brojomohini*, 20 C. 187, P. C.; 6 C. W. N. 386; *Peary Mohun v. Durlari*, 18 C. W. N. 954; 19 C. L. J. 441; *Baleshwar Bagarti v. Bhagirathi Dass*, 7 C. L. J. 503; 12 C. W. N. 657, p. 687; 35 C. 701, p. 716.

A decree for possession made by a Court under section 9 of Act I of 1877 although not *res judicata* is some evidence of possession in a subsequent suit between the same parties to recover mesne profits.—*Jiaullah Sheikh v. Inu Khan*, 23 C. 603. It is also evidence of title, *Koilash v. Gajendra*, 15 C. W. N. 1.

**Explanation VI.**—This explanation provides that where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

The words "*public right*" have been added to this explanation to give due effect to suits relating to public nuisances under section 91, which has been newly added. The expression "*public right*" means a right in which many members of the State, i.e., public at large, are interested; whereas the words "*private right claimed in common, etc.*" refer to a lesser portion of the community, that is, a certain class of persons. There is distinction between a public high way and a village road, see *Kalicharan v. Ramikumar*, 17 C. W. N. 73.

The explanation is an exception to the general rule laid down in the body of the section, that a former decision between the parties who are expressly named in the record as plaintiffs or defendants operates as *res judicata* in a subsequent suit between them, or between parties under whom they or any of them claim. This explanation by way of exception provides that a former decision will operate as *res judicata* even as against persons who are not expressly named in the record as plaintiffs or defendants, provided the conditions mentioned in the explanation are fulfilled. The explanation may be divided into two clauses, viz. (1) where persons litigate *bona fide* in respect of a public right, that is, where a suit is brought for abatement of a public nuisance, as provided

decision. It has also set at rest the conflicting rulings and has overruled the cases in which contrary views were taken.

But the change in the law has no retrospective operation. In an instance, in a suit instituted before the enactment of the C. P. Code of 1908, a decision in a suit of 1902 which had not the effect of *res judicata* under s. 18 of the Code of 1882, was pleaded as bar, on the strength of the alteration in the law made by section 11, Explanation 2 of the Code of 1908. *Held* that the explanation had no retrospective effect and that the decision relied upon was no bar; *Raja of Kalahasti v. Kanakamma*, 29 M. L. J. 535; 31 I. C. 214.

The language of Expl. II implies that the competence of a court for purposes of *res judicata* is not affected by the fact that its decision is not appealable; *Muthaya Shetti v. Kantappa Shetti*, 34 M. L. J. 431; 36 M. L. T. 291; 45 I. C. 975.

The question of finality is unaffected by considerations whether an appeal lay from the decision or whether it was embodied in the decree. The decision is on a matter which was substantially in issue between the parties; it will be *res judicata* although there was no appeal, or could have been no appeal, and although the decree itself was based on grounds independent or in spite of the particular decision; *O. Subbar v. Ramaswami*, 25 M. L. W. 797; A. I. R. 1927 M. 648.

**Decision of Revenue Courts When Res Judicata.**—As regards the question whether decisions of Revenue Courts are *res judicata* in Civil Courts, the settled law now is that the decision of a Revenue Court on a matter within the exclusive cognizance of that court is binding on Civil Courts; *Mallo v. Ramlal*, 43 A. 191; *Itar Singh v. Umrao*, A. I. R. 1927 A. 189.

The decision by a Court of Revenue of a question of title, though such question was necessary for the disposal of the case before it, cannot prevent the same question being again litigated between the same parties in a Civil Court.—*Rani Kishori v. Rajaram*, 26 A. 408. See also *Debi Prasad v. Jafar Ali*, 3 A. 40; *Husain Shah v. Gopal Rai*, 2 A. 4; *Ajudhia Prasad v. Sheodin*, 6 A. 403, and *Ashrafunnissa v. Ali Akbar*, 26 A. 601, and 7 C. L. J. 202; *Mukunda Lal v. Kali Prasanna*, 19 C. L. J. 24. See however, *Subarni v. Bhagwan Khan*, 19 A. 101; and *B. Pande v. Raja Kausal Kishore*, 29 A. 160; 4 A. L. J. 53; *Taufiqunnisa v. Taskin Bannu*, 15 I. C. 239; *Shahsade v. Md. Ahmed*, 32 A. 8; A. L. J. 917; *Musst. Gomti v. Mundi*, 1 I. C. 517; *Subanna Acharian v. Gopal Krishna Acharian*, 34 I. C. 354; *Misaji Lal v. Hori Lal*, 34 I. C. 162; *Bila v. Sultan Ali*, 77 P. W. R. 1918; 45 P. R. 1918; 84 P. L. J. 1918; 46 I. C. 13 (26 A. 468, 70 P. R. 1893, 83 P. R. 1918, refd.). 29 A. 601, 33 A. 453 (distd.); *Potineni Gangayya v. Rajah Venkateswara Ramayya*, 25 I. C. 372; *Sobhanadri Apparao Bahadur v. Dathavaram Venagatraju*, 39 M. L. J. 476; 48 M. 859 60 I. C. 700.

The decision of a Revenue Court, declaring the plaintiff entitled to assess rent upon land alleged by the defendant to be *lakhiraj*, is conclusive in a subsequent rent suit under Act VIII of 1869.—*H. Sunkur v. Mukhtarum Patro*, 15 Bom. L. R. (F. B.) 238; 24 W. R. 154, and *Rameshwar Koer v. Gobaradhan Lal*, 7 C. L. J. 202. But the decision of a Civil Court in a rent suit under Act VIII of 1869 is binding in a subsequent suit between the same parties for a declaration of *lakhiraj* title.

Court does not prevent the application of the Explanation. The expression "private right claimed in common" in Explanation VI to S. 11 is not confined to the right of joint Hindu Family or to the right of a Malabar *Taricad* or to joint trusteeship rights, etc.; *Rangamma v. Narasimhacharyulu*, 31 M. L. J. 20: (1910) 2 M. W. N. 258: 35 I. C. 110.

The Court should hesitate to hold that any litigation had been *bona fide* within the meaning of Expl. VI of s. 11 in which there had been a substantial departure from the accepted rules as to the joinder of parties as, for instance, by suing without the leave of the Court in a cause properly falling under Or. I, r. 8. The failure of the plaintiffs in the prior suit to implead the legal representatives of A in the second appeal could not in the circumstances of the case be said to constitute such a want of *bona fide* as to render the Explanation inapplicable. A suit instituted for settling the amount of *Kattubadi* due to the Receiver of an Estate upon *agraharam* is one in which all the *agraharamdars* are necessarily interested and the decision therein is, if the litigation is conducted *bona fide*, binding on all *agraharamdars* by virtue of Expl. VI of S. 11. Cases in which a party is represented at one stage of the suit and afterwards ceases to be represented owing to a failure to bring his legal representatives on record are not exceptions to the rule laid down by the Explanation; *Gopala Charyulu v. Subamma*, 38 M. L. J. 403: 55 I. C. 964: 43 M. 427.

Where a party sets up his own individual right, which happens to be common to him and others, he cannot be said to be litigating on behalf of the others. It is not necessary that, in order to attract the provisions of Expl. VI, the suit should be representative suit, for if it is a representative suit under Or. I, R. 8, no question can arise as to the binding nature of the decision of the suit, nor is it necessary that the party should be sued in a representative capacity. But the person litigating must put forward a right common to him and others not only on his behalf but on behalf of the others as well. If he simply puts forward a right alleged to be common to him and others, that would not make him a representative of the others. The word "*bona fide*" in Expl. VI could only apply to a litigation where every attempt is made to bring all the persons interested before the Court. The meaning of due care and caution cannot be applied to one who puts forward only his own right as one of a body of persons who have equal rights with himself; *Kumaraud v. Venkatasubramania*, 52 M. L. J. 641: A. I. R. 1927 M. 645: 101 I. C. 58.

This explanation refers only to representative suits and in order that this explanation may be applicable, there must be community of interest, such as is referred to in Or. I, r. 8 of the C. P. Code, 1908; *Jaimangal v. Bedasaran*, 33 A. 403, F. B.; 8 A. L. J. 845: *Bedsaran v. Bhagat*, 33 A. 453 F. B.: 8 A. L. J. 841; see also 28 M. 28, p. 32 and 16 C. P. L. R. 161. Where a party to a suit is allowed to represent others under Or. I, r. 8 of the C. P. Code, 1908, the decree will be binding on those whom he is allowed to represent; *Srinivasa v. Aiyar*, 33 M. 483: 20 M. L. J. 546. As to the position and rights of a representative of a class to compromise the representative suit and the binding effect of the compromise decree upon the absent members of the class, see *Krishnama Chariar v. Chinnamal*, 24 M. L. J. 192: 18 M. L. J. 151; 18 I. C. 869. See also *Chentraya Goundan v. Athappa Goundan*, (1929) M. W. N. 645.

is not barred by the former decision of the Revenue Court.—*Rarutha Koudan v. Muthu Koudan*, 13 M. 41. But see *Balijepalli v. Balijepalli*, 30 M. 320 (17 M. 302 approved), see also *Kesiram v. Narasimhulu*, 30 M. 126.

The Revenue Court is not the final competent authority to decide whether particular lands constitute an estate or not and a decision passed by the Revenue Court on such a question in commutation proceedings will not be *res judicata* between the parties in a suit in the Civil Court for a declaration that the lands do not form an estate; *Ramadinadas v. Boishmo Mundalo*, 14 L. W. 251.

The decision of Collector in measurement proceedings under Bengal Act VIII of 1869, section 18, is conclusive between the parties in a subsequent suit for rent, if the Collector has properly exercised the jurisdiction conferred on him by that section. But if he exceeds his jurisdiction, his proceedings are null and void.—*Merjah Janand v. Kristo Chunder*, 10 C. 507.

The dismissal of a suit in a Revenue Court to eject the defendant as a tenant, does not operate as *res judicata* in a subsequent suit in the Civil Court to eject him as a trespasser.—*Mohesh Prasad v. Ranior Singh*, 27 A. 163.

The decision of a Revenue Court on a question of title in a suit triable exclusively by that Court, is no bar to a subsequent civil suit for the trial thereof.—*Inayat Ali v. Murad Ali*, 27 A. 569; 2 A. L. J. 283; see *Maddu v. Baggu*, 160 P. W. R. 1913; 280 P. L. R. 1913; But see *Grandi Prasad v. Mahendra*, 24 A. 112 and *Dwarkadas v. Akhay*, 30 A. 470. 5 A. L. J. 407.

Section 70 (5) of the Bengal Tenancy Act does not bar a suit by a tenant against a third party for recovery of crops awarded to the latter by the Collector.—*Chhedi v. Cheddan*, 32 C. 422 (22 C. 410, referred to).

The decision of a Revenue Court that parties do not stand in relation of landlord and tenant, does not bar a civil suit to establish such relation.—*Gopal v. Uchabal*, 3 A. 51. Nor the decision of Revenue Court establishing such relation operates as *res judicata* in a civil suit for ejectment, *Md. Abu Jafar v. Wali Muhammad*, 3 A. 81; *Chatu v. Jitun*, 3 A. 63; see 13 A. 364.

Where, in proceedings for partition under Act XIX of 1873, a question of title to land is determined, such determination will operate as a bar to a suit between the same parties in the Civil Courts to contest the title to such land.—*Har Sahai v. Maharaj Singh*, 2 A. 294; *Bateahar Nath v. Faizul Hasan*, 5 A. 280, and *Amir Sing v. Naimati Prasad*, 9 A. 333. See, however, *Asghar Ali v. Jhanda Mal*, 2 A. 339. But see *Har Charan v. Harshankar*, 16 A. 864.

In a prior suit between the parties as regards a particular plot of land, the Revenue Court had decided against the plaintiff. In a subsequent suit in the Civil Court brought by the plaintiff for recovery not only of that plot of land but also of other plots to which his title was identical, held that the decision of the Court was *res judicata*; *Baru Mal v. Sunder Lal*, 21 A. L. J. 330; 72 I. C. 155.

Previous suit between the parties for cancellation of notice of ejectment in the Revenue Courts cannot operate as *res judicata* in a

Court does not prevent the application of the Explanation. The expression "private right claimed in common" in Explanation VI to S. 11 is not confined to the right of joint Hindu Family or to the right of a Malabar *Taricad* or to joint trusteeship rights, etc.; *Rangamma v. Narasimhacharyulu*, 31 M. L. J. 20: (1910) 2 M. W. N. 258; 85 I. C. 110.

The Court should hesitate to hold that any litigation had been *bona fide* within the meaning of Expl. VI of s. 11 in which there had been a substantial departure from the accepted rules as to the joinder of parties as, for instance, by suing without the leave of the Court in a cause properly falling under Or. I, r. 8. The failure of the plaintiffs in the prior suit to implead the legal representatives of A in the second appeal could not in the circumstances of the case be said to constitute such a want of *bona fide* as to render the Explanation inapplicable. A suit instituted for settling the amount of *Kattubadi* due to the Receiver of an Estate upon *agraharam* is one in which all the *agraharamdars* are necessarily interested and the decision therein is, if the litigation is conducted *bona fide*, binding on all *agraharamdars* by virtue of Expl. VI of S. 11. Cases in which a party is represented at one stage of the suit and afterwards ceases to be represented owing to a failure to bring his legal representatives on record are not exceptions to the rule laid down by the Explanation; *Gopala Charyulu v. Subamma*, 88 M. L. J. 493: 55 I. C. 984: 43 M. 427.

Where a party sets up his own individual right, which happens to be common to him and others, he cannot be said to be litigating on behalf of the others. It is not necessary that, in order to attract the provisions of Expl. VI, the suit should be representative suit, for if it is a representative suit under Or. I, R. 8, no question can arise as to the binding nature of the decision of the suit, nor is it necessary that the party should be sued in a representative capacity. But the person litigating must put forward a right common to him and others not only on his behalf but on behalf of the others as well. If he simply puts forward a right alleged to be common to him and others, that would not make him a representative of the others. The word "*bona fide*" in Expl. VI could only apply to a litigation where every attempt is made to bring all the persons interested before the Court. The meaning of due care and caution cannot be applied to one who puts forward only his own right as one of a body of persons who have equal rights with himself; *Kumaraudy v. Venkatasubramania*, 52 M. L. J. 641: A. I. R. 1927 M. 645: 101 I. C. 58.

This explanation refers only to representative suits and in order that this explanation may be applicable, there must be community of interest, such as is referred to in Or. I, r. 8 of the C. P. Code, 1908; *Jaimangal v. Bedsaran*, 33 A. 493, F. B.; 8 A. L. J. 845: *Bedsaran v. Bhagat*, 83 A. 453 F. B.: 8 A. L. J. 841; see also 23 M. 28, p. 32 and 16 C. P. L. R. 161. Where a party to a suit is allowed to represent others under Or. I, r. 8 of the C. P. Code, 1908, the decree will be binding on those whom he is allowed to represent; *Srinivasa v. Aiyar*, 33 M. 483: 20 M. L. J. 546. As to the position and rights of a representative of a class to compromise the representative suit and the binding effect of the compromise decree upon the absent members of the class, see *Krishnama Chariar v. Chinnamal*, 24 M. L. J. 192: 18 M. L. J. 151; 18 I. C. 800. See also *Chenraya Goundan v. Athappa Goundan*, (1923) M. W. N. 84

then sued in the Civil Court to compel the landlord to grant him a *pattah* by virtue of a special agreement. *Held* that the suit was barred by the decision of the Revenue Court.—*Harika Ramayyar v. Sindu Tirtasami*, 7 M. 61. Followed in *Gangaraju v. Kodireddiswami*, 17 M. 106. But see *Rangayya Appa v. Ratnam*, 20 M. 392 (0 M. 89, *dissented from*) See also *Kidambi Venkatachariar v. Lakshmi Dass*, 31 M. 62.

Previous decision of Revenue Court establishing relation of landlord and tenant between plaintiff and defendant, operates as *res judicata* in a subsequent suit under s. 9 of the Madras Rent Recovery Act by a landlord against his tenant to enforce acceptance of *pattah* by the defendant—*Venkatachalapati v. Krishna*, 13 M. 287. Followed in *Sellappa v. Velayutha*, 30 M. 498; 17 M. L. J. 433. See also 30 M. 510 p. 514.

In a suit brought in the Revenue Courts by a landlord for recovery of rent of the area of a house site included in the tenant's holding, *held* that a prior decree of a Civil Court establishing and declaring the landlord's rights to get a reasonable rate of rent on the site in question operated as *res judicata*, though a mere finding in the judgment of the Civil Court on the question of the landlord's right might not operate as such; *Ramasami Servaigaran v. Athivaraha Chariar*, 23 M. L. T. 183: (1918) M. W. N. 340: 7 L. W. 471: 44 I. C. 663.

Where a Court of Revenue, acting under s. 113 of Act XIX of 1873 has decided a question of title or of proprietary right, such decision, being the decision of "a Court of civil judicature of first instance," will operate as *res judicata* in a subsequent civil suit in which the same question is being litigated.—*Har Charan v. Har Shankar*, 18 A. 59 (16 A. 464, *affirmed*). *Thakur Hanwant Singh v. Mt. Jhamola*, 20 A. L. J. 340.

A Court of Revenue in execution of a decree for rent sold the mortgagor's interest in a certain house in contravention of s. 99 Transfer of Property Act (IV of 1882). Subsequently the auction purchaser at the sale sued in the Civil Court for partition of the share purchased by him. *Held* that the co-sharers in the property could not dispute the validity of the sale.—*Tara Chand v. Imadad Husain*, 18 A. 325.

In a suit brought by a tenant mortgagor under s. 44 of the Agra Tenancy Act to challenge the validity of a distraint against the landlord mortgagee, it was *held* that the mortgage had been satisfied. Thereupon the mortgagee brought a suit in the Civil Court for a declaration that the mortgage still subsisted; *held* that the subsequent suit was not *res judicata*; *Suraj Kauri v. Chit Ram*, 41 A. 369: 17 A. L. J. 352: 49 I. C. 591.

When as between parties to a revenue suit, a Civil Court of competent jurisdiction has decided title to the property adversely to the plaintiff who claims profits, the Revenue Court is bound by that decision; *Bhawani v. Dilawar*, 31 A. 253, F. B.; *Gobindi v. Sahebram*, 31 A. 257. See also *Sundar Kunwar v. Dina Nath*, 37 A. 380; 13 A. L. J. 326; *Murtaza Husain v. Zia-ut-Hassan*, 19 A. L. J. 279; 62 I. C. 684.

**Decision of Settlement Courts.**—A decision of a Settlement Officer passed in a case relating to the amendment of *jamabandi* declaring the defendant's status as tenant liable to pay rent is not *res judicata* either in the Revenue Court or in the Civil Court; *Sakhawat Ali v. Suraj*

tiff, nor as against a brother of one of the original defendants.—*Krishnambat Bin v. Lakshmanbat Bin*, 1 B. 141.

Plaintiff sued to establish his right to receive certain honours in a temple and to recover damages for invasion of the right. In a former suit between the predecessor and the first defendant, the claim to sit at the right side of the idol was admitted but the right to receive a cake was disallowed. *Held*, that the plaintiff's claim to establish the right was *res judicata*.—*Archakam Srinivasa v. Udayagiri Anantha*, 3 M. H. C. R. 340.

Judicial decision recognising the existence of a disputed custom amongst the *Jains* of one place is very relevant as evidence of the existence of the same custom amongst the *Jains* of another place, unless it is shown that the custom is different.—*Harnabh Potshad v. Mandi Dass*, 27 C. 370.

Where it is necessary to establish or deny a custom in the family, and where pains have been taken to bring upon the record every branch of the family, and where that custom has been the subject of contest and thoroughly threshed out in the presence of all branches of the family, the matter cannot be again raised by the descendants of those branches, even though certain branches did not take an active part in the contest but contended themselves with admitting that the custom existed: *Mawar Sheebaz Singh v. Mawar Thakur Dayal Singh*, 1 P. L. J. 221; 86 I. C. 960.

The dismissal of a suit brought by the members of a community to assert their personal right is no bar to a subsequent suit by them as representatives of the community to establish the right of the community; *Radha Kishen v. Ram Nath*, 18 A. L. J. 150.

Where in a previous suit instituted by the plaintiff's father against the defendants it was found that the suit path was a public one, but the suit was dismissed on the ground that no special damage was alleged; and the present suit was brought by the plaintiff with three other members as plaintiffs after obtaining the requisite sanction under s. 91 of the C. P. Code and the defendants pleaded that the pathway in dispute was a private right of way. *Held*, that the finding in the previous suit operated as *res judicata* in the present suit; *Khaji Sayyid Yusuff v. Ediga Narasimhappa*, (1918) M. W. N. 175; 8 L. W. 377; 44 I. C. 367 (86 M. 141 *relied on*).

A suit by a reversioner for a declaration that an alienation made by a Hindu widow in possession is without legal necessity and inoperative beyond her lifetime is brought by him not for his personal benefit but in a representative capacity, that is as representing the whole body of reversioners, for the protection of the estate, to remove an apprehended injury to the common interests of all the reversioners. A decree in such a suit is therefore binding if obtained after fair contest and in the absence of fraud and collusion, not only between the reversioners who brought the suit and the transferee, but also as between the whole body of reversioners on the one hand and the transferee or his representative in title on the other. This is so, not because one reversioner must in that case be deemed to claim title through another but because the reversioner who sues represents the others and Expl. VI of s. 11 of the C. P. Code comes into operation: *Kesho Prasad Singh v. Sheo Pargash*, 19 A. L. J. 749, F. B. See also *Potha Kushi Rajapoplan v. Ramamoorthy*, 18 L. W. 491; 73 I. C. 284; *Kuar Nageshar Sahai v. Kuar Mata Prasad*, 9 O. L. J. 235.



A decision by a Settlement-officer under Chap. X, B. T. Act as to which of two persons claiming to be tenant ought to be recorded as such, does not operate as *res judicata* in a subsequent civil suit concerning the title to the land.—*Pandit Sardar v. Meajan Mirdha*, 21 C. 378. See also *Mohunt Jagannath v. Chandra Kumar*, 5 C. W. N. 421. and *Donay Dass v. Keshub*, 8 C. W. N. 741.

The judgment of a Special Judge determining that certain land was rent free and not *mal* land does not operate as *res judicata* in a subsequent civil suit to have the land assessed with rent.—*Karmi Khan v. Brojo Nath*, 22 C. 244. See *Birendra Kishore v. Kalitara*, 22 C. L. J. 155. But see *Nabin Chandra v. Maharaja Radha Kishore*, 11 C. W. N. 859; *Misri v. Rameshwar*, 7 I. C. 71.

A decision in previous proceedings under the B. T. Act, that the defendant was a tenure-holder, does not operate as *res judicata* in a subsequent suit for ejectment in the Civil Court.—*Gokul Mundar v. Pudmanund Singh*, 26 C. 707, P. C. 6 C. W. N. 825, P. C.

A decision in a proceeding under section 104, cl. (2) of the Bengal Tenancy Act in consequence of an application made by a landlord for the settlement of the rent, has the effect of a decree and the matters decided by such decision can only be re-opened on an appeal to the special Judge—*Durga Charan v. Hateem Mandal*, 29 C. 252; 6 C. W. N. 238. When there is a total denial of relation of landlord and tenant by one of the parties, a Revenue-officer has jurisdiction in a proceeding under sec. 103 of the Act to decide that question, but his decision cannot operate as *res judicata* in a subsequent civil suit for ejectment and declaration of title.—*Dharani Kant v. Goher Ali*, 30 C. 339; 7 C. W. N. 33.

A settlement of rent under sec. 104 (2) of the B. T. Act for the purposes of land revenue, has under sec. 107, the force of a final decree of a Civil Court and operates as *res judicata* upon the question of rent payable by the tenant, both as to its nature and amount.—*Brahmanunda v. Arjun Raut*, 1 C. L. J. 310.

The decision of the settlement-officer under ss. 104 and 105 of the B. T. Act does not operate either as *res judicata* or as a final decree under s. 107 of the Act, estopping a plaintiff from having the same matters tried by the regular Civil Court.—*Secretary of State v. Kajimuddy*, 23 C. 257; 2 C. W. N. 137. See *Mahim Chandra v. Kali Tara Debi*, 11 C. W. N. 1028.

An issue regarding a dispute as to the existence of the relation of landlord and tenant between the parties in a proceeding under s. 159, B. T. Act, does not operate as *res judicata* between them in a subsequent regular suit to recover possession of the land.—*Peary Mohun v. Ali Sheik*, 20 C. 249. But see *Barhamdat v. Krishna Sahai*, 20 I. C. 910.

Section 109 of the B. T. Act lays down a rule of evidence; it does not override the rules of *res judicata* which are of general application. The presumption under sec. 109 of the Act in favour of the accuracy of an undisputed entry as to the rate of rent is sufficiently rebutted by the decree in a contested suit *inter partes* showing a different rate.—*Ghaneshyam Misser v. Padmanand Singh*, 32 C. 336; 9 C. W. N. 610.

Withdrawal of an application under s. 105 of the B. T. Act without leave does not bar a subsequent suit for enhancement of rent; *A. B. Choidith v. Tulsi*, 40 C. 428; 17 C. W. N. 467.

The dismissal of a former suit brought by a younger son against his father during his lifetime for maintenance founded upon an *ikramnama*, does not bar a subsequent suit for maintenance brought by him against his elder brother, upon the ground that the maintenance of a younger member of the family is a charge upon the inheritance, to which the eldest male member had alone succeeded to their deceased father, as the previous suit was based upon a different title; *Ahmad Hassan v. Nihaluddin*, 9 C. 945 P. C.; 13 C. L. R. 33.

A former suit to recover a share of joint-family property based upon a written agreement, does not bar a subsequent suit for the same purpose, based on the plaintiff's hereditary right to sue as members of the family. —*Sadu v. Baiza*, 4 B. 37, and *Nilo Ram Chandra v. Gobind*, 10 B. 24.

Plaintiff claimed certain money on the basis of pro-note executed in favour of the defendant and a sale-deed by which the defendant had transferred his rights under the pro-note to the plaintiff. The suit was dismissed. In a subsequent suit by plaintiff upon a covenant of indemnity, forming part of the conveyance executed by the defendant in his favour, held that the plaintiff was not suing the defendant under the title which was the basis of the previous suit and that the subsequent suit was not therefore barred by *res judicata*; *Gobind Ram v. Ram Chandra*, 42 I. C. 895.

Plaintiff sued defendant for recovery of money on the basis of a promissory note. The suit was dismissed on the finding that the pro-note was not genuine. Defendants then prosecuted plaintiff for forgery but the plaintiff was acquitted. He thereupon brought a suit for damages for malicious prosecution. Held, that the finding as to the genuineness of the pro-note in the previous suit was not *res judicata* in the suit for malicious prosecution inasmuch as plaintiff was not litigating under the same title in both the suits; *Teju Bhagat v. Deoki Nandan*, 47 I. C. 141.

A decree for possession obtained against a person as heir of another wrongly described as dead, is not binding on such person when he actually becomes such heir and sues for recovery of possession; *Ramani Mohan v. Jagabandhu*, 37 I. C. 881.

Where a person is entitled to property both on the strength of an adoption and a will, the omission to mention the will in the first suit based on adoption does not bar a subsequent suit on the strength of the will; *Manbehari v. Sumer Chand*, 12 A. L. J. 441: 25 I. C. 175.

The dismissal of a previous suit for redemption upon an alleged mortgage is no bar to another suit for redemption on another mortgage in respect of the same properties under the provisions of s. 13 (s. 11) and s. 43, C. P. Code, 1882; *Ram Shai v. Ahmadi Bagan*, 8 A. L. J. 47; 9 I. C. 53; 33 A. 802.

A decision against a person in his individual capacity does not bind his successor in the office of trustees of an endowment; *Narain Das v. Abdur Rahim*, 24 C. W. N. 690; 58 I. C. 705; *Sitaram v. Ghanno*, 69 I. C. 528.

When once it is made clear that the self-same right and title were substantially in issue in two suits, the precise form in which the suits are brought or the fact that plaintiff in one suit was defendant in the

same and the issues in the two cases are identical.—*Raj Kumari v. Bama Sundari*, 23 C. 610. In *Gogun Chunder v. Empress*, 6 C. 247, it has been held that the judgment in civil suit out of which the criminal prosecution arises is inadmissible in evidence.

A Civil Court is not bound by a Magistrate's view of the genuineness of a document.—*Nittyanund v. Kashee Nath*, 5 W. R. 26; *Juggut Misser v. Baboo Lall*, 5 W. R. Cr. 50.

Former Magistrate allowed maintenance to a wife overruling the husband's objections. The husband subsequently again objected on the same ground to pay the allowance, and the second Magistrate allowed it and stopped the allowance. Held that the second Magistrate was wrong in re-opening the questions on the general principles of *res judicata*.—*Laraiti v. Ram Dial*, 5 A. 224.

A conviction for breach of contract of service under s. 2. Act XIII of 1859, is a bar to any subsequent conviction on the same contract for a further breach for not returning to service.—*Griffiths v. Texir Dosadh*, 21 C. 262.

The order of a Criminal Court disallowing costs of a witness in a proceeding under sec. 145, Cr. P. Code, is not *res judicata* in a civil suit for recovery of the costs.—*Nemai Chandra v. Ajahar*, 8 C. W. N. 178.

**Decision under the Land Acquisition Act, When Res Judicata.**—A decision by a Judge under the Land Acquisition Act on a question of title does not operate as *res judicata* in a subsequent suit between the parties—*Mahadevi v. Neelamani*, 20 M. 269. Distinguished in *Chowakaran v. Vayyapruth Kunhi*, 29 M. 173. See also *Nabodeep Chunder v. Brojendra Lall*, 7 C. 406; 9 C. L. R. 117; followed in *Rai Bhaia Dirgaj Deo v. Kali Charan*, 34 C. 466; 11 C. W. N. 525; *Basant v. Keshal*, 2 I. C. 853. But it seems that the Privy Council has taken a different view in the case of *Raja Nilmoni Singh v. Ram Bandhu*, 7 C. 388 (P. C.), and in *Ram Chunder v. Madho Kumari*, 12 C. 484 (P. C.) (reversing 9 C. 411). See *Punnabati Dai v. Pudmanund Singh*, 7 C. W. N. 538.

When after a reference has been made to the Civil Court, the proceedings are dismissed for want of prosecution, a suit is not maintainable for the trial of the questions involved in the reference, but the party who seeks to have such questions tried, must get the proceedings revived in accordance with law.—*Bhandi Singh v. Ramadhin Rai*, 2 C. L. J. 359; 10 C. W. N. 991. Explained in *Rameswar Singh v. Secretary of State*, 34 C. 470; 5 C. L. J. 669; 11 C. W. N. 356.

When a *patnidar* has been made a party to a reference under the Land Acquisition proceedings and omits to make a claim at the time of the apportionment of the compensation, a subsequent suit to recover a portion of the compensation in a Civil Court is not sustainable; *Rangit Sinha v. Sajjad Ahmad*, 32 I. C. 922.

Where in certain land acquisition proceedings a dispute arose as to the apportionment of compensation between two rival claimants and the dispute was decided by the Court on the construction of the terms of a gift deed in which the land acquired was included, that decision operates as *res judicata* as between those parties or their representatives not only with reference to the extent of the money but with reference to other property covered under such title, in a subsequent suit between the parties.

over the suit in which it was passed but also over the subsequent suit in which the plea of, *res judicata* is raised. That is to say, both the Courts must be Courts of concurrent jurisdiction, and in order to establish the plea of *res judicata*, the former decision must be a decision of a Court which would have had jurisdiction over the matter in the subsequent suit, in which the former decision is pleaded as *res judicata*. For instance, the jurisdiction of a Munsif, in Bengal, extends to Rs. 1,000, whereas a Sub-Judge or District Judge has jurisdiction to try suits of any value without any limit of amount; therefore, if the decision of a Munsif in respect of a very small portion forming part of a large estate, is to operate as *res judicata* in a subsequent suit regarding the entire estate valued at lakhs of rupees, then the title to the large estate will be lost for ever on account of the decision of a Court of the lowest grade in a suit for a very small portion of the property affected by its judgment. In *Runbahadur v. Lacho Koer*, 11 C. 301 P. C., their Lordships of the Judicial Committee observed:—"If this construction of the law were not adopted, the lowest Court in India might determine finally and without appeal to the High Court, the title to the greatest estate in the Indian Empire." In *Misser Raghobardial v. Sheo Baksh Singh*, 9 C. 439 P. C.: 12 C. L. R. 520, the Privy Council held that in order to make the decision of one Court final and conclusive in another, it must be the decision of a Court which would have had jurisdiction over the matter raised in the subsequent suit in which the decision is given in evidence as conclusive; and such jurisdiction must be such as not to be ousted by the pecuniary limits imposed on Courts in India. In other words, the two Courts must have had concurrent jurisdiction. This decision was followed in 11 C. 301 P. C., where it has been further held that the expression "concurrent jurisdiction" means concurrent as regards pecuniary limit as well as the subject matter. On this point see the following cases:—*Giriya Chettiar v. Sabapathy*, 29 M. 65; *Khetter Kristo v. Dinendra*, 3 C. W. N. 202; *Gokul Nandan v. Pudmanand*, 29 C. 707 P. C.; 6 C. W. N. 825; *Bahabhat v. Narabhat*, 13 B. 224; *Ghuloppa Bin v. Raghavendra*, 28 B. 388; *Gadulula v. Vadiki*, 6 M. L. T. 375; 4 I. C. 67; *Kunji v. Raman*, 15 M. 494; *Pachuma v. Salimamma*, 8 M. 83; *Venkatraghava v. Rangama*, 15 M. 498; *Subbammal v. Huddleston*, 17 M. 273; *Bharasi Lal v. Sarai*, 23 C. 415; *Jaiullah v. Inu Khan*, 23 C. 693; *Hassu v. Ram Kumar*, 16 A. 183; *Ram Dyal v. Janakidas*, 24 B. 356; *Rajkumar v. Probal*, 9 C. W. N. 566; *Srimat Paramahansa v. Prayaga*, 21 M. L. J. 730; 10 M. L. T. 133; (1911) 2 M. W. N. 202 and *Valeswara v. Muthukrishna*, 21 M. L. J. 57; 9 M. L. T. 288; 9 I. C. 386, where it has been further held, that the rule is obviously enacted to save the jurisdiction of the superior Courts, to enable them to investigate questions when they arise in a suit of such value and importance that it is not entrusted to the inferior Court, even though those questions have been decided by the inferior Court in another proceeding of less value and importance, though between the same parties.

The plea of *res judicata* cannot be availed of unless the Court which tries the former suit can be said to have jurisdiction with the reliefs prayed for in the subsequent suit; *Drupad Chandra v. Bindumoyi*, 43 C. L. J. 606; A I. R. 1926 C. 1053; 97 I. C. 209.

**Decision of Lower Court Not Res Judicata.**—The decision of a question in the Court of a Munsif does not operate as *res judicata* on the same question in a subsequent suit between the same parties brought in the Court of a Subordinate Judge; *Promotha Bhusan v. Narendra Bhusan*, 56

that question does not operate as *res judicata* in a subsequent suit brought after the grant of letters of administration; *Akhilsundari v. Nanibala*, 8 I. C. 28.

First application for revocation was refused.—Second application for revocation of the probate on the ground that the will was a forgery and that the probate was obtained by fraud was not barred.—*Kherodamoyi v. Bagala Sundari*, 4 C. L. J. 492. See *Ramani v. Kumud*, 14 C. W. N. 924; 12 C. L. J. 185.

A decision dismissing an application made by the widow of the testator for revocation of letters of administration with the will annexed, is binding on the daughter, who would, if the will were set aside, be the next heir.—*Durgagati Debi v. Sauravini Debi*, 33 C. 1001; 10 C. W. N. 955. See also *Ramnandan v. Sheoparsan*, 11 C. L. J. 623.

Directions given in an Administration suit, bind all parties determine the construction to which the will gives effect and are final and conclusive; *Gopal Lal v. Purna Chandra*, 36 C. L. J. 57; 49 I. A. 100 P. C.

A decision under the Guardian and Wards Act, 1890, declaring the forgery of a will, does not operate as *res judicata*, on the question of the genuineness of the said will, in a subsequent proceeding under the Probate Act, 1881.—*Chinnasami v. Hariharbarada*, 16 M. 380. (6 A. 269, referred to.)

**Decision of Insolvency Courts When Res Judicata.**—The plaintiff objected to the attachment by a receiver of certain property under s. 22 of the Prov. Insol. Act on the ground that the property attached belonged to him. The objection was dismissed and the order was upheld in appeal. Plaintiff then brought a suit for a declaration that the attached share belonged to him. *Held*, that the suit was barred by the principle of *res judicata*; *Irshad Hussain v. Gopinath*, 41 A. 378; 49 I. C. 590.

An adjudication by an Insolvency Court on the application of a claimant under s. 22 of the Insolvency Act, operates as *res judicata* and bars subsequent suits in the Civil Court for the same relief; *Pitaram v. Jhujhar Singh*, 33 I. C. 798; 15 A. L. J. 661.

**Decision of Liquidating Court When Res Judicata.**—An order passed by a Court bringing the name of a person as a contributory on the list of contributories if not appealed against is final and operates as *res judicata* barring the question as to the liability of such person as contributory being re-opened; *Kanshi Ram v. The Peshawar Bank Ltd.*, 41 P. L. R. 1915: 226 P. W. R. 1915: 28 I. C. 95.

An opinion expressed by the Liquidation Judge with regard to the plea of set off raised by the defendants (in a suit filed against them by the Official Liquidator of a Bank in Liquidation) did not operate as *res judicata*; *Official Liquidator, Industrial Bank of India Ltd. v. Kesho Das*, 43 I. C. 653.

**Decision of Mamlatdar When Res Judicata.**—The dismissal of a possessory suit by a Mamlatdar on the merits does not bar a subsequent suit under s. 9, Specific Relief Act (I of 1877), in a Civil Court.—*Ram Chandra Balaji v. Narasinhacharya*, 24 B. 251. (6 B. 477, dissented from). See also *Raja Ram v. Ganesh Hari*, 21 B. 91 and *Babajirao v. Laxmandas*, 28 B. 216.

litigation is not. S. 13, C. P. Code, in term requires for the bar a hearing as well as a final decision by a Court competent to try the latter suit; *Valiurara Iyer v. Muthu Krishna Iyer*, 21 M. L. J. 57; 9 I. C. 680; 9 M. L. T. 288.

From the above cases it would appear that in order to establish the plea of *res judicata*, the competency of the original Court which decided the former suit must be looked to and not that of the Appellate Court in which the suit was ultimately decided on appeal. For instance, A brought a suit against B in the Munsif's Court for recovery of a plot of land situated in a mahal, valuing it at Rs. 500, the suit was dismissed and brought up to High Court on appeal which was also dismissed. A then brought another suit against B for recovery of the entire mahal valuing the suit at Rs. 10,000, which was also brought up to High Court on appeal. The High Court is no doubt competent to try both the appeals, but the competency of the Appellate Court to try both the appeals is not the test to determine the plea of *res judicata*, it is the competency of the original Court that is to be looked to, and as the Munsif was not competent to try the subsequent suit brought in the Sub-Judge's Court, his former decision cannot therefore operate as *res judicata*. A similar illustration is to be found in *Bharosi Lal v. Sarat Chandra*, 23 C. 415.

**Concurrent Jurisdiction and Exclusive Jurisdiction.**—In determining whether a court which decided the former suit was competent to try the subsequent suit, the points to be considered are: (1) whether the jurisdiction of the court which decided the former suit was *concurrent* with the jurisdiction of the court in which the subsequent suit is instituted; (2) whether the court which decided the former suit was a court of *exclusive* jurisdiction. The expression "concurrent jurisdiction" means concurrent as regards pecuniary limit as well as the subject matter. See *Runbahadur v. Lucho Koer*, 11 C. 801, P. C.; and *Subammad v. Huddleston*, 17 M. 278; *Ganapathi v. Chathu*, 12 M. 223; *Mukund Ram v. Sheo Narain*, 47 I. C. 21.

Where the court which decided the former suit was a court of *exclusive jurisdiction*, the decision of such suit will bar the trial of the same matter in a subsequent suit. For instance, the Revenue Courts have jurisdiction to try certain matters to the exclusion of the regular Civil Courts; therefore, the judgment of the Revenue Courts in those matters will operate as *res judicata* in a subsequent suit, notwithstanding the fact that Revenue Courts have no jurisdiction to try the subsequent civil suit. On this point, see the cases under the headings "*Decisions of Revenue Courts*" and "*Decisions of Settlement Officers*."

The word "Competent" is also to be Considered with reference to the Date of the Former Suit and Not to the date of the Subsequent Suit.—The words "in a court competent to try such subsequent suit" refer to the jurisdiction of the court at the time when the first suit is brought. For instance, when the first suit is within the jurisdiction of the Munsif, and the subsequent suit by reason of an increase in value of the property or by reason of intentional over-valuation to avoid the effect of *res judicata*, is beyond his jurisdiction, such subsequent suit would nevertheless be barred, inasmuch as, if the subsequent suit had been brought at the time when the first suit was brought, the Munsif would have been competent to try such subsequent suit relating to that property. *y. Bhagwat*, 10 C. 687; *Raghunath v. Issur*, 11 C. 153; *Kunji*.

was directly and substantially in issue in the former suit, is also directly and substantially in issue in the subsequent suit, but another most important condition is also necessary and that condition is, that the matter must *have been heard and finally decided* in that suit. The expression "has been heard and finally decided" does not apply to an opinion expressed in the judgment on other issues not material for the purposes of the decree; nor does it apply to findings in a judgment not embodied in the decree, in as much as such findings do not amount to anything more than *obiter dicta*, see *Davarakonda v. Davarakonda*, 4 M. 184; *Avala v. Kupper*, 8 M. 77; *Ahmed Bhai v. Sir Dinshaw Pelit*, 12 Bom. L. R. 1061; 12 I. C. 818; *Amir Mirza v. Haridar Mirza*, 2 O. L. J. 113; 28 I. C. 217; *Madhab Koeri v. Baikuntha*, 4 Pat. L. J. 682; (1919) Pat. 343; 52 I. C. 338; *J. H. Jones v. The Administrator-General of Bengal*, 46 C. 485.

However definite a finding may be, it will not operate as *res judicata* where the decision in the case is not based upon it but is made in spite of it. A finding in a suit will operate as *res judicata* in a subsequent suit against a party only if that party could or was bound to have appealed against it. The words in s. 11 of the C. P. Code "has been heard and finally decided by such Court" apply not to an expression of opinion in the judgment but to what has been decided by the decree and that the bare wording of the decree is not the sole test of what has been decided. The question in each case is what did the Court really decide; *Mittan Poddar v. Jadab Chandra*, 2 Pat. L. J. 159; 1 Pat. L. W. 221; 38 I. C. 211.

Or. XVIII of the C. P. Code, 1908 lays down the procedure for the hearing of suits and every suit must be heard according to the rules contained in that Order. The expression "has been heard" means heard according to the procedure prescribed therein. The word "final" means unalterable; and the expression "finally decided" means decided in the manner provided by rule 1 of Order XX.

**Final Decision.**—Final decision means a decision which cannot be altered by the Court passing it, except as provided by section 152 of the C. P. Code. See Order XX, r. 3. A decision liable to appeal remains final until appeal is made, and it becomes final if no appeal is made within the prescribed period or if the appeal is withdrawn; *Ghelabhai v. Bai Javer*, 37 B. 172; 14 Bom. L. R. 1142. But it loses its finality as soon as appeal is made against it and the question of *res judicata* is to be determined with reference to the decree of the first court; see *Nilvaru v. Nilvaru*, 6 B. 110; *Maruvada Venkataratnamma v. Maruvada Krishnamma*, 57 I. C. 735; *Balkishan v. Kishan Lal*, 11 A. 148, followed in *Chengalavala v. Mudapathi*, 30 M. L. J. 379; (1916) M. W. N. 223, where it has been held that a judgment liable to appeal is only provisional and not operative as *res judicata*; *Noor Ali v. Koni Meah*, 13 C. 13; *Kailash v. Girija*, 39 C. 925; 16 C. W. N. 658; *Chundra Kumar v. Shibo Sundari*, 9 C. 631; 11 C. L. R. 22; *Sheosagar v. Sitaram*, 24 C. 616, P. C. An appeal is only a continuation of the original proceedings and the decree passed by the Appellate Court is the decree in the suit. On the filing of an appeal, the judgment ceases to be *res judicata* and becomes *sub judice*; *Chengalavala v. Madapathi*, 30 M. L. J. 379; (1919) M. W. N. 233; *Obedur Rahman v. Darbari Lal*, 7 L. 423; 98 I. C. 584; A. I. R. 1927. L. 1.

Where an appeal is filed and admitted the matters decided by the Lower Court cease to be *re judicata* and if the appeal is disposed of on

When the pecuniary value of a suit is beyond the jurisdiction of a court which adjudicated upon the dispute between the same parties some time before, any finding there arrived at cannot be treated as *res judicata* in the subsequent suit, though the judgment of that Court is admissible in evidence; *Har Parahad v. Sadhu*, 32 I. C. 504; *Ram Gobind v. Sri Thakurji Maharaj*, 11 A. L. J. 231; 10 I. C. 120.

A talukdari settlement officer is not a Court of jurisdiction competent to try a suit. He is an administrative officer.—*Maluhhai v. Suraangji*, 80 B. 220; 7 Bom. L. R. 821.

The Court of the Rajah of independent Tipperah was not a competent Court within the meaning of this section.—*Mahomed v. Alibur*, 10 W. R. 337. See however, *Madhao Bibec v. Ram Manicko*, 6 W. R. Civ. Ref. 31

A committee of Oudh talukdars made an award on a claim for maintenance, which was followed by a decree in the Court of Financial Commissioner. Held that the committee was not a Court within the meaning of s. 13, C. P. Code, 1882 (s. 11).—*Har Sankar v. Lal Raghuraj*, 11 C. W. N. 841, P. C.; 20 A. 510; 6 C. L. J. 13; 4 A. L. J. 497; 17 M. L. J. 354; 9 Bom. L. R. 757.

**Explanation II.—The Competency of the Court shall be Determined Irrespective of any Provisions as to Right of Appeal from the Decision of Such Court.**—This explanation is new; it was inserted to set at rest the conflicting rulings of the several High Courts. Under section 13 of the old Code, it was held by the Calcutta High Court and by the Madras High Court in some of its earlier rulings, that to make a matter *res judicata*, it is not necessary, that the two suits must be open to appeal in the same way, in order that the decision upon any issue in the previous suit can bar the trial of the same issue in the subsequent suit.—*Raicharan v. Kumud Mohan*, 25 C. 571; 2 C. W. N. 297; *Bhugwanbatti v. Forbes*, 28 C. 78; 5 C. W. N. 483; *David v. Grish Chunder*, 9 C. 183; 11 C. L. R. 305; *Subhammal v. Huddleston*, 17 M. 273; *Ahmed v. Moidin*, 24 M. 444; *Musaddilal v. Jwala Prosad*, 10 A. L. J. 106; *Ranga Nathan v. Lakshmee*, 25 M. L. J. 379; 14 M. L. T. 189; *Guru Charan v. Ura Charan*, 26 C. W. N. 490; *Rama Behari v. Surendra*, 10 C. L. J. 34; 21 I. C. 970; *Ram Faqir v. Bindeshri Singh*, 16 A. L. J. 782; 47 I. C. 837; 41 A. 54. The same view was taken by the Allahabad High Court in *Bani Madho v. Indar Sahi* 32 A. 67; 6 A. L. J. 991. Followed in *Itar Singh v. Umrao*, A. I. R. 1927 A. 189, when it was held that the application of the rule of *res judicata* is irrespective of any provisions as to the right of appeal from the decision of the court which decided the issue.

On the other hand it was held by the Bombay High Court and also by the Madras High Court in a Full Bench decision overruling the earlier decisions (17 M. 273 and 24 M. 444) that a decision in a previous suit of a Small Cause nature in which no second appeal lies is no bar to a subsequent suit which is open to second appeal; see *Avanasi Gounden v. Nachammal*, 29 M. 195, F. B.; *Bholabai v. Adesang*, 9 B. 75; *Govind v. Dhondbarav*, 15 B. 104; *Vithilinga v. Vithilinga*, 15 M. 111, 17 M. 768, 18 M. 189, 5 Bom. L. R. 742, 13 B. 224, 24 B. 456, 25 B. 652.

It would thus appear from the above rulings that the explanation is intended to affirm the view taken by the High Courts of Calcutta, Allahabad and Madras in their earlier decisions, that the competence of the jurisdiction of a Court does not depend on the right of appeal from its



In all these and in some other cases, in which decisions are not given on the merits but on technical points, those decisions do not operate as *res judicata*, because in those cases, a matter cannot be said to have been heard and finally decided. The reported cases on those points are numerous and some of them are given below under different heads by way of illustrations.

**Dismissal on Failure to Produce Evidence.**—The plea of *res judicata* ordinarily presupposes an adjudication on the merits, and the decision pronounced under Or. XVII, r. 3, shall have the force of a decree on the merits and will operate as *res judicata* in a subsequent suit.—*Venkatachalam v. Mahalakshamma*, 10 M. 272; not followed in 18 M. 463. See also *Arunachala v. Panchanadam*, 8 M. 348; *Muhammad v. Imam Khatun*, 25 P. L. R. 1912; 37 P. W. R. 1912. *Salig Ram v. Ram Kishen*, 10 A. L. J. 51; 15 I. C. 51.

Dismissal of a claim for failure to produce evidence to substantiate it, is of the same effect as a dismissal founded upon evidence for the purpose of barring a suit as *res judicata*—*Rama Rao v. Suriya Rao*, 1 M. 84. See also *Sahadeo Pandey v. Nakkid Pandey*, 15 W. R. 573; *Mofzooddeen v. Amooddeen*, 23 W. R. 52; *Watson v. Collector of Rajshahye*, 11 M. I. A. 170; *Kartick v. Sridhar*, 12 C. 563; *Har Baksh v. Lala*, 3 O. L. J. 236; 34 I. C. 640.

Where a plaintiff appears in a suit and goes into evidence, but before the evidence is closed makes default and the case is dismissed. Held, that the former judgment operates as *res judicata* in a subsequent suit between the same parties.—*Romanath v. Mohesh Chundra*, 9 C. W. N. 679; *Kartick v. Sridhar*, 12 C. 563; *Nagauda v. Krishnamurti*, 34 M. 97. See however, *Dama Ram v. Raghunath*, 10 C. W. N. 40.

**Judgments on Technical or Preliminary Points.**—An assignee of a mortgage bond sued to recover money due thereunder, but the suit was dismissed on the ground that his sale-deed not being registered, was inadmissible in evidence. Subsequently, he, having produced a fresh registered sale-deed, brought a second suit on such bond. Held, that the second suit was not barred.—*Ishri Dat v. Har Narain*, 3 A. 334.

A former judgment which wholly proceeded upon a technical defect or irregularity in the proceedings, and not upon the merits of the case, does not bar a subsequent suit for the same cause of action; *Shokhee Bewa v. Mehdee*, 9 W. R. 327. Approved in *Ramireddi v. Subareddi*, 12 M. 500; *Mokund Narain v. Janardun*, 15 W. R. 208 and *Pogha v. Gooroo*, 24 W. R. 114; *Ramji v. Sheik Mansur*, 15 I. C. 890; 8 N. L. R. 68; *Deodhar v. Thakur Nihal Singh*, 16 N. L. R. 206; 47 I. C. 909; *Ganesh Ram Chandra v. Lazmi Bai*, 46 B. 726; 24 Bom. L. R. 240.

Where a certificate made under the Public Demands Recovery Act for arrears of rent, was cancelled on appeal by the Collector on the ground that *bona fide* claim of right is involved, a subsequent suit for the same arrears is not barred; *Janki Koeri v. Basdeoajha*, 13 I. C. 351.

**Dismissal of Former Suit for Want of Jurisdiction or Cause of Action.**—Dismissal of former suit for want of jurisdiction or cause of action does not operate as *res judicata*; *Lakshman v. Ramchandra*, 5 B. 48 P. C.; 7 C. L. R. 320; see also *Baban v. Nagu*, 2 B. 19; *Bhukandas v. Lallubhai*, 17 B. 562; *Lakshmishankar v. Vishnuram*, 24 B. 77; *Ramgobind v.*

*Mohima Chunder v. Asradha Dassia*, 15 Bom. L. R. 251, 21 W. R. 207; see also *Ram Dass v. Rash Monce*, 25 W. R. 180; *Bachhi v. Md. Majidullah*, 6 A. L. J. 527. So also the decision of Revenue Court; *Sudar Kunwar v. Dhananath*, 13 A. L. J. 926; *Bid Saran v. Bhagat Deo*, 83 A. 453; 8 A. L. J. 341; 10 I. C. 924.

The decision of a Revenue Court in a rent suit as to the genuineness of a document does not operate as *res judicata* in a subsequent suit in a Civil Court for trial of such issue, such Courts having no jurisdiction to try the subsequent suit, and s. 11 is not exhaustive on the subject of *res judicata*.—*Gomti Kunwar v. Gudri*, 25 A. 138 (20 C. 707, P. C., followed); distd. in *Ram Singh v. Girraj Singh*, 37 A. 41; 12 A. L. J. 1252, followed in *Sherkhan v. Debi Prasad*, 37 A. 254.

A former decision by a Revenue Court cannot operate as *res judicata* in a subsequent suit which is only triable by a Civil Court; *Jaman v. Chandya Ram*, 69 P. W. R. 1018; 106 P. L. R. 1018; 48 P. R. 1018; 18 I. C. 918.

A co-sharer sued the two lambardars jointly for profits, and the Revenue Court held that they were not liable to be sued jointly and dismissed the suit. The plaintiff then filed separate suits. Held that the former decision did not operate as *res judicata*.—*Kamta v. Mukhta*, 29 A. 287; 4 A. L. J. 178.

The decision of an officer appointed under sec. 48 of the N. W. P. Rent Act, 1881, to divide produce, or estimate or appraise a standing crop as between a landholder and his alleged tenant, as to the liability of the tenant to pay rent, if such liability is denied, will not in a subsequent suit between the parties, be *res judicata*.—*Jafar Khan v. Ghulam Muhammad*, 25 A. 282; *Talagapu Tavodu v. Zamindar of Tarla*, 32 I. C. 706.

The decision of Revenue authorities allowing mutation of names in favour of a person who alleged that he was entitled to succeed upon the death of an occupancy tenant could not operate as *res judicata* in a subsequent suit brought by the zemindar, in the Civil Court for his ejection, on the allegation that he was a mere trespasser.—*Naidar v. Baru Mal*, 24 A. 163.

A Revenue Court has no jurisdiction to entertain a claim between rival claimants to a tenancy. A decree for rent therefore does not operate as a bar to the maintenance of a suit for declaration of right to a tenancy against a rival claimant; *Balbhaddar v. Somaru Rai*, 13 A. L. J. 395; 27 I. C. 914; *Kanhai Ram v. Durga Prasad*, 37 A. 223.

Decision of settlement officer passed in a case relating to amendment of *jamabandi* declaring the defendant's status as tenant liable to pay rent is not *res judicata* either in the Revenue Court or in the Civil Court; *Sakhawat Ali v. Suraj Prasad*, 14 A. L. J. 140; But see *Harjas Brahman v. Makund Sarup*, 27 I. C. 78.

In a *jamabandi* case it was decided that the plaintiffs were non-occupancy tenants but the length of tenancy was not determined. Held, that in a suit for determination of the tenure the first judgment did not operate as *res judicata*; *Lal Bahadur v. Maharaja of Vizianagram*, 33 I. C. 558.

A suit to establish plaintiff's title to certain land alleged by the defendants to be *maniyam* land attached to the office of the defendants

the merits within the meaning of this section.—*Futteh Singh v. Lachmi Koor*, 13 B. L. R. Ap. 37; 21 W. R. 106; *Trilochun v. Nabo Kishore*, 2 C. L. R. 10. See also *Muhammad Salim v. Nabain Bibi*, 8 A. 282, *Deodhar Sheo Singh v. Nihal Singh*, 47 I. C. 909; *Kotasseri Sankaran v. Konholi*, 43 M. L. J. 572.

**Dismissal For Under-Valuation.**—Dismissal of former suit for under-valuation is no bar to a subsequent suit on the same cause of action.—*Dullabh Jogi v. Narayan*, 4 B. H. C. 110 and *Irawakom v. Satiyappa*, 35 B. 31.

**Order For Abatement.**—No order for abatement of a suit under Or. XXII. r. 9 is a bar to a fresh suit on the same cause of action.—*Nistarini v. Brojo Nath*, 10 C. L. R. 229.

**Dismissal for Want of Succession of Collector's Certificate.**—Dismissal of suit for want of heirship certificate does not bar a subsequent suit brought upon the same cause of action.—*Pethaparumal Chetti v. Murunandi*, 18 M. 466. Nor the dismissal of the former suit for want of Collector's certificate under the Pensions Act bars the subsequent suit.—*Putali Meheti v. Tulja*, 3 B. 223.

**Effect of Withdrawal of Suit or Appeal Without Permission.**—The dismissal of the former suit "in the form it was brought" without any permission under Or. XXIII, r. 1, to bring fresh suit bars a fresh suit on the same cause of action.—*Ganesh Rai v. Kalka Prasad*, 5 A. 595, and *Kudrat v. Dinu*, 9 A. 155. Unconditional withdrawal of suit may result in the subject matter of the suit becoming again *res judicata*; *Sitaram v. Chholkai*, 5 N. L. R. 88. But the Allahabad High Court has held that dismissal of former suit with permission under Or. XXIII, r., to bring a fresh suit as to a part of the subject-matter does not prevent the subsequent suit from being barred by the principle of *res judicata*.—*Sukh Lal v. Bhikhi*, 11 A. 187, F. B. The Privy Council seems to have taken a different view in *Parsotam Gir v. Narboda Gir*, 21 A. 505; 3 C. W. N. 517 (P. C.). The Calcutta High Court held that the termination of a suit by the plaintiff being allowed to withdraw it without leave to bring a fresh suit is not a bar to a subsequent suit in which the same matter is in issue.—*Kamini Kant v. Ram Nath*, 21 C. 265. See also *Sultan Begum v. Md. Munir*, 149 P. W. R. (1911); *Amir Singh v. Jai Ram*, L. R. 3 A. 84 (Rev.).

Where the first suit was fairly contested and an appeal was preferred against the decision, the mere fact of the withdrawal of the appeal does not deprive the decree of its operative character in law: *Ghelabhai v. Bai Javer*, 37 B. 172; 14 Bom. L. R. 1142.

**Dismissal of Plea of Set-off.**—Dismissal of plea of set-off in a former suit bars a subsequent suit for the same claim.—*Abdoolah v. Sree Kanto*, 15 W. R. 252. But a plea of set-off is not barred by this section where the two claims are founded on different titles.—*Amir Zama v. Nathu Mal*, 8 A. 396. See also *Lucki Narain v. Khettro Pal*, 13 B. L. R. (P. C.) 146; 20 W. R. 380; *Pichi Aiyar v. Subramania*, 28 M. L. J. 513; 29 I. C. 84.

**Dismissal on Default to Give Security for Costs.**—Dismissal of a suit on default of plaintiff to give security for costs does not operate as *res judicata*. Under this section a defendant may be precluded from pleading as a defence, matter which is *res judicata*.—*Rungrar v. Ravji*, 6 B. 482. See also *Hariram v. Lalbai*, 26 B. 637; 4 Bom. L. R. 262.

subsequent suit for ejectment in the Civil Court; *Jaman v. Chandiaya*, 69 P. W. R. 1918; 106 P. L. R. 1913; 83 P. R. 1913.

In a suit for ejectment by a landholder under N. W. P. Rent Act (XVIII of 1873), the decision of a Revenue Court declaring the tenant's liability or non-liability to ejectment is not a bar to a fresh determination of their respective rights in the Civil Court.—*Sukhadaik Misser v. Karim Chaudhri*, 3 A. 521; *Birbal v. Tikaram*, 4 A. 11; *Lodhi Singh v. Ishri Singh*, 6 A. 295; *Sundar Kunwar v. Dina Nath*, 87 A. 280; 28 I. C. 482. But see *Radha Prasad v. Salik Rai*, 5 A. 245; and *Bihari v. Sheobalak*, 29 A. 601; 4 A. L. J. 515.

In a suit brought in a Revenue Court, the plaintiff alleged that the defendants had got their names entered without his consent and prayed for their ejectment as tenants. In the present suit in Civil Court, he prayed for ejectment of the defendants as trespassers. Held that the suit was not barred by the rule of *res judicata*; *Mukh Ram v. Chajju*, 17 A. L. J. 646; 1 U. P. L. R. (H. C.) 74; 50 I. C. 734.

A decision of the Revenue Court ordering the ejectment of the plaintiff on the ground that he was the sub-tenant of the defendant, is not *res judicata* in a suit by the plaintiff brought in the Civil Court, for a declaration that he was the owner of a certain occupancy holding and praying for its possession; the Revenue Court not being competent to try the present suit; *Kanhai Ram v. Durga Prasad*, 87 A. 223; 13 A. L. J. 278; 27 I. C. 913.

Suit in a Civil Court for a declaration on a question of title decided by a Revenue Court under section 39 of Act XII of 1881 is barred by *res judicata*.—*Sheo Narain v. Parmeshar*, 18 A. 270 (F. B.)

An entry in a revenue record which is based solely on the fact of possession cannot operate as *res judicata* on a question of title subsequently raised in a civil suit.—*Kaliani v. Dasu Pandu*, 20 A. 520.

The decision of a Revenue Court determining that an occupancy holding is heritable operates as *res judicata* in a subsequent civil suit by the landlord for recovery of the possession of the holding by a declaration that it is not heritable.—*Shimbhu Narain v. Bochcha*, 2 A. 200. See also 15 A. 387; *Tikait Ganesh Narain v. Maharajah Pratap Udai Nath*, 43 C. 136; 19 C. W. N. 998; 23 C. L. J. 118; 31 I. C. 691.

Where a Revenue Court decides in a rent suit, that the status of a tenant is that of a sub-tenant, that decision is binding on a Civil Court and operates as *res judicata* to bar a suit brought subsequently in the Civil Court by the tenant for a declaration that he is an occupancy tenant; *Mollo v. Ramlal*, 58 I. C. 773; *Ramdas v. Dubri*, 20 A. L. J. 606. *Dilwar Khan v. Kulsum*, 3 O. W. N. 210; 93 I. C. 62; A. I. R. 1926 Oudh 205. Where a Revenue Court which is not authorised to determine a matter finally gives a decision on the matter, it does not operate as *res judicata* in a suit in the Civil Court. *Obiter Dicta* in a prior decision does not operate as *res judicata* in a subsequent suit; *Wadhawa v. Hassi*, 73 P. R. 1915; 111 P. L. R. 1915; 64 P. W. R. 1915; 29 I. C. 778.

A landlord obtained a decree against his tenant in the Revenue Court to enforce acceptance of *pattah* at certain rates. The tenant

prior to the institution of the suit, the Court, under Or. XX, r. 12, is bound to direct an enquiry as to such rents and mesne profits and ascertain them in the suit and then pass a decree: and if in such a case the Court does not grant the relief, then it should be considered to have been refused. See *Kachu v. Lakshman Singh*, 25 B. 115, in which it has been held that where a claim for past mesne profits is made in the former suit and inquired into and finding recorded that there was a balance due to the plaintiff, but no particular sum is fixed by the decree, 'no second suit can be maintained by reason of the bar created by this explanation.' In the above case, all the rulings of the several High Courts have been referred to and discussed. See also 31 B. 527 and 34 C. 223. But where in a suit for possession the plaintiff also claimed mesne profits for a period subsequent to the institution of the suit, it is not obligatory on the Court to grant relief for such mesne profits; and in such a suit if the decree was silent as to such future mesne profits, it would not bar those mesne profits in the second suit. See 17 C. 968; 19 C. 615; 21 A. 425 F. B.; 4 M. 308; 14 M. 328; 19 B. 532; 32 C. 118; 30 A. 225 and other cases noted below. The reason being that it was not obligatory, but discretionary, with the Court to grant such relief or not. But see *Ramaswami v. Srirangaraja*, 2 L. W. 8; 26 I. C. 622.

From the reported decisions bearing on this explanation, the following rules may be gathered regarding its applicability:—

(1) That the relief claimed in the former suit was a substantial relief and not ancillary to the main relief; (2) that the relief claimed in the former suit was such which the plaintiff might claim as of right; (3) and that it was obligatory on the Court to grant the relief.

**Relief Claimed but Not Granted.**—This explanation does not apply where the Court is silent on a head of relief only claimed as an ancillary to the main relief, and which by implication is rather granted than refused. It only applies where the Court is silent on an independent head of relief claimed and duly controverted, *Fatmabai v. Aishabai*, 12 B. 454, on appeal 13 B. 242.

Where a mortgagee had previously instituted a suit to enforce his security and was content to take a money-decree, and failing to obtain satisfaction of the decree brought another suit to realise the debt by the sale of the mortgaged property. Held that the second suit was barred by *res judicata*.—*Shibu Bera v. Chandra Mohun*, 33 C. 849; folld. in *Piri Lal v. Nand Ram*, 31 A. 19; 5 A. L. J. 732.

Decree in a redemption suit making no order as to mesne profits.—Subsequent suit by a plaintiff for surplus mesne profits accrued due prior to former suit. Held, that the claim was *res judicata* and was barred.—*Kachu v. Lakshman Singh*, 25 B. 115. Approved in *Rukhmini Bai v. Venkatesh*, 31 B. 527; 9 Bom. L. R. 958 and in *Satyabadi v. Hirabati*, 34 C. 223; 5 C. L. J. 192. See 13 C. W. N. 669.

The rejection of an application for the assessment of mesne profits awarded by the decree in a suit for possession of lands debars a further application for assessment, as the rejection has the effect of dismissing the suit; *Purna v. Jogendra*, 29 C. L. J. 470 50 I. C. 262.

Where a decree for possession is silent as regards mesne profits which have accrued between the date of the institution of the suit and delivery of

*Prasad*, 14 A. L. J. 140; 33 I. C. 343. Where Settlement Courts have fully gone into the rival claims and dealt with and decided all points raised, it is not open in subsequent proceedings to one party to deny the status of another party as found by such Settlement Courts or to assert more than what was awarded by such Settlement Courts; *Rani Indar Kuar v. Thakur Baldeo Baksh Singh*, 39 M. L. J. 115; 28 M. L. T. 334; 25 C. W. N. 170; 18 A. L. J. 1057; 57 I. C. 397 (P. C.); but where the point was incidentally decided in a settlement proceeding, it did not operate as *res judicata*; *Maharaji Mamrik v. Suast Manjhi*, 18 C. W. N. 833; 18 I. C. 115; *Rani Indar Koer v. Thakur Baldeo Baksh Singh*, 25 C. W. N. 170; 39 M. L. J. 115; 18 A. L. J. 1057; 57 I. C. 397 P. C.

An erroneous decision of a Settlement Court deciding a question of title operates as *res judicata* as regards the matter in controversy in the suit; *Tiluk Chand v. Sambhu Singh*, 23 O. C. 269, 2 U. P. L. R. (H. C.) 163; 60 I. C. 404.

**Decisions under the Bengal Tenancy Act (VIII of 1885), When Res Judicata.**—When a Revenue-officer disposes of an objection summarily under sections 103-A and 105 of the Bengal Tenancy Act, without adopting the procedure laid down in the C. P. Code, his order will not have the effect of *res judicata*; *Kurban Ali v. Jafar Ali*, 28 C. 471; 5 C. W. N. 798. Followed in *Nasarulla v. Amiruddi*, 8 C. L. J. 183.

*Held* that the previous decision of a Special Judge not having been between the parties, but between the plaintiffs on the one hand and the landlord on the other, cannot operate as *res judicata* in the subsequent suit.—*Mohunt Jagannath v. Chandra Kumar*, 5 C. W. N. 421.

A previous *ex-parte* order of a Settlement-officer under section 107 of the Bengal Tenancy Act (VIII of 1885), is not *res judicata* on the question of tenant's rent, but is admissible in evidence as to his rent.—*Ashutosh Nath v. Abdool*, 28 C. 676.

Order of the Special Judge, affirming the fair rent fixed by the Settlement Officer, has the force of a decree under s. 107, Bengal Tenancy Act, and when a tenant in his appeal before the Special Judge did not take the objection as to the effect of s. 192 of the Act, the matter is *res judicata* and cannot be re-opened.—*Mohim v. Kalitara*, 11 C. W. N. 939.

Where in a previous suit before the Revenue Officer under s. 105 of the Bengal Tenancy Act, the question as to the maintainability of a suit on the ground of jurisdiction was raised and adjudicated upon, and it was not appealed against by some of the parties to the suit, it is not open to those parties to subsequently bring a suit in a Civil Court for a declaratory decree that the decree of the Revenue Officer was without jurisdiction; *Chowdhury Upendranandan v. Umai Set*, 30 C. W. N. 974; 97 I. C. 702; A. I. R. 1926 C. 1180.

The decision of a Revenue-officer under s. 106, Bengal Tenancy Act, (VIII of 1885), is *res judicata* between the same parties in a subsequent suit in a Civil Court.—*Gokul Shahu v. Jadu Nundun*, 17 C. 721; *Nikunja Behari v. Birendra Kishor*, 22 C. L. J. 148. See however *Ram Chandra v. Nanda*, 19 C. L. J. 197; *Muktinath v. Rameswar Singh*, 15 C. W. N. 57; *Shashi Bhuan v. Sheik Eshabar*, 19 C. W. N. 636; *Jatindra Nath v. Azizur Rahman*, 71 I. C. 307.

set aside the transaction, which was dismissed on the ground of limitation; *Mina Lal v. Kharsetji*, 30 B. 395: 8 Bom. L. R. 269.

The Court having awarded a particular sum as annual mesne profits without setting forth in the judgment the details thereof, and it having, therefore, become impossible to say that the right to a particular deduction therefrom claimed by the defendant was adjudicated upon by the Court, held that the rule of *res judicata* did not apply to the question as to the payment by the defendant.—*Kacharala Chela v. Sha Oghadbbhai*, 17 B. 35. See 29 I. C. 731: 160 P. L. R. 1915: 72 P. W. R. 1915.

Where a Court expressly declares, whether rightly or wrongly, that it is not competent in a particular suit to grant a further relief claimed and directs plaintiff to take separate proceedings to get the relief, a subsequent suit by plaintiff to get the relief is not barred either by *res judicata* or by Or. II, r. 2, C. P. Code; *Muhammad Baksh v. Baki-ri-shan*, 160 P. L. R. 1915: 72 P. W. R. 1915: 29 I. C. 731.

Explanation V, s. 11, contemplates, decree which does not expressly grant the relief claimed; the termination of a suit by the plaintiff being allowed to withdraw it without leave to bring a fresh one, is not a bar to a subsequent suit in which the same matter is in issue.—*Kamini Kant v. Ram Nath*, 21 Cal. 265. Refd. to in 4 C. W. N. 110; 9 O. C. 164, p. 166.

#### Principle of Res Judicata When Applicable to Execution Proceedings.—

It is true that s. 11 of the Code of Civil Procedure, or any of its explanations, cannot in terms apply to an execution proceeding because, the question arises in the same suit and not in a second suit. But as observed by their Lordships of the Privy Council in the case of *Ram Kripal v. Rup Kunwari*, 11 I. A. 37: 6 A. 269 P. C., an order in execution may be as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties and in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment does not depend on s. 11 but upon the *general principles of law*. If it were not binding, then there would be no end to litigation; where a point has once been expressly decided in the execution department, that decision binds the parties in all subsequent proceedings, and in cases where a point has not been directly decided but is such as must be deemed to have been necessarily decided before an order of execution was passed, the decision has a similar binding force. For instance, objections that the application is not in accordance with the law, or that it is barred by time, or that the decree is not capable of execution, or that the Court has no jurisdiction to entertain the application, or that the person applying for execution has not the right to do so, are objections, which, if not raised before the execution is ordered, have been held in several cases to have been decided adversely to the objectors by the execution order; *Dip Prakash v. Dwarka Prasad*, A. I. R. 1926 A. 71: (*Mangal Prasad v. Grija Kanta*, 8 I. A. 123: 8 C. 51 P. C.: *Ramkripal v. Rup Kunwari*, 11 I. A. 37: 6 A. 269, P. C.); *Raja of Ramnad v. Veluswami*, 48 I. A. 45: 25 C. W. N. 581: 40 M. L. J. 197: 59 I. C. 880, fold.); *Binda Prasad v. Raj Ballaw*, 48 A. 245: 91 I. C. 785: A. I. R. 1926 A. 220.

Where a Court, upon an application for execution, has decided that the execution is barred by limitation, and that order has become final in conse-

A decision in a proceeding under s. 105 of the B. T. Act in which no question as to correctness of entries was raised, is no bar to a civil suit questioning the correctness of entries: *Pandab v. Ananda*, 14 C. W. N. 897; 12 C. L. J. 195. See however *Berhamudul v. Frolshi*, 18 C. W. N. 406.

**Decision in Small Cause Court Suits When Res Judicata in Civil Suits.**—A decree passed in a suit in a Small Cause Court in which a question of title is incidentally dealt with is not a bar to a suit for a general declaration of title.—*Inayat Khan v. Rahmat Bibi*, 2 A. 97; *Anwar Ali v. Nural Huq*, 4 A. L. J. 517; *Manappa Mudali v. McCarthy*, 3 M. 192; *Poram Sookh v. Parbutty*, 3 C. 612; 1 C. L. R. 404; *Baldoco Prasad v. Narain Halwai*, 34 I. C. 123. See however *Dakhyani v. Pole Gobind*, 21 C. 430; *Puttangauda v. Nilkanth*, 37 B. 675 F. B. But though the finding on the question of title will not be *res judicata*, a finding as to the actual subject-matter is always *res judicata*; *Raman Menon v. Madhava Menon*, 98 I. C. 176; A. I. R. 1927 M. 96.

Decision in previous suits which were in the nature of small cause suits, and in which there was no right of second appeal, does not operate as *res judicata* in a suit for declaration of right.—*Gobind v. Dhondbarav*, 15 B. 104 (9 B. 75, followed). Followed in *Namasivaya v. Kadir*, 17 M. 168, and in *Srirangachariar v. Ramasami*, 18 M. 189. See *Avansi Gounden v. Nachammal*, 29 M. 195; 16 M. L. J. 41 F. B. (17 M. 278, 24 M. 444 and 24 M. 63 overruled). See also *Dulare v. Hazari*, 12 A. L. J. 853; see however *Sellam v. Veeerappa*, 18 M. L. T. 171: (1915) M. W. N. 605; 30 I. C. 522.

A previous decision of a Munsiff's Court under s. 9 of the Specific Relief Act decreeing possession to the plaintiff operates as *res judicata* in a subsequent suit for recovery of damages for such dispossession by the same plaintiff in the Court of Small Causes as regards the issue as to dispossession; Held also that the Munsif who had tried the former suit was competent to try the subsequent suit for damages within the meaning of s. 11; *Bodlu Bhonja v. Mohan Singh*, 15 A. L. J. 789; 39 A. 717; 42 I. C. 862 (8 B. 338; 27 M. 63 folld.).

**Decisions of Criminal Courts.**—The decision of a Criminal Court does not operate as *res judicata* in a civil suit in respect of the same cause of action.—*Ram Lal v. Tularam*, 4 A. 97.

Orders of Magistrates under section 145 of the Cr. P. Code are admissible in evidence, on general principles, also under section 13 of the Evidence Act to prove certain facts.—*Dinomoni v. Brojo Mohini*, 29 C. 187 P. C.; 6 C. W. N. 386, P. C.

The conviction in a criminal case is evidence in a civil suit for damages in respect to the same act.—*Bishoonath v. Huro Gobind*, 5 W. R. 27; *Doorga Das v. Doorga Charan*, 6 W. R. Civ. Ref. 26; *Jadubar Singh v. Seo Saran*, 21 A. 26; *Rai Jung Bahadur v. Rai Gudur Sahoy*, 1 C. W. N. 537.

The judgment of a Criminal Court is the only evidence of the fact that the defendants were convicted.—*Deb Nath v. Umacharan*, 9 C. W. N. cclxiv (264).

Held by Ghose, J., that the decision in a civil suit would be admissible in evidence in a criminal case if the parties are substantially the



between the parties and if in any subsequent proceedings, the point again becomes material, the parties are bound by that previous decision and the matter cannot be reopened; *Kapur Chand v. Kanhaiya Lal*, 45 A. 735: 21 A. L. J. 641; *Musst. Pura v. Behari Lal*, 68 I. C. 239.

An objection which has been disposed of finally by an order in execution proceedings is not to be entertained a second time in execution proceedings relating to the same decree; *Dip Prakash v. Dwarka Prasad*, 48 A. 201: A. I. R. 1926 A. 71; *Raj Kumari v. Sirdar Gur Bakhsh*, 99 I. C. 1006: A. I. R. 1927 L. 179.

Omission by the judgment-debtor to prefer objection to execution after issue of notice under Or. XXI, r. 22, creates the bar of *res judicata*.—*Jogendra v. Hiranya Kumar*, 2 C. L. J. 499.

A previous *ex parte* order for execution passed on service of proper notice to the judgment-debtor, which raised a question about the executability of the decree operates as *res judicata* and the judgment-debtor can not at a subsequent application raise the plea that the decree is not executable and that the previous application was barred by limitation; *Subbarayadu v. Bapayya*, 98 I. C. 702: A. I. R. 1927 M. 149.

Where a judgment-debtor having an opportunity to plead limitation as a bar to the execution of the decree, neglects to do so, and the application for execution is entertained and orders passed thereon, the principle of *res judicata* will apply to such execution-proceedings on a subsequent application for execution.—*Lakshmanan v. Kuttayan*, 24 M. 669. See also *Subbarama v. Nagammal*, 24 M. 683. See also *Sheoraj Singh v. Kameshar Nath*, 24 A. 282; *Coventry v. Tulshi Pershad*, 31 C. 822: 8 C. W. N. 672; and *Behari Lal v. Mujid Ali*, 24 A. 138. *Subbiah v. Ramanathan*, 37 M. 462; *Govinda Nath v. Basiruddin Mandal*, 34 C. L. J. 163; *Mt. Muham-madi Begum v. Mt. Umda Begum*, A. I. R. 1922 A. 100: 66 I. C. 751.

Where a former application for execution was struck off in consequence of non-payment of *talabana*, a subsequent application for execution is barred.—*Pheku v. Pirthi Pal*, 15 A. 49.

An application for execution was dismissed for want of jurisdiction—No appeal from the order of dismissal. *Held*, that the subsequent application for execution is barred.—*Nabi Muhammed v. Jwala Prasad*, 27 A. 148; *Kondu Nagayyan v. Embill Srinivasa Ayengar*, 14 L. W. 18: 62 I. C. 856.

Questions decided in an execution case cannot be re-opened by the successor to the Judge who decided them.—*Bullabh v. Narain*, 3 A. 173.

Where a judgment-debtor, being entitled and having an opportunity to plead Or. XXIII, r. 1, as a bar to the execution of the decrees, neglects to do so, and the application is entertained by the Court and orders passed thereon, the principle of *res judicata* will apply to such execution proceedings at a subsequent stage of the same.—*Sher Singh v. Daya Ram*, 13 A. 564; see also *Kishna Sahai v. Aladad Khan*, 14 A. 64; see, however, *Rim Lal v. Narain*, 12 A. 539; *Masirunnisa v. Joychand*, 16 I. C. 238; *Palancheri Govinda v. Krishna*, 45 M. L. J. 71: (1923) M. W. N. 299.

The principle underlying s. 11 applies to execution proceedings as much as to suit; *Ram Lal v. Deodhari Lal*, 2 Pat. 771; 5 Pat. L. 1. 7.

though not by reason of s. 11, C. P. Code but by reason of the general principles of *res judicata*, (49 C. 40 *folld.*; 23 C. 526: 17 C. W. N. 935 *overruled*) *Ramachandra Row v. Ramachandra Row*, 45 M. 320: 26 C. W. N. 713: 49 I. A. 129 (P. C.).

**Decision under the Probate and Guardians and Wards Act, When Res Judicata.**—A decision under the Probate and Administration Act (V of 1881) does not operate as *res judicata* in subsequent suit to establish title to the property.—*Arunmoyi v. Mohendra*, 20 C. 889; *Lalitmohon v. Radharaman*, 15 C. W. N. 1021: 13 C. L. J. 547. *Gonesh Jagannath v. Ram Chandra*, 21 B. 563; and *Jagannath Prasad v. Ranjit Singh*, 25 C. 354, p. 369; *Lalit Mohan v. Radharaman*, 18 C. L. J. 547: 15 C. W. N. 1021: *Nawab Akbari Begum v. Nawab Nazhat-ud-dowla*, 1 C. L. J. 594, P. C.; 9 C. W. N. 939. See *Chintamani v. Ramachandra*, 34 B. 580: 12 Bom. L. R. 694; *Rajendra v. Manick*, 8 A. L. J. 1063, *Magbul Shah Ahmad v. Muhammad Azmatulla*, 49 P. R. 1918: 46 P. L. R. 1918: 34 P. W. R. 1918: 43 I. C. 723. But *Arunmaji v. Mohendra*, 20 C. 888 and *Lalitmohon v. Radharaman* have been dissented from in *Dwijapada v. Kalipada*, 31 C. W. N. 899, where it has been held that the previous decision of Probate Court in a matter which was fought out between the parties and finally decided by that Court operates as *res judicata* in a subsequent title suit. "The real principle is that if a matter has been fought out in a Court having jurisdiction to decide that matter, the decision on that matter would operate as *res judicata* although the Courts might not be the same;" *Sheo Parsan v. Ramnandan*, 43 I. A. 91: 43 C. 694: 20 C. W. N. 788; *T. B. Ramchandra Rao v. A. N. S. Ramchandra Rao*, 49 I. A. 129: 45 M. 320: 26 C. W. N. 718 *referred to*).

Judgment in a probate case regarding genuineness or otherwise of a will operates as *res judicata* in a subsequent suit; *Kishorbhai v. Ranchchodia*, 38 B. 427. See also *Kalyan Chand v. Sita Bai*, 38 B. 309 F. B. and *Brendon v. Sundarabai*, 38 B. 272; and *Sheoparsan Singh v. Ramnandan*, 20 C. W. N. 788 P. C.: 43 C. 694: 23 C. L. J. 621: 31 M. L. J. 77: 33 I. C. 914. 43 I. A. 91 (P. C.); *Dwijapada v. Kalipada*, 31 C. W. N. 898.

Where a matter has been finally decided between the parties, the mere fact that the decision was given in an Administration suit does not affect its finality; *Hook v. Administrator-General of Bengal*, 25 C. W. N. 915 P. C.: 48 C. 499: 33 C. L. J. 405.

A decision in probate proceedings that two prior wills of the testator had not been revoked by a third will is not *res judicata* in a subsequent suit where the question is how far the dispositions in the prior wills were affected by the third will; *Subramania Aiyar v. Muthammal*, 21 M. L. T. 485; 9 M. L. T. 319: (1911) 1 M. W. N. 189 9 I. C. 613.

A question of status decided in proceedings under the Probate and Administration Act can be gone into again in a regular suit. A judgment of a Probate Court is conclusive proof that the person to whom Letters of Administration or Probate have been granted has been clothed with the powers and the responsibilities of the deceased and nothing else; *Mi Ngwe Tan v. Mi Shwa Taik*, (1910) 1 U. B. R. 61; 10 I. C. 987.

A court of probate jurisdiction is alone competent to determine the question of genuineness of a will, the decision of any other court determining

An order rejecting an application for execution of decree on the ground of limitation is not an adjudication within the rule of *res judicata*.—*Delhi and London Bank v. Orchard*, 3 C. 47, P. C. See also *Kuppu v. Saminath*, 18 M. 482. Nor the dismissal of an application for execution for default bars a fresh application.—*Tirthasami v. Annappayya*, 18 M. 181. See also *Dhonkal v. Phakkar*, 15 A. 84 *Vithora v. Tejiram*, 14 Bom. L. R. 264; *Jugal Kishore v. Chintamoney*, 18 C. W. N. 1288; 20 C. L. J. 15; *Bahir Das v. Girish*, A. I. R. 1923 C. 287; *Mahadeo v. Gajadhar*, 1 Pat. L. R. 145.

An order refusing an application to execute a decree is not an adjudication within the rule of *res judicata*.—*Hurro Soondary v. Jugobundhu*, 6 C. 203; 7 C. L. R. 61. See also *Kishore Bun v. Dwarka Nath*, 21 C. 784, P. C. and *Gouri Sunker v. Abhoyeswari*, 25 C. 262

The provision of s. 11, C. P. Code embodying the principle of *res judicata* did not apply to a case like this where the question was as to the finality of an order made in an earlier stage of the same proceeding between the parties and an examination of Expl. IV to that section was beside the question. The principle of Expl. IV to s. 11, C. P. Code, has not been extended to execution proceedings; *Phulchand v. Kanhaya Lal*, 19 A. L. J. 923.

The law of *res Judicata* does not apply in proceedings in execution of decree. Therefore an order refusing to award mesne profits in execution is not final, but such question is open to re-adjudication on a subsequent application for execution.—*Rup Kunwari v. Ram Kirpal*, 3 A. 141.

A judgment-debtor is not estopped from contending that a previous application for execution was barred by limitation, merely because notice had been served upon him and he did not appear and contest the proceedings; *Umed Ali v. Abdul Karim*, 8 C. L. J. 193. See also *Halyan Singh v. Jagan Prosad*, 37 A. 589; 13 A. L. J. 828; But see *Gour Chand v. Janardhan*, 4 Pat. L. T. 204.

Where the previous application for execution was different from the subsequent application, the principle of *res judicata* does not apply, *Haji Ashfaq v. Gouri Sahai*, 13 C. L. J. 351 P. C.; 15 C. W. N. 370, P. C.; 33 A. 264.

An order in prior execution proceedings which does not decide the point raised in a later application does not operate as *res judicata*; *Kandasamy Chettiar v. Maruda Pillay*, 18 L. W. 652; (1923) M. W. N. 835.

Omission of the judgment-debtor to take objection, at the time of attachment before judgment that the attached property was not saleable, is no bar to take such objection in subsequent execution proceedings; *Basiram v. Kattyayani*, 38 C. 448; 15 C. W. N. 795.

In an application for execution for possession and mesne profits, the Court passed an order for delivery of possession, making no reference whatever to the mesne profits. Held that the decree-holder's subsequent application for execution for mesne profits was not barred by *res judicata*.—*Nityanada v. Gajapati*, 24 M. 681.

The fact that the decree-holder does not choose to proceed with the execution and the case is struck off does not entitle any party to reopen the question upon which there has been a previous adjudication.—*Musat Pura v. Behari Lal*, A. I. R. 1923 Nag. 1.

**Decision upon Questions Decided in the Review Proceedings If Operates as Res Judicata.**—The decision upon questions raised and decided in the review proceedings is *res judicata*; *Ramgopal v. Prasanna*, 2 C. L. J. 508: 10 C. W. N. 520. Followed in *Kailash Chunder v. Gopal Chunder*, 18 C. W. N. 1201. But see *Gulab Koer v. Badshah*, 10 C. L. J. 420: 13 C. W. N. 1197 and *Srish Chunder v. Trigna*, 40 C. 541.

**Dekkhan Agriculturists' Act.**—The Dekkhan Agriculturists' Relief Act (XVII of 1879) is in relief of a certain class of His Majesty's subjects, and therefore, the decision in a former suit for the recovery of interest on a mortgage cannot affect and be *res judicata* in the subsequent suit brought under the above Act, which is of a different character given to it by a special law, unless the previous suit also falls within the class of suit to which that law applies; *Vithal Ram Chandra v. Sitabai*, 30 B. 548: 14 Bom. L. R. 579.

**Adjudication in accordance with Oaths Act If Operates as Res Judicata.**—An adjudication by a court on an oath made by one of the parties to the suit would make the matter or issue covered by the adjudication *res judicata* in a subsequent litigation between the same parties, though the subject matter of the suit is different; *Sanyasi v. Ardaswaro*, 36 M. 287: 24 M. L. J. 821. See however, *Keshava v. Rudran*, 5 M. 259.

**Decision of Arbitrators.**—A judgment and decree passed in terms of an award under (Sch. II, r. 16), constitute *res judicata*.—*Vyankatesh Chimaji v. Sakha Ram Daji*, 21 B. 465. (7 C. 727; 9 C. L. R. 877, *folld.*); see also *Muhammad Newaz v. Alam Khan*, 18 C. 414 (P. C.) and *Krishna Panda v. Balaram Panda*, 19 M. 290; *Rajah of Ramnad v. Venkatasubba Aiyar*, 29 M. L. T. 322: 44 M. 514: 41 M. L. J. 288: 63 L. C. 205. But an award in excess of the jurisdiction of the arbitrators is not *res judicata*.—*Har Sankar v. Lal Raghuraj*, 29 A. 519, P. C.: 6 L. J. 13: 11 C. W. N. 841: 17 M. L. J. 854: 9 Bom. L. R. 757.

The mere fact that an arbitration award is not strictly in accordance with the terms of the reference to arbitration, does not render the decree in which the award is incorporated void for want of jurisdiction and the decree operates as *res judicata* to bar a subsequent suit in respect of the same cause of action; *Sibnath v. Mohes Chandra*, 59 I. C. 89.

**Private Award.**—A valid private award, even though neither party has sought to enforce it by suit or application under (Sch. II, r. 20), operates as *res judicata* relating to the same matter—*Bhajahari Shahu v. Behary Lal*, 33 C. 881: 4 C. L. J. 162. See *Jadu Nath v. Kailas*, 10 C. L. J. 41.

**Refusal to file a Private Award.**—Refusal of a Court to file a private award will not operate as *res judicata* in a subsequent suit to enforce the award; *Kunji Lal v. Durga Prasad*, 32 A. 484; 7 A. L. J. 425; *Shib Charan v. Ram Chandra*, 33 A. 490; 8 A. L. J. 315; *Basant Lal v. Kunji Lal*, 28 A. 21; *Rajmal Girdhari Lal v. Maruti Shivram*, 45 B. 329: 22 Bom. L. R. 1877; 59 I. C. 755.

**Condition (5).**—The Matter Directly and Substantially in Issue in the Subsequent Suit must have been Heard and Finally Decided by the Court—In the First Suit—Explanation V.

"Has been heard and finally decided in the former suit."—To constitute a matter *res judicata*, it is not sufficient that the matter

21, r. 58; *Govindasami v. Peramal Raja*, 1927 M. W. N. 53; A. I. R. 1927 M. 327; 99 I. C. 833.

The rule that an unsuccessful claimant in execution-proceedings must establish his right by a regular suit within one year at the expiration of which the order passed in execution becomes conclusive, applies in the case of defendant also; and the fact that the purchaser has filed the present suit before the year had expired, does not exempt the defendant from this rule.—*Namagaudu v. Paresha*, 22 B. 640; and *Surnamoyi Dasi v. Ashutosh*, 27 C. 714. Approved in 74 P. L. R. (1901).

An order passed under Or. XXI, r. 58 rejecting a claim after investigation, will, if not contested by regular suit, estop the claimant from afterwards pleading adverse possession at the date of the order in a suit brought to eject him by the decree-holder.—*Velayuthan v. Lakshmana*, 8 M. 506. Followed in *Achuta v. Mammuru*, 10 M. 357, where a claim under Or. XXI, rr. 97 and 100 was rejected after investigation. See also *Bailur Krishna v. Lakshmana*, 4 M. 302; *Krishnaji Vithal v. Bhaskar Rangnath*, 4 B. 611. *Ram Das v. Mulchand*, 89 P. L. R. 1949. But see *Gend Lal v. Deno Nath*, 11 C. 673, and *Gnanambal v. Parcati*, 15 M. 477.

A decision of Calcutta Small Cause Court disallowing a claim under Or. XXI, r. 58 is a bar to a regular suit under Or. XXI, r. 63.—*Ismail Solomon v. Mahomed Khan*, 18 C. 296. Followed in *Deno Nath v. Nuffer Chunder*, 26 C. 778; 4 C. W. N. 590.

Where a third party claiming lands objects to the delivery of possession, such objection comes under Or. XXI, r. 58 and not under Or. XXI, r. 99. Therefore, the order allowing the objection does not operate as *res judicata* in a subsequent suit for establishment of right to possession.—*Mahabir Prasad v. Parma*, 14 A. 417.

An investigation under Or. XXI, r. 99, is limited to the fact of possession, and is no bar to a subsequent suit brought to try the title to the land in dispute; *Chinnasami v. Krishna* 3 M. 104. See however *Maula Khan v. Gari Khan*, 14 B. 627. See also *Kadambini v. Doyaram*, 11 C. L. J. 478.

In a claim suit the decision will be *res judicata* as between the judgment-debtor and the claimant in regard to the whole of the property involved provided the Court passing the decree had jurisdiction covering the value of the property in suit. It does not matter whether the judgment-debtor confesses judgment or denies the claim and the fact that it is decided after trial of the issues is immaterial. But it will not be *res judicata* where the judgment-debtor though *pro forma*, a party, has no interest of any kind in the decision; but confession of judgment is not equivalent to absence of interest; *Sada Begun v. Mihrchand*, 39 P. W. R. 1913; 89 P. L. R. 1913; 82 P. R. 1913; 18 I. C. 120.

**Interlocutory orders.**—A decision of a merely interlocutory character passed in the course of the same suit, without determining the main question in the suit which was still open, and must be decided in final decree in the suit is not a final determination within meaning of this section.—*Deo Kishen v. Banshi*, 8 A. 172 (F. B.).

A decision under r. 5 of Or. XXII of the C. P. Code, that a person is not the legal representative of the deceased plaintiff, does not bar a subsequent suit brought by such person as such legal representative; *Pakkai v. Pathmma*, 25 M. L. J. 270; 14 M. L. T. 176.

some other ground, the finding of the lower Court will not stand concerning matters not referred to by the Appellate Court; *Venganal Raja Vasudeva v. Ramakutty*, 24 M. L. T. 54: 50 I. C. 100.

An appellate judgment operates by way of estoppel as regards all findings of the Lower Court which though not referred to in it, are necessary to make the appellate decree possible only on such findings; *Narayanan v. Kananammai*, 28 M. 338.

Two appeals were filed against a decree of a Munsif. The Lower Appellate Court dismissed both the appeals. A second appeal was filed against one of the decrees only, held, that there being a final and binding decree between the parties, it operated as *res judicata* and the appeal was not maintainable; *Balhari v. Sirasampat*, 18 A. L. J. 40.

To conclude a party by a plea of *res judicata*, it is not only necessary that the ground of legal right on which the plaintiff sues was a point raised and opened for decision, but it is also necessary to show that it was finally dealt with by the judgment and the decree therein and that there was a final decision granting or withholding the relief sought.

Where an Appellate Court confirms the decision of the trial Court by deciding on one point only without giving its decision on another point which was also decided by the trial Court, the decision of the trial Court on this point is not *res judicata* in a subsequent suit; *Iswar Sant v. Torendranath*, 42 C. L. J. 560: 92 I. C. 981: A. I. R. 1926 C. 163.

Where a matter has been heard and finally decided in the previous suit, it cannot be raised again in a subsequent suit; *Mahamad Gaus v. Rajabaksha*, 37 B. 224: 15 Bom. L. R. 266.

Where the matter was not heard and finally decided on the merits, there can be no *res judicata*; *Dasarathy Naidu v. Palkumaramul*, 24 M. L. T. 311: 1918 M. W. N. 427: 7 L. W. 557: 45 I. C. 959.

A matter will be deemed "to have been heard and finally decided" in each of the following cases: *viz.*, (1) *Ex parte* decrees; (2) consent decrees, (3) decrees upon awards; (4) decrees passed in accordance with the Oath's Act; (5) dismissal of suits under Or. IX, rr. 8 & 9; (6) dismissal of suits under Or. XVII, r. 3; (7) dismissal of suits on failure to produce evidence, because a decision passed in each of these cases operates as *res judicata* in subsequent suits, when the other conditions of *res judicata* are fulfilled. But a matter cannot be said to have been heard and finally decided unless the former decision was given on the merits. A decision based upon technical points does not operate as *res judicata*. For instance (1) dismissal of previous suit as premature, (2) dismissal of previous suit as not being proper remedy, (3) dismissal of former suit for default in appearance under Or. IX, r. 8, (4) dismissal of former suit under Or. IX, r. 2 for failure to pay process fees or postal charges or commission fees, (5) dismissal of former suit under Or. IX, r. 5, (6) dismissal of former suit for misjoinder or non-joinder of parties, (7) dismissal of former suit for multifariousness, (8) dismissal of former suit for want of jurisdiction or under valuation, (9) dismissal of former suit for want of succession certificate or probate or letters of administration, (10) dismissal of former suit for default in furnishing security for costs, (11) dismissal of former suit to pay the deficit Court fees on plaint, (12) dismissal of former suit as barred by limitation.

any date on which it should become due. Subsequently she sued for arrears of maintenance at the rate specified in the former decree. *Held*, that the suit did not lie.—*Venkanna v. Aitamma*, 12 M. 183. But a second suit for maintenance at an increased rate with arrears and for declaration of charge for change of circumstances will lie.—*Bangaru Annmal v. Vijayamachi Rediar*, 22 M. 175.

**Declaratory Decree in a Partition Suit does Not Bar a Subsequent Suit for Partition.**—Where a declaratory decree in a partition suit becomes operative by lapse of time or otherwise, a fresh suit for partition will not be barred by reason of the former decree, though that decree may operate as *res judicata* in respect of any claim or defence which was or might have been raised in the suit in which it was passed.—*Nazratullah v. Mujibullah*, 13 A. 809. Followed in *Modon Mohon v. Baikunta*, 10 C. W. N. 839: 3 C. L. J. 61-n., and in *Bisheshar v. Ram Prasad*, 28 A. 627: 3 A. L. J. 379; *Monsharam v. Gonesh*, 17 C. W. N. 521; *T. G. Mookerjee v. Afzal Beg*, 13 A. L. J. 98: 37 A. 155. See also, *Beemabai v. Yamunabai*, 13 M. 313; *Thakore Becharji v. Thakore Jujaji*, 14 B. 31; *Jagu v. Balu*, 37 B. 307: 14 Bom. L. R. 1198; *Gaman v. Imam*, 77 P. R. 1915: 164 P. W. R. 1915: 31 I. C. 205.

If by mistake or by consent of the co-owners, a partition of a portion only of the estate has been made, whether by order of the Court or otherwise, a second suit for partition of the remainder is not barred.—*Jogendra v. Baladeb*, 12 C. W. N. 127. See however, *Pursotum v. Radha Bai*, 32 A. 469: 7 A. L. J. 451.

The plaintiff sued to establish his sole right to a portion of a field, alleging that it had been allotted to him by partition. The defendant also claimed it as his share obtained by partition.—The Court finding that no partition had taken place amongst the co-parceners rejected the plaintiff's claim. *Held*, that the second suit brought for the partition of the field, was not barred; *Shivram v. Narayan*, 5 B. 27.

The plaintiff sued his father and brother for a declaration of his right to a partition of the ancestral estate, the suit was dismissed on the ground that he had no right, in his father's life time, to compel partition. After his father's death he again sued his brother for a share of the ancestral property. *Held*, that the suit was not barred.—*Lakshman v. Ram Chandra*, 15 B. 48, P. C.

Decree in a partition suit, directing the partition, and appointing a Commissioner who did nothing, does not bar a subsequent suit for partition brought by the auction-purchaser of the rights and interests of one of the co-sharers.—*Kirty Chunder v. Anath Nath*, 10 C. 97: 18 C. L. R. 249.

Dismissal of previous suit for possession of a house alleged to have been partitioned in a Court of Revenue on the ground that the partition by the Revenue Court was not proved, does not bar a subsequent suit for partition of the same house in a Civil Court.—*Bal Bhaddar Nath v. Ram Lal*, 26 A. 501.

**Judgment Obtained against One of Several Joint Contractors, If Bars a Subsequent Suit against Others.**—There is a difference of opinion among the Indian High Courts as to the effect of the judgment against one of the joint promisors, as regards the others. But the better opinion seems to be such judgment remaining unsatisfied is no bar to a subsequent suit on

*Mangar Ram*, 13 C. L. R. 83; *Deriditta v. Nathu*, 245 P. W. R. 1912: 56 P. R. 1912; 251 P. L. R. 1912: 15 I. C. 930.

**Dismissal of Previous Suit as Premature.**—A suit dismissed as being prematurely brought is not *res judicata* in a subsequent suit brought at the proper time.—*Elahee Bukah v. Sheo Narain*, 17 W. R. 860; *Ramireddi v. Subbareddi*, 12 M. 500 (8 M. 77: 10 C. 173, referred to). See also *Ganga Ram v. Kanhaiya Lal*, 27 A. 254.

**Dismissal as Not being Proper Remedy.**—The dismissal of a former suit brought by an usufructuary mortgagee to recover his mortgage money, on the ground of dispossession from the mortgaged property, does not bar a subsequent suit for possession against the same parties, and on the same cause of action.—*Deodhari Singh v. Lella Sewaran*, 8 C. L. R. 395. See also *Narasinga v. Venkatanarayana*, 16 M. 481. (7 C. 739: 9 C. 441, referred to).

**Dismissal for Default in Appearance.**—Dismissal of a suit for default in appearance of the parties does not debar a plaintiff from bringing another suit upon the same cause of action; *Gobind Chunder v. Afzul*, 9 C. 426; *Krishnai Lakshman v. Sitaram*, 5 B. 406; *Chand Kour v. Partab Singh*, 16 C. 98 P. C.; *Brindabun v. Moti*, 12 A. L. J. 53: 22 I. C. 820. *Brijnandan v. Kailash*, 24 I. C. 17; *Lachmi Narain v. Dhondu*, 12 A. L. J. 911: 24 I. C. 480; *Bukharam v. Ramji*, 10 N. L. R. 39; *Girbala v. Nitya Lal*, 41 I. C. 905; *Promotha Bhusan v. Narendra Bhusan*, 56 I. C. 932.

**Dismissal of suit for non-appearance of plaintiff in Mamlatdar's Court** does not bar a subsequent suit in the Civil Court on the same cause of action.—*Raja Ram v. Ganesh Hari*, 21 B. 91; *Ram Chandra Balaji v. Narsinhacharya*, 24 B. 251. But see *Ram Chandra v. Bhikabai*, 6 B. 477.

**Dismissal of suit for plaintiff's default to appear under Or. IX, r. 4** is a decree and bars a subsequent suit on the same cause of action; *Punam Chand v. Mallison*, 13 B. L. R. 658.

The dismissal of a suit under Or. IX, r. 8, C. P. C. is not intended to operate in favour of the defendant as *res judicata*; *Tikaram v. Ramchandra*, 54 I. C. 789.

**Dismissal for Failure to Pay Process or Commissioner's Fees.**—Dismissal of a suit on plaintiff's failure to pay costs for service of summons on defendant does not bar a subsequent suit for the same property.—*Bissesar v. Murli*, 9 C. 163; dismissal for non-payment of court-fees is no bar to a subsequent suit.—*Nagathal v. Ponnusami*, 13 M. 44; *Mahammad Salim v. Nabian Bibi*, 8 A. 282. *Irawa Lazmana v. Satyappa Mudali*, 12 Bom. L. R. 766: 35 B. 88: 7 I. C. 967. Dismissal for default in payment of Commissioner's fee is no bar to a subsequent suit.—*Shaik Sahib v. Mohamed*, 13 M. 510.

**Dismissal as Barred by Limitation.**—Dismissal of former suit on the ground of limitation does not bar a subsequent suit brought on the same cause of action.—*Price v. Khilat Chandra*, 5 B. L. R. Ap. 50. 13 W. R. 461; *Brindabun Chunder v. Dhununjoy*, 5 C. 246; see also *Lakshmandas v. Jugal Kishore*, 22 B. 216; *Gokul Chand v. Nadar Mal*, 1 P. R. 1916; *Shanchi Khan v. Karam Chand*, 73 I. C. 705.

**Dismissal for Misjoinder or Non-Joinder of Parties.**—Dismissal of a suit for multifariousness or for non-joinder of parties is not a decision on



*Jijibai*, 36 B. 189; 14 Bom. L. R. 9. See also, *Brinsamead v. Harrison*, L. R. 6 C. P. 584; and *Weggy-Prosser v. Evans*, 1 Q. B. 108 (1895), where it has been held that the cause of action in the second suit must be precisely the same as the cause of the action in the first suit in order to make the judgment in the first suit a bar to the proceedings in the second suit.

**Estoppels.**—As section 11 does not cover all cases of estoppel by judgment (*see* 36 M. 141), it therefore seems desirable to give here some important cases of estoppel by judgment. The subject of estoppel has been exhaustively treated in the Author's Annotated Edition of the Evidence Act, Section 115, and the readers may consult the notes and the cases under that section.

The distinction between *res judicata* and estoppel has already been pointed out. The one prevents the Court from trying the question which has already been tried, and the other prevents the party from gainsaying what he has said or done. The following are some examples of estoppel by judgment.

**Estoppel by Judgment.**—The doctrine laid down in the *Duchess of Kingston's* case as to estoppel by judgment, is applicable to cases tried under the C. P. Code, section 11, which is consistent with that rule.—*Khugowlee Singh v. Hossein Buz*, 7 Bom. L. R. 367; 15 W. R. (P. C.) 30.

An estoppel is not confined to the judgment but extends to all facts involved in it as necessary steps or ground-work; in other words, a judgment operates by way of estoppel as regards all the findings which are essential to sustain the judgment, though not as regards findings which did not form the basis of the decision or were in conflict therewith; *Dwijendra v. Joges*, A. I. R. 1924 Cal. 600; *Nazoo Mia v. Mazar Ali*, 43 C. L. J. 501; 95 I. C. 1011; A. I. R. 1926 Cal. 1003.

A party will be excluded against his contention by a former judgment if he could have used it as a protection, had the judgment been the other way and a person can claim the benefit of a judgment as an estoppel upon his adversary, if he would have been prejudiced by a contrary decision of the case. An estoppel is not confined to the judgment but extends to all facts involved in it as necessary steps or ground-work upon which it must have been founded.—*Lilabati v. Bishnu Chobey*, 6 C. L. J. 621. (28 M. 338, *refd.* to).

Judgment not operating as *res judicata* is still strong evidence of title.—*Trailokya Mohini v. Kali Prosanna*, 11 C. W. N. 380.

Certain property conveyed by one Abdul Ali to his wife was purchased by one G at a sale in execution of a mortgage decree against the wife. In a previous suit to which G and all the heirs of Abdul Ali were parties, it was held that the heirs of Abdul Ali were estopped from showing that the conveyance by Abdul Ali was a fictitious transaction and a decree was made in G's favour. In a subsequent suit between G and one B who was no party to the previous suit. Held, that B was not estopped by that decree from disputing G's title to the property.—*Brojendra Kumar v. Gopi Mohan*, 7 C. W. N. 574.

An adoption having been held valid by the High Court on appeal from a subordinate Court, an appeal to the Privy Council was preferred. when the parties entered into a compromise, and the appeal was permitted to be withdrawn. Held, that the decree of the High Court as to

**Order Rejecting Plaint If Res Judicata.**—An order rejecting a plaint after a full trial on the merits and recording a finding adversely to the plaintiffs bars a subsequent suit for the same subject-matter and based on the same cause of action. The finding in the previous suit operates as *res judicata* to bar the subsequent suit; *Santhanathammall v. Isaki Suppan Sari*, 1920 M. W. N. 616: 12 L. W. 457: 60 I. C. 694.

**Incidental Findings When Res Judicata.**—In order that an incidental finding in one proceeding shall be *res judicata* in another, it is essential that the issue in the second proceeding should have been raised and decided clearly in the first; *Kalandar v. Kalandar*, 41 M. L. J. 437: (1921) M. W. N. 754: 14 L. W. 702.

**Orders Interlocutory or Otherwise, When Res Judicata.**—The validity of an order made at one stage of a litigation unless forthwith challenged by an appropriate proceeding in a superior tribunal is conclusive between the parties and cannot be questioned or collaterally attacked at a later stage; *Raja Sasi Kanta v. Chandra Rai*, 34 C. L. J. 415. The principle of law underlying s. 11 applies to interlocutory orders; *Hitendra Singh v. Maharajadhiraj Sir Rameshwar Singh*, 2 Pat. L. T. 628.

**Summary Dismissal of Miscellaneous Application for Setting Aside Compromise Decree does Not Bar Suit for Same Relief.**—A summary dismissal of an application under s. 151 challenging the validity of a compromise-decree is not a bar to a subsequent suit brought for the purpose of avoiding the decree on the ground of fraud; *Parshan Sahi v. Richardsor*, 5 Pat. 276: A. I. R. 1926 Pat. 287.

**Dismissal of Insolvency Application for Non-production of Evidence.**—Dismissal of previous application to be declared insolvent does not bar a second application by the principle of *res judicata*; *Salig Ram v. Ram Krishan*, 10 A. L. J. 51: 15 I. C. 51.

**Dismissal of an Application under Or. XXI, r. 2.**—Dismissal of an application by judgment-debtor under Or. XXI, r. 2, bars a subsequent suit by him for recovery of the money alleged to have been paid by him by way of adjustment; *Manurath v. Rajlumari*, U. B. R. (1909), 2nd Quarter 31.

**Explanation V.**—"Any relief claimed in the plaint which is not expressly granted by the decree."—According to this explanation any relief claimed in a suit, but which is not expressly granted by the decree, shall be deemed to have been refused. The effect of the omission to grant, by the decree, the relief asked for in the plaint amounts to an express refusal, and the matter in respect of which the relief was claimed, but not expressly granted, will be treated as *res judicata* in a fresh suit. The relief claimed must have been substantial relief and not one claimed only as ancillary to the main relief. See *Fatmabai v. Aishabai*, 13 B. 242; and it must be such relief which the plaintiff being entitled to claim as of right, asked for it and the Court was bound to grant it with reference to the matter directly and substantially in issue, and not one which the Court in the exercise of its discretion may refuse to grant. See *Thyila Kandi v. Thyila Kandi*, 4 M. 808.

For instance, where a plaintiff under Or. III, r. 4 of the C. P. Code claims for recovery of possession of immoveable property and also for rents and profits which accrued due on the property during the

**Estoppel by Deeds.**—The defendant having obtained possession of some land under a deed of sale from P, who had no title to it, afterwards perfected his title by purchase from the real owner. In a suit for recovery of possession of the land brought by the plaintiff, claiming to be a subsequent purchaser from P, on the ground that the previous purchase by the defendant was a fraudulent one—*held*, that the defendant was not estopped from denying P's title and setting up his own as purchaser from the real-owner. Sections 115, 116 and 117 of the Evidence Act are not exhaustive of the doctrine of estoppel by deed.—*Rupchand v. Sarbessur*, 33 C. 915: 10 C. W. N. 747: 3 C. L. J. 629.

Where a non-transferable holding is sold by a tenant by a *kobala*, he is estopped from setting up the invalidity of the sale by him—*Bhagirath v. Hafizuddin*, 4 C. W. N. 679. See 27 A. 684.

A son, against whom a suit ought to have been instituted, conducted on behalf of his mother a suit wrongly brought against her: *Held* that the decree in that suit was not binding on the son, and did not estop him, in a subsequent suit against him from contesting the validity of that decree.—*Mohunt Das v. Nil Romul*, 4 C. W. N. 283. But see *Lilabati v. Bishun Chobey*, 6 C. L. J. 621.

Where a person chooses to entrust to his own man a blank paper duly stamped as a bond and signed and sealed by himself in order that the instrument may be duly drawn up and money raised upon it for his benefit, it must, in the absence of any evidence to the contrary, be taken that the bond was drawn up in accordance with the obligor's wishes and instructions.—*Wahidunnissa v. Durga Dass*, 5 C. 89.

On this point, see notes and cases under s. 115 of the Author's Evidence Act.

**Estoppel by Conduct.**—In determining whether an estoppel has been created, the main question is whether the representation has caused the person, to whom it has been made, to act on the faith of it.—*Helan Dasi v. Durga Das*, 4 C. L. J. 323.

No general rule can be formulated as to when silence may operate as estoppel. The presence of the silent party, when the transaction takes place, makes a much clear case of estoppel than when he is absent. When a party fails to make his rights known, where fairness and good conscience require that he should do so to protect the interest of others, he cannot be heard as against them to assert such rights.—*Thomas Barclay v. Syed Hossein Ali*, 6 C. L. J. 601.—*Jokhomull v. Saroda Prasad*, 7 C. L. J. 604. When silence amounts to fraud, see *Joy Chandra v. Sree Nath*, 32 C. 357: 1 C. L. J. 23: 9 A. 413.

Where A, having used a document in a suit and disclaimed all right under it as a will, brought a suit to recover property in which he set up the document as a valid will. *Held*, that A having abandoned all right to it as a will, could not again use it as a will though for a different purpose.—*Raghoonadha v. Kattami Nauchear*, 10 W. R. (P. C.) 1.

A minor, who, representing himself to be a major and competent to manage his own affairs, collects rents and gives receipts therefor, is estopped by his conduct from recovering again the money once paid to him by instituting a suit through his guardian.—*Ram Ratan v. Shew Nandan*, 29 C. 126.

possession, a separate suit will lie for such subsequent mesne profits; sections 11 and 47 being no bar to it.—*Mon Mohun v. Secretary of State*, 17 C. 908. Applied in *Lalcessor Babui v. Janaki Bibi*, 19 C. 615. Followed in *Ram Dayal v. Madan Mohun*, 21 A. 425 F. B., in 10 B. 532; and in *Hays v. Padmanand Singh*, 32 C. 118, in 2 N. L. R. 91 and in *Misau v. Nya Meik*, (1915) U. B. R. 81: 31 C. 103. See also *Rambhadra v. Jagannatha*, 14 M. 328: 15 M. L. J. 462: 5 A. L. J. 192: 30 A. 225: 1 L. B. R. 13; *Mi Sa U v. Nya Meik*, (1915) U. B. R. 81: 31 I. C. 103; *Mahomed Ishay Khan v. Mahomed Rustam Alikhan*, 40 A. 202: 16 A. L. J. 182: 44 I. C. 88; *Ramaswami Iyer v. Srirangaraja Iyengar*, 2 L. W. 8: 26 I. C. 622.

Where in a suit for partition past as well as future mesne profits are asked for, but the Court in decreeing partition only awards past mesne profits and makes no mention of the future mesne profits, a separate suit for such future profits is barred under Explanation V to s. 11 of the C. P. Code; *Atmaram v. Parshram*, 22 Bom. L. R. 982: 58 I. C. 419.

Where after a suit for possession and mesne profits past and future had been brought and decided and a decree had been obtained for possession and past mesne profits, without the claim to future mesne profits being decided, a second suit was brought to recover mesne profits from institution of the first suit till delivery of possession. *Held per Wallis, C. J. and Kumaraswami Sastri, J., (Ayling, J., dissenting)* that the second suit was maintainable; *Dorasami Aiyar v. Subramani Aiyar*, 41 M. 188: 33 M. L. J. 699: (1917) M. W. N. 847: 6 L. W. 784: 42 I. C. 929; 22 M. L. T. 484 (F. B.).

A decree in a suit for possession and for mesne profits prior to the institution of the suit, awarded possession, but was silent as regards mesne profits. In a subsequent suit the plaintiff claimed mesne profits prior to the institution of the first suit and also mesne profits for a period subsequent to that suit. *Held* that the claim for mesne profits prior to the institution of the first suit was barred; *Jiban Das v. Durga Pershad*, 21 C. 252, *refd. to in Kachu v. Lakhman Singh*, 25 B. 115.

This explanation refers to relief applied for which the Court is bound to grant, with reference to the matters directly and substantially in issue. The words "relief claimed" apply only to something which forms part of the claim, i.e., something which the plaintiff may claim as of right, something included in his cause of action, and which, if he establishes his cause of action, the Court has no discretion to refuse; *Ram Rayal v. Madan Mohun*, 21 A. 425 F. B. See also *Thuala v. Thuala*, 4 M. 308.

Where a mortgagee in suing upon his mortgage included in his plaint certain property not included in the mortgage-deed and this fact was apparently overlooked by the defendant who defended the suit *Held* that the decree must be held to mean the hypothecated property mentioned in the plaint, and that neither section 11 and 47 excluded the defendant from subsequently suing to recover the property wrongly included in the plaint.—*Ram Chunder v. Kondo*, 22 A. 442: *Refd. to in 7 M. L. T. 191.*

Where no relief was asked for or granted against a person in the former suit, though he was a party to it, the subsequent suit is not barred by *res judicata*.—*Ram Das v. Vaziraheb*, 25 B. 589.

A defendant is not precluded from pleading fraud in a suit brought against him, although he may have himself brought an unsuccessful suit to

that he is an occupancy ryot, and is therefore not liable to be ejected.—*Sutyabhama v. Krishna Chunder*, 6 C. 55; 6 C. L. R. 375.

A defendant in a suit who contended that the plaintiff ought to proceed under s. 47 is estopped from objecting in execution that a suit was his proper remedy.—*Gaya Prasad v. Randhir Singh*, 28 A. 681; 3 A. L. J. 456; See also *Hara Dhan v. Purna Chandra*, 11 C. W. N. 145, where it has been held that the defendant who objected in an appeal preferred against an order under Or. XXI, r. 58, that an appeal does not lie against that order, is estopped, in regular suit brought by the plaintiff from raising the question that the suit is barred by s. 47.

Where a judgment-creditor in execution of money-decree sells property, as belonging to his judgment-debtor, he is afterwards estopped from enforcing as against the purchaser, a previous mortgage of the property which has been created in his own favour, but of which he has given no notice at the time of the sale and in ignorance of which the purchaser has bid for the property and paid the full price.—*Agar Chand v. Rakhma Hanmant*, 12 B. 678. Referred to in *Jaganatha v. Gangi Reddi*, 15 M. 303. See also *Kasturi v. Venkata Chalapathi*, 15 M. 412.

See cases under s. 115 of the Author's Evidence Act.

**Equitable Estoppel—Acquiescence.**—Acquiescence under such circumstances that assent may be reasonably inferred from it is no more than an instance of the law of estoppel by words or by conduct; in other words, acquiescence does not mean simply an active, intelligent consent, but may be implied, if a person is content not to oppose irregular acts which he knows are being done.—*Ananda Chandra v. Parbati Nath*, 4 C. L. J. 198. See the article in 9 C. L. J. p. 47-n—53-n.

Inaction of an agent, whose authority is limited in regard to the construction of a building by a vendee of a tenant does not amount to an acquiescence and is not binding on the principal.—*Raj Narain v. Budh Sen*, 27 A. 338. (*Ramsden v. Dyson*, L. R. I. E. and I. A. 129, referred to).

In order to raise an equitable estoppel against the landlord, it is incumbent upon the tenant to show that, in spending money in erecting the pucca buildings, he was acting under an honest belief that he had a permanent right in the land, and the landlord knowing that he was acting under such belief, stood by and allowed him to go on with the construction of the buildings.—*Ismail Khan v. Jaigun Bibi*, 27 C. 570; 4 C. W. N. 210. See also *Nundo Kumar v. Banomali*, 29 C. 871.

To raise an equitable estoppel against the landlord precluding him from suing, on the determination of the tenancy, for possession, the tenant should show facts sufficient to justify the legal inference that the landlord has by plain implication contracted that the right of tenancy should be changed to a right of permanent occupancy.—*Beni Ram v. Kundan Lal*, 21 A. 496 (P. C.); 3 C. W. N. 502 (P. C.). See also *Krishna Kishore v. Mir Mahomed Ali*, 3 C. W. N. 255; *Noyna Misser v. Rup Kun*, 9 C. 609; and *Nounipal Bhagot v. Rameshar Bhagat*, 16 A. 328.

Long possession, transfer of the holding by succession and purchase, erection of pucca building with the permission of landlord, by successive tenants, are sufficient for presumption that the tenancy is a permanent one. The question of acquiescence is not a question of fact, but of legal inference from facts.—*Caspersz v. Kedar Nath*, 28 C. 788; 5 C. W. N. 858. See also

quence of no appeal having been preferred therefrom, such order will, upon a subsequent application for execution of the same decree, operate as a bar to execution.—*Mungul Pershad v. Grija Kant*, 8 C. 51, P. C.; *Khosal v. Ukiladdi*, 14 C. W. N. 114; *Bandey Karim v. Romesh Chunder*, 9 C. 65; *Manjunath v. Venkatesh*, 6 B. 54; *Futteh Narain v. Chundrabati*, 20 C. 551, p. 500; see also, *Dali Chand v. Bai Shirkar*, 15 B. 212; *Nepal v. Amrita Lal*, 26 C. 888; *Narendra v. Bhupendra*, 23 C. 374 and *Raja Thakur Barham v. Ananta Ram*, 2 C. L. J. 584; *Doorras Seeshadri Aiyar v. Govindaswami Pillai*, 13 L. W. 529: 1921 (M. W. N.) 314: 40 M. L. J. 550: 63 I. C. 189. The principle which underlies the decision in the case of 8 C. 51 P. C. is not applicable unless it is proved that the judgment-debtor had an opportunity to challenge the validity of the execution proceedings and failed to avail himself of it; *Mochai v. Misruddin*, 18 C. L. J. 26; *Mozam Hussien v. Sarat Coomary*, 11 C. L. J. 357: 14 C. W. N. 114; *Monmohan v. Dirakaranath*, 12 C. L. J. 812; *Sarat v. Khalil*, 11 C. L. J. 501; *Bholanath v. Prafulla*, 28 C. 122: 5 C. W. N. 80; *Hiralal v. Dwija Charan*, 3 C. L. J. 240: 10 C. W. N. 209; *Jnanada v. Nokuleswar*, 11 C. W. N. 230; *Vyapuri v. Chidambara*, 37 M. 814: 24 M. L. J. 26; *Varadiah v. Kumara Venkata*, 26 M. L. J. 83: 14 M. L. J. 530: (1914) M. W. N. 157; *Varadaraja v. Murugesam*, 18 M. L. T. 818: (1915) M. W. N. 769; *Kalian Singh v. Jagan Prasad*, 13 A. L. J. 162

Although the doctrine laid down in s. 11, C. P. Code may be applied to certain proceedings in execution arising out of the same judgment so as to put an end to the litigation and may possibly be applied in certain cases when separate suits have been brought raising points which have already been decided in execution cases fought between the same parties, the special rules laid down in the Expl. to s. 11 which go beyond the ordinary doctrine of *res judicata* ought not to be applied generally to execution cases; *Pirithi Mahton v. Jamshed Khan*, 3 Pat. L. T. 403: 67 I. C. 658.

A decision on an application to execute a decree that the application is barred by limitation does not operate as *res judicata* in a subsequent application to execute the decree; *Venkatesh v. Shrinivas*, 46 B. 467.

It is not competent to a judgment-debtor to bring forward any plea that would bar the execution of the decree on an occasion when its executability is adjudicated upon, but it is also incumbent on him to do so if he purposes to rely on any such plea. Where a plea of limitation was as a matter of fact raised by the judgment-debtor in a prior stage of an execution application but was rejected and the decree-holder was allowed to execute the decree—*Held*, it was not competent for the Court to admit the same plea on the subsequent final proceedings in execution of that decree; *Raja of Ramnad v. Velusami Tevar*, 40 M. L. J. 197: 29 M. L. T. 345: 25 C. W. N. 581: 33 C. L. J. 218: 23 Bom. L. R. 701: 19 A. L. J. 168: 59 I. C. 880: 48 I. A. 45 P. C.; *Kidarnath v. Radha Kishan*, 67 I. C. 65; *Dambar Singh v. Kallyan Singh*, 44 A. 350; *Gour Chandra v. Janardhan*, 68 I. C. 337.

There is nothing to prevent persons who are ascertained to have ventured out of which the case is proposed on all these applications, is that if there has been a previous application in which there has been a definite decision affecting a particular piece of property or particular person and from that decision nothing has been done by way of appeal or institution of suit, that decision is a final decision

that the effect of his action will be to confirm it.—*Dhanukdhari Singh v. Nathuni Sombu*, 6 C. L. J. 62: 11 C. W. N. 848. See also 11 C. L. J. 364, p. 370.

If the provisions of law are waived in the course of a trial, they cannot afterwards be set up by way of objection to any step taken or about to be taken upon the footing of the waiver; when a litigant has, without mistake induced by the opposite party, taken a particular position in the course of a litigation he must act consistently with it, specially, if to allow him to do otherwise would be to prejudice his opponent.—*Manindra Chandra v. Secretary of State*, 34 C. 257: 5 C. L. J. 148.

A judgment-debtor who obtains an adjournment of sale upon the condition that he would not raise any objection on the ground of irregularity and inadequacy of price does not waive his right to question the sale on the ground of fraud.—*Ambika Prasad v. Whitewell*, 6 C. L. J. 111.

**Estoppel with regard to Benami Transactions.**—See notes under s. 66 under the headings "*Benami Transfer: Fraudulent Intention: Estoppel.*"

**12.** Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies. [New.]

## COMMENTARY.

**Section is New.**—This section is new and is necessiated by the transfer of certain of the provisions of the Code of 1882 to Rules of the present Code—*Notes on clauses appended to the Report of Special Committee.*

**"Precluded by rules."**—The Rules by which a plaintiff is precluded under the present Code from instituting a fresh suit in respect of the same cause of action are (i) Or. II, r. 2 which deals with omission by plaintiff to sue in respect of or relinquishment by him of part of the claim; (ii) Or. IX, r. 9 which precludes the plaintiff from bringing a fresh suit in respect of the same cause of action where his suit is dismissed for default in appearance; (iii) Or. XXII, r. 9, which provides that an abatement or dismissal under that order bars a fresh suit in respect of the same cause of action, and (iv) Or. XXIII, r. 1 which provides that the withdrawal of a suit or abatement of a part of a claim without leave a Court bars a fresh suit.

The word "Rules" has been defined in section 2 (18) and the effect of the Rules contained in schedule I is to be found in Part X of this Code. The provisions of section 2 (18) and of sections 122 and 125 should be read with this section.

It should be noted here that the operation of this section is limited to Courts to which this Code applies; it follows, therefore, that this section is not applicable to Revenue or other Courts to which the provisions of the Code do not apply, nor the section applies to the provisions contained in Schedules II and III.

Principles of *res judicata* apply generally to execution-proceedings, and also to the personal liability of the judgment-debtor to satisfy the decree where the point was raised and actually contested in the previous execution-proceedings.—*Budan v. Ram Chand*, 11 B. 537. Referred to in *Narayana Pattar v. Gopal Krishna*, 28 M. 355; 15 M. L. J. 217. See *Ramasami v. Ramasami*; 30 M. 255; 17 M. L. J. 201; 2 M. L. T. 167.—Approved in 5 M. L. T. 203; *Chunni Lal v. Triham Das*, 18 N. L. R. 78-39 I. C. 845.

When an order of satisfaction of decree is entered by Court in execution and is not set aside, it operates as *res judicata* and bars a subsequent application for execution; *Mulraj v. Kishorilal*, 91 I. C. 172; A. I. R. 1926 L. 518.

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Where any matter is decided under section 47 C. P. Code 1908 between the parties in execution of a decree, it cannot be made the subject of a separate suit.—*Kali v. Kedar*, 6 C. L. R. 215; see also *Basudeo v. Seolajy*, 14 C. 640.

Where at one stage of an execution proceeding an order is made disallowing the objections of the judgment-debtor, the order is binding in all subsequent stages of the same execution (42 C. 440 *refd. to*).; *Kshitindra v. Nawab Khawja Habibulla*, 64 I. C. 724.

Although a decree does not in express terms give a certain relief, yet if it is construed by the Court in an application for execution as having given that relief, the Court is not competent on subsequent applications to put a different construction on the decree.—*Venkatanarasimha v. Pammah*, 19 M. 54; see also *Ram Kripal v. Rup Kunwari*, 6 A. 269, P. C.; *Baniram v. Nanhumal*, 7 A. 102 P. C. *Basudeo v. Seolay* 14 C. 640, and *Norendra v. Bhupendra*, 23 C. 374; *Collector of Shajhanpur v. Kunj Behari*, 32 A. 210; 7 A. L. J. 100.

A privity exists between an execution-creditor and a purchaser at a Court sale. Therefore, when the plea of estoppel is available to a decree-holder, it is likewise available to the auction-purchaser as his representative.—*Krishnabhupati v. Vikrama*, 18 M. 13 (20 B. 296, *followed*).

An application under s. 63 of Act II of 1874 is a "suit." Therefore, the principles of *res judicata* apply to applications under the Administrator-Generals Act.—*Smith v. Secretary of State*, 3 C. 340.

**Principles of Res Judicata When Inapplicable to Execution Proceedings.**—Though orders in execution proceedings do not come directly within the language of what is now s. 11 of the C. P. Code, yet such orders if not appealed from are binding on the parties in subsequent proceedings on principles analogous to those of *res judicata* strictly so called. Where an execution application was rejected on the ground that it was not in accordance with law and the decree-holder acquiesced in this order and did not appeal, held that the order was final and could not be questioned in further proceedings; *Jagannath v. Behari Lal*, 72 I. C. 473.



thereby adjudicated upon, except in the cases provided in clauses (a) to (f) of this section.—*Indar Singh v. Thakur Singh*, 3 Lah. L. J. 317: 63 I. C. 387; *King v. Buchanan*, 9 B. L. T. 106.

*A foreign judgment can be final even when an appeal is pending in a Foreign Court.*—A foreign judgment may be final or conclusive though it is subject to appeal and though an appeal against it is actually pending in the foreign country where it was given; *Hari Singh v. Muhammad Said*, 8 Lah. 54: A. I. R. 1927 Lah. 200.

**Clause (a).**—Where a judgment was pronounced by a competent foreign court having territorial jurisdiction over the person or property of the litigants, such judgment may operate as *res judicata* in British Indian Courts, but if it was passed by a foreign court without jurisdiction then it will not be conclusive. The leading decision on this point is that of *Gurdayal Singh v. Raja of Faridkot*, 22 C. 222: 21 I. A. 171: 34 P. R. 1898, where it was held by their Lordships of the Privy Council that “as a general rule the plaintiff must sue in the Court to which the defendant is subject at the time of suit. Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory, while they are within it, but it does not follow them after they have withdrawn from it and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory; but no territorial legislation can give jurisdiction, which any Foreign Court ought to recognise, against foreigners, who owe no allegiance or obedience to the power which so legislates. In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced in *absentum* by a Foreign Court, to the jurisdiction of which the defendant has not in any way subjected himself, is by International Law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the Courts of every nation, except (when authorised by special local legislation) in the country of the former by which it was pronounced.” In other words, a Foreign Court cannot assume jurisdiction in cases where the claim is a personal one, merely because the cause of action arose within its jurisdiction. In the case of personal claims, it is residence alone that gives jurisdiction in a suit against a foreigner.—*Jivappa v. Jurgi*, 40 B. 551: 36 I. C. 363; *Lakshmishankar v. Vishnuram*, 24 B. 77; *Nalla v. Mahomed*, 20 M. 112; *Christien v. Delanney*, 26 C. 931; *Kassim Mamoojee v. Isuf*, 29 C. 509; *Hari Singh v. Muhammad Said*, 8 Lah. 54: A. I. R. 1927 Lah. 200.

Whether a foreign court is or is not a court of competent jurisdiction within the meaning of s. 13 (a) has to be determined in accordance with the principles of international law and not in accordance with the law of the country in which the foreign court is situated. Where a defendant submits himself to the jurisdiction of a foreign court and takes the chance of a judgment in his favour, there is a duty cast on him to obey that judgment if it goes against him; but where his appearance is not voluntarily but brought under duress, the case is treated as though he had not appeared. When, therefore a defendant appeared in a foreign court under protest because “he did not want to be arrested when he went there on business,” and a decree having been passed against him, the decree-holder applied in British India under s. 44 of the C. P. Code for execution thereof. Held, that the mere intention of avoiding an inconvenience that might happen in the future did not make the defendant's appearance involuntary and

A declaration by a Court in execution-proceedings, that a person not a party to the suit applying for execution is legitimate, since it is made without jurisdiction, cannot be pleaded as a bar to a regular suit in which it is sought to establish the illegitimacy of the applicant.—*Abidunnissa v. Amirunnissa*, 2 C. 327, P. C.

Where there were two inconsistent decisions in an execution proceeding, the latter decision will prevail and operate as *res judicata*.—*Dambar v. Munwar Ali*, 37 A. 531: 13 A. L. J. 764.

Order disallowing plaintiff's objections raised in execution-proceedings, not in his character as a judgment-debtor but in a different and quite an independent character, does not operate as *res judicata*.—*Gourmoni v. Juggut Chundra*, 17 C. 57.

A judgment-debtor, against whom an order for execution has been obtained behind his back, is not estopped from afterwards contending that there exists no decree which can be executed.—*Ishwar Das v. Dosibai*, 7 B. 316.

Where an objection petition in an execution proceeding is dismissed for non-prosecution, there is no adjudication on the merits and hence it cannot be *res judicata*;—*Bahir Das v. Girish Chandra*, 67 I. C. 603.

A judgment-debtor who was not a party to previous application for execution of a decree or to any order made upon it is not precluded from showing that the said application was barred by limitation and therefore it was not in accordance with law;—*Sita Nath v. Ram Kanak Prabha*, A. I. R. 1923 C. 322.

Order in execution-proceedings that a deed was valid does not operate as *res judicata* in a subsequent suit between the same parties with regard to the question of the validity of the deed.—*Dinkar Ballal v. Hari Shridhar*, 14 B. 206.

Dismissal of former application for execution under Or. XVII, r. 3, does not bar a subsequent application for execution, where the relief asked for in that application was different from what is asked for in the subsequent application.—*Haffizuddin v. Abdul Aziz*, 20 C. 755, p. 758.

A party is not precluded from setting up in execution-proceedings a claim which he might have set up as a plea in the suit.—*Atchayya v. Bangarayya*, 16 M. 117.

**Decision of a Question of Law in Execution Case is Res Judicata in a Subsequent Application.**—S. 11 of the C. P. Code applies to suits and an execution case is not a suit; but it is firmly established that the principle of law underlying s. 11 applies to proceedings in execution of decrees. Consequently a decision of a question of law in an execution case is *res judicata* in a subsequent application for execution of the same decree even though the view of law enunciated in the prior execution case has been since disapproved by a Full Bench,—*Ramlal v. Deodhar*, 2 Pat. 771: 74 I. C. 781.

**Effect of Orders in Claim-cases under Or. XXI, rr. 58, 97, 98, 100 & 102.**—There is no absolute rule of *res judicata* applying to execution proceedings, and it cannot be held that a man is debarred from defending his action under Or. 21, r. 89 because he desisted from his action under Or.

thereby adjudicated upon, except in the cases provided in clauses (a) to (f) of this section.—*Indar Singh v. Thakur Singh*, 3 Lah. L. J. 317: 63 I. C. 387; *King v. Buchanan*, 9 B. L. T. 106.

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**The Applicability of the Doctrine of Res Judicata to Proceedings.**—We have seen that the word "suit" in this section does not include proceedings. But it has been long recognized that the doctrine of *res judicata* applies to certain proceedings. "The Committee recognize that a proceeding does not come within the language of the section; but they think it better not to deal with the point in express terms for the reason that the applicability of the doctrine of *res judicata* to certain proceedings is not open to doubt, and they foresee that any express reference to proceedings in a crystallised definition might only lead to difficulties (L. R. 11 I. A. 37; 6 A. 269 P. C. and C. 707 P. C.)."—*Report of the Special Committee—Statement of Objects and Reasons.*

Successive applications for amendment of a decree are not barred by this section. If such an application has been heard and disposed of on the merits, a subsequent application of the same scope and character may be barred upon general principles of law; *Langat Singh v. Janki Koer*, 39 C. 265; 14 C. L. J. 481 (6 A. 269 P. C. and 7 A. 102 P. C. followed). Followed in *Jitendra v. Rasik Lal*, 27 I. C. 800.

An order made at an earlier stage in the same proceedings is binding upon the Court at a subsequent stage; *Jogendra v. Ram Gopal*, 45 C. L. J. 462; A. I. R. 1926 Cal. 611.

Where a question has already been determined under s. 47, C. P. Code, 1908, the same question cannot be re-opened under s. 64 upon general principles of law; *Umesh Chundra v. Madhu Sudan*, 9 C. L. J. 356 (6 A. 269 P. C., followed).

An *ex parte* order passed in proceedings without jurisdiction cannot operate as *res judicata*; *Sasibhusan v. Sadananda*, 92 I. C. 845; A. I. R. 1926 C. 991.

**Applicability of the Doctrine of Res Judicata in Criminal Proceedings.**—As to the applicability of the doctrine of *res judicata* to criminal proceedings under s. 133, Cr P. Code, see *Sarojebashini v. Charan*, 42 C. 702; 19 C. W. N. 832. See also, *In re Kanakasabhai*, (1915) M. W. N. 786; 33 I. C. 745, *Emperor v. Jivram*, 40 B. 97. 17 Bom. L. R. 881 and the cases referred to in the Bombay case and also the cases noted under s. 40 of the author's Evidence Act.

**Declaratory Decree.**—Where in a suit for enhancement of rent, the plaintiff failed to prove notice of enhancement, but the Court enquired into and gave declaratory decree as to his right to enhance, such decree is decisive of the right in a subsequent suit for enhancement of the rent of the same tenure founded on a valid notice—*Nuffer Chunder Paul v. Poulson*, 12 B. L. R. (P. C.) 53; 19 W. R. 175; see also *Enaetoollah v. Ameer Buksh*, 25 W. R. 225.

Former decree upon a mortgage-bond for instalments due and unpaid, with a declaration of plaintiff's right to recover instalments which were not due in execution of that decree, does not bar a second suit to recover such instalments by enforcement of lien, when the Court executing the decree refused to execute the declaratory portion of it against the mortgaged property.—*Umrao Lal v. Bchar Singh*, 3 A. 297.

A Hindu widow obtained a decree which provided that she should receive future maintenance annually at a certain rate, but did not specify

A judgment of a foreign Court obtained in default of appearance against a defendant, cannot be enforced in a Court in British India, where the defendant, at the time the suit commenced, was not subject of, nor resident in the country in which the judgment was obtained.—*Kassim Memoojee v. Isuf Mahomed*, 29 C. 509; 6 C. W. N. 829 (22 C. 222 referred to).

In a suit brought in British India on the judgment of the French Court it appeared that the defendants neither resided nor owned property in the French territory, and had no actual notice of the proceeding. Held that want of notice to the defendants was fatal to the suit.—*Bungarusami v. Balasubramanian*, 13 M. 496.

An *ex parte* judgment of a French Court against a native of British India not residing in French territory upon a cause of action which arose in British India imposes no duty on the defendant to pay the amount decreed so as to bar a suit in British India.—*Hinde & Company v. Ponnath Brayan*, 4 M. 359.

Service of summons on an agent of partnership whose members reside out of jurisdiction, does not create jurisdiction on the ground of residence; *Ramanathan v. Kalimuthu*, 37 M. 163 (20 M. 112 distinguished; 15 M. 82; 17 B. 662; 26 M. 544 and several English cases referred to).

It is quite competent to a British Indian Court, executing a decree passed by a court in a favoured Native State (that is, one in respect of which a notification pursuant to s. 44 of the C. P. Code has been issued) to go behind the decree and enquire into the question whether the Court which passed the decree had jurisdiction to do so, as a British Court ought not to execute the decree if passed without jurisdiction; *Veeraraghav Aiyar v. Muga Sait*, 39 M. 24; 27 M. L. J. 535; 26 I. C. 287 (F. B.).

**Submission to Jurisdiction.**—Where a suit is instituted in British India on the judgment of a Foreign Court, effect will be given to the judgment, though the Court had no jurisdiction over the defendant, if the defendant appears and defends the suit brought against him in that Court without making any objection to its jurisdiction.—*Gangaprasad v. Ganeshilal*, 46 A. 119; A. I. R. 1924 All. 161; 79 I. C. 332; *Sheik Atham v. Davud*, 32 M. 469. If however the defendant takes objection to the jurisdiction and in spite of his objection the case is proceeded with against him, the judgment is a nullity.

The objection to the jurisdiction must be made at an early stage of the proceedings. If no objection as to jurisdiction is made before the suit reaches the stage of appeal, it amounts to submission to jurisdiction.—*Kaliyugam v. Chokalinga*, 7 M. 105. The fact that an objection as to jurisdiction was taken in the Court of first instance in the foreign territory, but was not persisted on in appeal, is a clear proof of submission to jurisdiction of Foreign Court.—*Patinjara v. Subramania*, 29 I. C. 456.

A party who has submitted to the jurisdiction of a foreign Court is bound by its judgment, when such judgment is within jurisdiction and does not offend the principles of natural justice. Irregularities which do not affect the jurisdiction of the Court do not vitiate such judgment even when they are such as will in the view of the foreign Court, render the judgment there a nullity. The judgment cannot be impeached on grounds which could have been but were not taken in the foreign Court.—*Gudaru Kristunayya v. Moradugula*, 30 M. 202; 2 M. L. T. 260.

the contract against the other joint contractors. The question has been fully considered in 22 A. 307 and 33 M. 317; the readers should consult those two cases. It has been held in those cases that the rule laid down in *King v. Hoare* and *Kendall v. Hamilton*, is not applicable to India.

The effect of section 43 of the Indian Contract Act (IX of 1872), being to exclude the right of a joint contractor to be sued along with his co-contractors, the rule laid down in the case of *King v. Hoare*, 13 M. and W. 490 (1844), and *Kendall v. Hamilton*, 4 Ap. Ca. 504 (1879), is no longer applicable to cases arising in India, at all events in the mufussil, since the passing of that Act, and a judgment obtained against some only of the joint-contractors, and remaining unsatisfied is no bar to a second suit on the contract against the other joint-contractors.—*Muhammad Askari v. Radheram*, 22 A. 307. See also *Ramanjulu v. Araramudu*, 83 M. 317. In these two cases all the Indian and English cases have been referred to.

Through ignorance of the position of affairs, one only of two joint-owners in a property was sued for a debt for which the property had been pledged by the person sued, and a decree was obtained, and execution issued against the property, a portion of which was released on the claim of the other sharer. The judgment-creditor then brought a suit against both sharers for making the share of the other co-sharer who had not been previously sued liable. Held, that the suit was not barred.—*Nabin Chandra v. Magantara*, 10 C. 924. See also *Raman v. Sriharan*, 16 M. 440.

Where several persons have made themselves jointly and severally liable to perform a particular contract, a decree obtained against one of the joint and several promisors is a bar to a suit against another.—*Nuthoo Lall v. Shoukee Lall*, 10 Bom. L. R. 200; 18 W. R. 458. Referred to in *Radha Pershad v. Ram Khelawan*, 23 C. 302. Distinguished in 5 C. 291 and in 9 C. 888.

A decree obtained against one of several joint-contractors is a bar to a subsequent suit against the others. The effect of section 43 of the Contract Act is not to create a joint and several liability in such a case.—*Hemendra Coomar v. Rajendro Lall*, 3. C. 353; distinguished in 5 C. 291 and in *Radha Pershad v. Ram Khelawan*, 23 C. 302.

In an action commenced against several joint-debtors, judgment recovered against one of them who admits the claim, does not bar the further prosecution of the suit against the others.—*Dick v. Dhunji Jaitha*, 25 B. 378. *King v. Hoare*, 13 M. and W. 494 (1844); *Kendall v. Hamilton*, 4 Ap. Ca. 504 (1879) *refd. to*.

In a rent suit, the plaintiff, discovering that the defendant had transferred the tenure to a third party, applied to make the transferee a party to the suit and subsequently for leave to withdraw it. Both these applications were refused and a decree was passed against the original tenants. Held, that a second suit against the original tenants and the transferee to recover the same arrears was barred.—*Dhunput Singh v. Sham Soonder*, 5 C. 291; 4 C. 501.

The doctrine that release of one joint tort-feasor operates as release of all, applies only in cases of joint liability, *Ram Ratan v. Aswini Kumar*, 37 C. 559; 14 C. W. N. 849. 11 C. L. J. 503. A fresh assignment in respect of a tort subsequent to that originally sued upon, will not come within the scope of the first judgment so as to bar the fresh assignment; *Gorind v.*

submitted to the jurisdiction of such Court. (18 M. 327 and 22 M. 407 distinguished, *see also Harchand v. Gulabchand*, 39 B. 34) As to what amounts to voluntary submission to jurisdiction, *see* 39 M. 24 noted below.

**Clause (b).**—A foreign judgment may operate as *res judicata*, when it is given on the merits of the case; a judgment upon a technical point cannot operate as *res judicata*. *See* notes to s. 11 under heading "*Has been heard and finally decided in the former suit.*"

If the foreign judgment is not given on the merits of the case, the plaintiff must prove his case independently of the judgment.—*Santa Sing v. Ralla Sing*, 49 I. C. 383: 14 P. R. 1919.

Where a plaintiff was given liberty in an action before the High Court of Judicature in England to exhibit interrogatories and on the defendants omitting to answer such interrogatories his defence was struck off and judgment was entered for the amount claimed for the plaintiff and the plaintiff subsequently instituted a suit on the judgment in the Madras High Court, held that the judgment sued on was not a judgment "given on the merits of the case" within s. 13 of the C. P. Code and that in consequence no action could be maintained on it in the Indian Courts. S. 13 (b) of the C. P. Code refers to those cases where the controversy raised in the action has not been the subject of direct adjudication by the Court; *Keymer v. Viswanathan*, 40 M. 112: 32 M. L. J. 35: 21 M. L. T. 78; 21 C. W. N. 858: 25 C. L. J. 233; 15 A. L. J. 92: 44 I. A. 6 P. C. (*affirming* 39 M. 95). The same view was taken in *Oppenheim v. Hajee Mahomed*, 49 I. A. 174: 45 M. 496: A. I. R. 1922 P. C. 120, where it was held that a judgment on an award obtained in England by default cannot be sued on in India, since it is not a judgment on the merits of the case. A contrary view was however taken in *Janoo Hassan v. Mahamad*, 47 M. 877: A. I. R. 1925 M. 155, where 40 M. 112 P. C. was sought to be distinguished. But *Janoo Hassan v. Mahamad*, 47 M. 877 has recently been overruled by the Full Bench case of *Mahomed Kassim v. Seeni Pakirbin*, 52 M. L. J. 240: A. I. R. 1927 Mad. 265, where it has been held (*applying* 40 M. 112, P. C.) that under s. 13 (b) a foreign decree obtained on default of appearance of the defendant without any trial or evidence is a case where the judgment must be held not to have given on the merits of the case and no suit lies in British India on such a foreign judgment. So also a wrong view as to the legal liability of a party or as to onus does not render a foreign judgment one 'not given on the merits' within the meaning of this clause.—*Rama Shenoi v. Hallagna*, 41 M. 205: 34 M. L. J. 295: 45 I. C. 703.

Where the writ of summons was accepted by the defendants' solicitor who entered an appearance on behalf of the defendant, a judgment passed against the defendant in his absence could not be said to have been given 'on the merits of the case,' within the meaning of this clause.—*Cole v. Harper*, 41 A. 521: 50 I. C. 780.

The defendant was sued in the courts of the Straits Settlements. Written statement was filed but at the trial the defendant's solicitor reported no instructions. Thereupon judgment was given for the plaintiff after examining his witnesses. On this judgment a suit was laid against the defendant in the Courts in British India. Held, that the judgment of the foreign court was given on the merits and that the same was conclusive against the defendant in the present suit; *Venkatachelam Chetty v.*

the validity of adoption became final and was not affected by the compromise so as to allow the matter to be again litigated between the parties or their privies.—*Vythilinga Muppanar v. Vijayathammal*, 6 M. 43.

An appellate judgment operates by way of estoppel as regards all findings of Lower Court, which, though not referred to in it are necessary to make the appellate decree possible only on such findings.—*Narayanan Chetty v. Kunammai Achi*, 28 M. 338.

A purchaser of land cannot be estopped by a judgment in a suit against his vendors commenced after the purchase; although the former had, as a pleader for the vendors, actively defended the suit. (4 C. W. N. 283, followed). Silence amounts to fraud for which a Court will grant relief only where it is the non-disclosure of those facts and circumstances which one party is legally bound to communicate to the other—Obligation of a party to make disclosure.—*Joy Chandra v. Sreenath*, 32 C. 857: 1 C. L. J. 23.

Where a joint-decree against several defendants has been satisfied out of the property of one of them, and then a suit for contribution has been brought by the latter against her co-defendants in the former suit, there is nothing to prevent the defendants from showing that plaintiff alone was liable to satisfy the decree in the former suit, and that consequently they were not liable to contribute.—*Asman Singh v. Ajanas Koer*, 2 C. L. R. 406.

The dismissal of a former suit brought by the plaintiff's predecessors in title to recover certain lands from Municipality on the ground that the plaintiff had been ousted therefrom by reason of the Municipality stacking stones on a portion thereof, was held no bar to a subsequent suit brought by the plaintiffs for ejectment and declaration of title against a purchaser of the land from the Municipality.—*Madhu Sudun v. Promoda Nath*, 20 C. 732.

Where a person on his own application was added as a party respondent to an appeal, and on the case on appeal being remanded for retrial on the merits, practically took no steps whatever to defend the suit. Held, that he could not afterwards plead, by way of objection to execution of the decree, matters which ought to have formed part of his defence to the suit, had he chosen to defend it.—*Kishan Sahai v. Aladad Khan*, 14 A. 64. See also *Behari Lal v. Majid Ali*, 24 A. 138.

A mortgagee sued on his mortgage and obtained a decree for the principal and interest. A second mortgagee, who was not a party to the suit, intervened in execution alleging that the land was not liable to be attached and sold by reason of his mortgage, and the Court made an order recognizing the priority of the decree-holder's lien and giving to the second mortgagee the opportunity of discharging it. The first mortgagee was not paid off and the mortgaged premises were sold and purchased by the first mortgagee, who now sued for possession and his claim was resisted by the second mortgagee. Held, that the second mortgagee was estopped from now re-asserting his claim.—*Krishun v. Chadayan*, 17 M. 17.

For further cases on estoppel, see author's *Evidence Act*, s. 115.



there is no duty upon the defendant to attend the foreign court or subsequently to obey the judgment passed by it; *Hinde & Co. v. Ponnath*, 4 M. 359.

The rule of international law that courts cannot by their judgments, bind absent foreigners who have not submitted to their jurisdiction is not restricted in its application to foreign Independent States only, but is also applicable where the country in which the judgment was passed and that in which it is sought to be enforced have separate and distinct systems of administration and judicature, though owing allegiance to the same sovereign, *Shaik Atham v. Davud*, 32 M. 469.

A foreign judgment obtained *ex parte* against a defendant described as resident of British India cannot bind the defendant; *Saminatha v. Abdool Gofoor*, 8 M. L. T. 287.

Clause (d).—The words "natural justice" in this clause refers rather to the form of procedure than to the merits of the particular case. The mere fact that the judgment is wrong in law does not necessarily make it one opposed to "natural justice." There must be something in the procedure anterior to the judgment which is repugnant to "natural justice."—*Rama Shenoji v. Hallagna*, 41 M. 205: 34 M. L. J. 295: 45 I. A. 703. A decision passed without reasonable notice to the persons concerned is contrary to natural justice and a suit on such judgment is not maintainable in a British Indian Court. It is a leading principle of the English law, always understood, except where expressly excluded, that a person proceeded against in a Court must have due notice of the proceedings.—*London Bank v. Govind*, 5 B. 223. *London Bank v. Hormasji*, 8 B. H. C. R. 200, *London Bank v. Burjorji*, 9 B. 346; *Edulji v. Manekji*, 11 B. 241. See also *Bangarusami v. Bala Subramanian*, 13 M. 496, where it has been held that the general rule is that a personal judgment based solely on extra territorial service of notice, when, as a matter of fact, the defendant (who is not domiciled within the jurisdiction) had no actual notice, is internationally invalid, and one State cannot in this way obtain jurisdiction over a person domiciled in other State. As to sufficiency of notice, if the Foreign Court has held service of the notice to be sufficient, it must be presumed to be correct in the absence of any evidence to the contrary.—*Janoo v. Mahomed*, 47 M. 877: A. I. R. 1925 Mad. 155.

Courts in British India in giving effect to a foreign judgment, should insist upon a strict proof of service of processes alleged to have emanated from a foreign Court and made a foundation for a liability to be enforced here by Courts that have no cognizance of the case on its merits.—*Edulji Burjorji v. Manekji Sarabji*, 11 B. 241.

Clause (e).—A foreign judgment will not operate as *res judicata*, if it can be shown that it was obtained by fraud. It is an established principle of law that fraud vitiates the most solemn proceedings of a Court of Justice; it avoids all judicial acts, ecclesiastical or temporal.

This clause should be read with section 44 of the Indian Evidence Act. The word fraud has not been defined in this Act, the term has been fully explained by the author in his notes to section 44 of the Indian Evidence Act and all the cases in which judgments have been declared null and void on the ground of fraud and collusion are exhaustively noted under that section.

The judgment-debtor can, notwithstanding his having filed a petition for the postponement of a sale, maintain that execution is barred by lapse of time.—*Mina Konwari v. Juggat Setani*, 10 C. 196 (P. C.); 18 C. L. R. 885.

Some of the heirs of a deceased person who entered upon possession of property as a valid wakf are not, as against the remaining heirs, barred by the rule of estoppel from disputing the validity of the wakf.—*Alamgir Khan v. Karrarunnessa*, 4 C. L. J. 442.

A mortgagee who has purchased at the sale in execution of his decree on the mortgage is bound by an estoppel that would have bound his mortgagor.—*Mahomed Mujaffar v. Kishory Mohun*, 22 C. 909 P. C. See also 35 C. 877.

A person who purchases property in execution of his own decree subject to a lien declared by the Court under Or. XXI, r. 62 without acquiescing in that order, is not estopped from questioning the validity and bona fide of the mortgage.—*Shah Ziauddin v. Kailash Chandra*, 2 C. L. J. 599. See also 21 A. 418 and 33 B. 311.

The main question, in determining whether estoppel has been occasioned, is whether the representation has caused the person to whom it has been made to act on the faith of it. If a person makes certain assurances in the character of a Muktear of a Hindu widow regarding a transfer, he is not estopped from claiming the property as reversionary heir, or the assignee of the reversionary heir.—*Sarat Chunder v. Gopal Chunder*, 20 C. 296 (P. C.) (2 A. 809: 7 M. 3, overruled). See 30 A. 549.

A judgment-debtor who does not object to execution after notice under Or. XXI, r. 22, is estopped from subsequently raising any objection. *Madhu Sudan v. Kailash Chunder*, 2 C. W. N. 254. See also *Coventry v. Tulshi Pershad*, 31 C. 822. See however 8 C. L. J. 193. Where a judgment-debtor having full knowledge of the execution proceedings failed to raise the objection at the time of the sale that the holding was not transferable, he cannot on that ground resist the purchaser after confirmation of the sale.—*Dwarka Nath v. Tarini Sankar*, 34 C. 199: 11 C. W. N. 513: 5 C. L. J. 294.

The mere attestation of deed by a relative does not necessarily import concurrence unless it is shown by other evidence that when becoming an attesting witness, he must have fully understood what the transaction was.—*Chunder Dutt v. Bhagwat Narain*, 3 C. W. N. 207. See also *Ram Chunder v. Haridas Sen*, 9 C. 463, and *Imam Ali v. Baij Nath*, 33 C. 613: 10 C. W. N. 551: 3 C. L. J. 576; 9 C. L. J. 453; 13 C. W. N. 544; 36 C. 780, P. C.; 13 C. W. N. 920; 3 O. C. 252, 2 N. L. R. 34: 7 I. C. 264; 13 C. W. N. 931.

See notes and cases under s. 115 of the Author's Evidence Act.

**Estoppel by Statements and Pleadings.**—Where a public officer purchases land *benami* his representatives are debarred from claiming the benefit of the purchase.—*Sheo Narain v. Mata Prosad*, 27 A. 73. (22 A. 220, approved).

In an ejectment suit, the defendant having by his written statement pleaded an adverse title in himself, is estopped from contending on appeal,

into the merits of the case if the judgment is that of certain Asiatic and African Courts. By this enactment the finality of the judgments of the above foreign Courts was taken away by the Legislature and thereby maintaining the finality of the judgments of the European and American Courts. See *The Collector of Moradabad v Harbans*, 21 A. 17.

That clause has now been omitted in the present Code and the judgments of all foreign Courts, of Europe, America, Asia or Africa, are now treated on equal footing.

The Madras High Court however, in *Sama v. Annamalani*, 7 M. 164, dissented from the above Bombay case by holding that Civil Courts in British India, may entertain suits, brought upon foreign judgments, including those of the Courts of the Native States, and that a foreign judgment may always be impeached on the ground of fraud or collusion, or for want of jurisdiction, or that the defendant had no notice of the suit, or that the Judge was an interested party. This Madras case was subsequently approved by the Bombay High Court in *Mayaram v. Ravji*, 24 B. 86. The Bombay cases in 6 B. 292 and in 8 B. 593 have also been disapproved in the Privy Council in *Gurdial Singh v. Raja of Faridkot*, 22 C. 222 P. C. where it has been held that suits may be brought in British Indian Courts upon the judgments of the Courts of Native States, the judgments of which must be regarded as judgments of foreign Courts. This Privy Council case is a very important one with regard to foreign judgments and it deals also with the question of territorial jurisdiction of domestic as well as of foreign Courts and with several other questions. The readers should consult the report of the case. The above Privy Council case has been followed in *Moazzim Hossen v. Raphael Robinson*, 28 C. 641: 5 C. W. N. 741, in 20 M. 112, 7 M. L. J. 76, in 26 C. 931, 3 C. W. N. 614, in 20 B. 133, in 18 M. 327, and referred to in 29 C. 509, in 29 M. 239, in 19 A. 450; in 25 B. 528. On the question of territorial jurisdiction on the maintainability of suits upon foreign judgment, see, 39 M. 24, p. 33 noted below; and *Shiyali Subraya v. Calve Subraya*, 21 M. L. T. 315: 5 L. W. 740: 37 I. C. 404.

B a British subject living in India entered into a contract with K carrying on business in London for the supply of a newspaper; B failed to pay his subscription for the paper, and K sued him in England and obtained *ex parte* decree and brought the present suit upon that judgment in British India. Held, that the King's Bench had jurisdiction to entertain the suit, as the subscription was payable in London and that the decree is therefore conclusive; *Brajanza v. King*, 3 Sind. L. R. 81 (28 C. 641, referred to).

The Supreme Court at Mauritius is a foreign Court. Judgments of a Court passed in *absentem* against a person, who at the time of the suit or judgment, was neither permanently nor temporarily resident in, nor the subject of, the same country, cannot be enforced against him in a Court in British India; *Kassim Mamjee v. Isuf Mahomed*, 29 C. 509: 6 C. W. N. 829.

Having regard to the language of s. 13, it is open to a Court to simply refuse execution of a foreign decree without deciding whether the party would be entitled to enforce the judgment by a suit or not. It is also open to the Court to consider whether, for any of the objections stated in s. 13, the judgment is invalid and to determine finally whether it is

*Durga Mohun v. Rakhal Chandra*, 5 C. W. N. 801. But these cases have been distinguished in *Ismail Khan v. Broughton*, 5 C. W. N. 846 and 858.

**Landlord and tenant—Ejectment—Origin of tenancy—Permanent tenancy—Presumption as to permanent character of tenancy—**On these points see the following cases: 6 C. W. N. 134 and 352; 7 C. W. N. 734 8 C. W. N. 297 and 301; 32 C. 41, P. C.; 8 C. W. N. 880, P. C.; and 32 C. 51, P. C., 8 C. W. N. 895, P. C. Followed in 5 C. L. J. 178; 11 C. W. N. 242 and in 34 C. 902, 11 C. W. N. 865, P. C. See also, 4 C. L. J. 198; 20 B. 580; 10 C. W. N. 765; 3 C. L. J. 610; 8 C. L. J. 518; 9 C. L. J. 476; 37 C. 377; 11 C. L. J. 401; 16 C. W. N. 567; 15 C. L. J. 220.

Delay by the owner in bringing a suit is not in itself sufficient to create an equity in favour of the person spending money on the land so as to deprive the owner of his strict rights.—*Premji Jivan v. Haji Cassum Jamma*, 20 B. 298. See, however, *Benode Comaree v. Saudaminey*, 16 C. 252. Referred to in *Nasarbhai v. Munshi Badrudin*, 16 B. 533.

**Estoppel by Inconsistent Position.**—A litigant is not to occupy inconsistent positions in court; he cannot be allowed to approbate and reprobate; *Bhagirathi v. Baleshwar*, 41 C. 69; 19 C. L. J. 155; 17 C. W. N. 877. See also *Brindeshwari v. Lakpat*, 15 C. W. N. 725 p. 726; *Raghubar Dyal v. Jadu*, 15 C. L. J. 89, p. 92; 18 C. W. N. 954. One who without mistake induced by the opposite party, has taken a particular position deliberately in the course of a litigation, must act consistently with it; and this principle will apply to any other suit than the one in which the action is taken, where the second suit grows out of the judgment in the first; *Gotha v. Sitaram*, 23 M. L. J. 335; (1912) M. W. N. 967. The rule against a party being allowed to take up inconsistent positions applies only when a party seeks to defeat his opponent by successive inconsistent positions, or when, having obtained a benefit by adopting one position, he afterwards tries to assume a different and contradictory position while retaining the advantage already obtained by his former position; *Velusami v. Bommachi*, 25 M. L. J. 324; 14 M. L. T. 229; 21 I. C. 219.

**Estoppel Against Tenant.**—See cases noted under s 116 of the *Author's Evidence Act*.

**Alternative Remedies: Election of One Operates as a Bar as regards the Other.**—When a litigant has the right to choose between two remedies which are not co-existent but alternative, he may select and adopt one as better adapted than the other, to work out his purpose; but once he has made his choice and adopted one of the alternative remedies, his act at once operates as a bar as regards the other, and the bar is final and absolute.—*Baikaunta Nath v. Nawab Salimulla*, 6 C. L. J. 547 and *Beni Madhub v. Jatindra Mohan*, 5 C. L. J. 580; 11 C. W. N. 765. See however 13 C. W. N. 1197; 10 C. L. J. 420.

**Waiver and its effect.**—True test of waiver explained, *Easin v. Abdul*, 15 C. W. N. 10; 6 I. C. 138.

A waiver is an intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. Hence there can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts which would enable him to take an effectual action for the enforcement of such rights. No one can acquiesce in a wrong while ignorant that it has been committed and

s. 14 of the Old Code was upon the plaintiff, but under the present section the onus lies upon the defendant; *Udhe Singh v. Purna Chand*, 185 P. W. R. 1909; 41 P. L. R. 1910.

**Foreign Decree Enforceable Only against Partnership Property of Partners.**—A decree obtained in a foreign country against a firm after service of notice against some of the partners or against the agent of the firm, while the principals of the firm who were defendants in the case were out of its jurisdiction cannot be enforced as a personal decree against them in British Courts; *Sahib Thambi v. Hamid Marakayar*, 86 M. 414; *Ramanathan v. Kalimuthu*, 37 M. 163 and *Shail Atham v. Davud Sahib*, 82 M. 469; 19 M. L. J. 459.

**Application for Execution of a Foreign Decree When Allowed.**—An application under s. 44 of the C. P. Code for the execution of a decree of a foreign Court may be resisted on any of the grounds mentioned in s. 13 of the Code (26 I. C. 217; 27 M. L. J. 535, *folld.*); *Rama Aiyar v. Krishna Pattar*, 39 M. 733; 30 M. L. J. 148; 32 I. C. 597.

**Execution of Decree.**—The judgment of a foreign court, obtained on a decree of a Court in British India, is no bar to the execution of the original decree.—*Fakuruddin Mahomed Assan v. Official Trustee*, 7 C. 82.

As to when a decree of a foreign Court is executable in British India, and whether a suit is maintainable upon such judgment; *Veeraraghava v. Muga Sait*, 14 M. L. T. 96; 1913 M. W. N. 605; 20 I. C. 704. As to execution of decree of foreign Court by British Court, see *Harchand v. Gulabchand*, 39 B. 34.

**Limitation.**—In a suit upon a foreign judgment, the period of limitation must be reckoned from the date of the judgment of the foreign Court, and such suit should be barred at the expiration of six years from that date.—See, Art. 117, Limitation Act and *Heeramonee Dasee v. Promotha Nath*, 8 W. R. 32; 2 Ind. Jur. (N. S.) 233; *Boloram v. Kameenee*, 4 W. R. 108. Where limitation bars the remedy but does not destroy the right, the judgment of a foreign tribunal is not open to the objection that the suit was barred by the law of British India—*Nallatambi Mudaliar v. Ponusami Pillai*, 2 M. 400.

Where a Foreign Court applying its own law holds that a suit is not time-barred, it cannot be said that it has refused to recognize the law of British India because the suit was time-barred according to that law.—*Ganga Prasad v. Ganeshilal*, 46 A. 119; A. I. R. 1924 All. 161.

The Indian Law of Limitation has no application to suits in England, and that a foreign judgment passed *ex parte* with jurisdiction, and according to the English Law of Limitation, but without regard to the Indian Law of Limitation is conclusive in a suit in British India based upon that judgment; *Sir H. S. King v. Major M. B. Braganza*, 2 Sind L. R. 51.

**14.** The Court shall presume, upon the production of any

Presumption as to  
foreign judgments.

document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

[S. 13, Expl.VI.]

**Cause of Action.**—The expression "Cause of action" has not been defined in this Code, and for the meaning of this expression we must refer to case laws. (*See* 5 A. 183, 18 A. 181, 210 and 432; 6 C. W. N. 585, p. 588; 8 I. C. 9; 22 C. 833; 83 C. 867; 20 B. 368 noted under *Or. II, r. 2.*)

The expression "cause of action" was also considered by their Lordships of the Judicial Committee in *Chand Kour v. Partab Singh*, 10 C. 98 P. C.; *Woomatara v. Kristomonee*, 18 W. R. 163 P. C. and also by the Madras High Court in *Naganada v. Krishnamurti*, 34 M. 97.

**13.** A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—

When foreign judgment not conclusive.

- (a) where it has not been pronounced by a Court of competent jurisdiction;
- (b) where it has not been given on the merits of the case;
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of British India in cases in which such law is applicable;
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
- (e) where it has been obtained by fraud;
- (f) where it sustains a claim founded on a breach of any law in force in British India.

[S. 14.]

## COMMENTARY.

This section corresponds with section 14 of the C. P. Code of 1882. The provisions as to foreign judgment have been re-arranged and stated more clearly in a different way.

**Foreign Judgment.**—The word "foreign judgment" has been defined in section 2 (6). It does not include acts of State i.e., orders passed by a State in its executive capacity.—*Sriman Goswami Gobardhanlalji v. Goswami Shri Girdharlalji*, 17 B. 620. The word includes the judgments of courts of foreign Independent States or territories as well as that of a court of a country which is subject to the same sovereignty; for instance, Ceylon Court is a foreign court; *Shaik Atham v. Davud*, 32 M. 469. The section provides that except in the cases specially mentioned in clauses (a) to (f) a foreign judgment shall be conclusive, i.e., it shall operate as *res judicata* as to any matter thereby directly adjudicated upon between the same parties or their privies litigating under the same title. In matters relating foreign judgments, the Courts in British India are guided by very much the same principles as those adopted by the Courts of England.—*Nalla v. Mahomed* 20 M. 112. A foreign judgment is conclusive as to any matter

## COMMENTARY.

This section exactly corresponds to s. 15 of the C. P. Code of 1882 and it provides that every civil suit shall be instituted in the Court of the lowest grade competent to try it. In other words, the section is intended to prevent suitors from instituting their suits in any other Court except in Courts of lowest grade competent to try such suits in regard to their value. The object of the section is to prevent Courts of higher grades from being overcrowded with suits of smaller values.

**Suit.**—The word "suit" has not been defined in this code. But s. 26 of the Code provides that every suit shall be instituted by the presentation of a plaint. The particulars to be written in a plaint are to be found in Or. VII, rr., 1-9. It therefore follows that the word 'suit' means a written complaint stating the cause of action and seeking redress for some thing.

The word "suit" has not the narrow significance attached to the word "action" in English law; but it embraces all contentious proceedings of an ordinary civil kind, whether they arise in a suit or miscellaneous proceedings.—*Bhoopendro Narain v. Baroda Prasad*, 18 C. 500.

**"Shall be instituted."**—The word "shall" in this section is imperative on the suitor and not upon the Court for whose benefit and convenience it is intended. The provision for the institution of all suits in the Court of the lowest grade is only a direction to the suitor and not an absolute rule binding the Court. The section is a *rule of procedure* and not of *jurisdiction*. It is merely directory and does not oust the jurisdiction of superior Courts. The District Judge, Subordinate Judge and Munsif have concurrent jurisdiction to try up to the value of suits triable by a Munsif. Therefore, a Subordinate Judge is not precluded from trying a suit within the jurisdiction of the Munsif's Court. The error in instituting a suit triable by a Munsif in a Subordinate Judge's Court is not an error which affects the jurisdiction of the Sub-Judge. The following cases clearly explain the meaning, scope and object of the section.—*Nidhi Lal v. Mozhar Husain*, 7 A. 230; *Krishnasami v. Kanakasabai*, 14 M. 183; 1 M. L. J. 234; *Augustine v. Medlycott*, 15 M. 241; *Gourachandra v. Vikrama*, 23 M. 367; 9 M. L. J. 263; *Matra Mondal v. Hari Mohan*, 17 C. 155; *Aklemaunessa v. Mahomed Hatem*, 31 C. 849; 8 C. W. N. 705, p. 708; *Shankerappa v. Kotrappa*, 8 Bom. L. R. 516, p. 521. See also 2 L. B. R. 117 and 192. The words are merely directory, and refer to procedure only, they do not deprive any Court of jurisdiction which it may otherwise possess; *Goura Chandra v. Vikrama*, 23 M. 367; *Tangor Majhi v. Jaladhari*, 14 C. W. N. 322; 5 I. C. 691.

This section does not preclude a Sub-Judge from trying a suit within the jurisdiction of the Munsif's Court.—*Matra Mondal v. Hari Mohan*, 17 C. 155. Approved in *Augustine v. Medlycott*, 15 M. 241; see also *Nidhi Lal v. Mazhar Husain*, 7 A. 230, and *Krishnasami v. Kanaka Sabai*, 14 M. 183. See, however, *Velayudam v. Arunachala*, 18 M. 273.

This section which provides that "every suit shall be instituted in the Court of the lowest grade competent to try it" does not affect the jurisdiction of the Sub-Judge to try a suit wherein several causes of action are joined, the cumulative value of which exceeds Rs. 1,000 notwithstanding that if separate suits be brought on the several causes of action each

the decree was binding upon him; *Rama Aiyar v. Krishna Patter*, 30 M. 733: (1916) 2 M. W. N. 83: 30 M. L. J. 148; 32 I. C. 507. (P. B.)

A British subject who has been properly served cannot object to a judgment of the King's Bench Division on the ground of want of jurisdiction, where the contract on which the suit was based was one in which the price was payable in England; *S. King v. D. J. Buchanan*, 9 Bur. L. T. 106: 35 I. C. 741 (28 C. 641, 5 C. W. N. 741, *re id. to*).

The mere making of a contract within the jurisdiction of a foreign Court does not necessarily render the Court competent to adjudicate upon all the obligatory relations, which flow directly or indirectly from it.—*Mathappa v. Chellappa*, 1 M. 106.

The rule that in the case of personal claims, it is residence alone that gives jurisdiction in a suit against a foreigner, applies where the country in which the judgment was passed and that in which it is sought to be enforced have separate and distinct systems of administration and judicature, though owing allegiance to the same Sovereign. Thus a judgment of the Ceylon Court against a native of British India who was not, at the time of the action, resident in Ceylon and had not submitted to the jurisdiction of such Court, must be treated as a nullity when sued upon in Courts in British India.—*Shaik Atham v. Davud Sahib*, 32 M. 469. Even if in such a case there be any special territorial legislation giving jurisdiction to the Foreign Court, no effect could be given to the judgment of such Court in a suit brought upon the judgment in a Court in British India, because no State can by its legislation confer jurisdiction upon its Courts to entertain a suit in respect of a personal claim against foreigners who at the date of the suit neither resided in that State nor owed any allegiance or obedience to the State.—*Christien v. Delanney*, 20 C. 931; *Hinde v. Ponnath*, 4 M. 359. But British Indian subjects, though foreigners, owe allegiance to the Sovereign of England, and the British Parliament is therefore competent to confer by legislation jurisdiction upon the Courts of England against British Indian subjects in British India; it was held therefore that an *ex parte* decree passed by the Queen's Bench Division of the High Court of Justice in England against a British Indian subject in an action for breach of contract committed within the jurisdiction of that Court, is not a nullity, and effect may be given to it in a suit on the judgment instituted in British India.—*Hossein Khan v. Raphael*, 28 C. 641; *Viswanatha Reddi v. Keymer*, 39 M. 95, on appeal 40 M. 112: 44 I. A. 6: 21 C. W. N. 358: 10 Bom. L. R. 206: 38 I. C. 683.

K sued C, a resident of British India, upon a bond executed by C within the territory of P, a Native State, and obtained a decree. After part-satisfaction, K sued C upon the judgment in a British Indian Court at T. Held that the Court at P had jurisdiction and K could sue upon the judgment of that Court in the Court at T.—*Kaliyugam Chetti v. Chokalinga Pillai*, 7 M. 105.

In a suit on a judgment of the Kandy Court it appeared that the defendant was domiciled and a resident of British India, and that he had not appeared to defend the suit at Kandy and was not at the date of the suit even temporarily resident in Ceylon; but he was a partner in a firm which carried on business at Kandy. Held the Court at Kandy had no jurisdiction over the defendant.—*Nalla Karuppa Settiar v. Mahomed Iburaam*, 20 M. 112.



Where two or more Courts have jurisdiction to try a suit, the Court of the lowest grade is competent to try it; where the jurisdiction of a S. C. Court Judge extends to Rs. 500, and the jurisdiction of the Cantonment Magistrate extends to Rs. 200, the Court of the Cantonment Magistrate is to be regarded as the Court of lower grade.—*Mohan Lal v. Vira Punja*, 12 B. 169.

Where two Courts have concurrent jurisdiction to try the same suit, the suit must be instituted in the Court of the lowest grade competent to try it; *Bibi Hayatu v. Ghulam Hussein*, 4 S. L. R. 264: 10 I. C. 990.

In the N. W. Provinces, the Court of a Munsif must, for the purposes of s. 63, be regarded as of a higher grade than a Court of Small Causes.—*Ballu Ram v. Raghubar Dial*, 16 A. 11.

Where a plaintiff presented a plaint to the District Court, the Sub-Judge's Court in which he ought to have presented it being then temporarily closed, it was held that the District Court could not be considered as a Court of first instance, competent to receive the plaint.—*Ramaya Elapa v. Muhamadbhai*, 10 B. H. C. R. 495.

**"Competent to try it."**—The words "competent to try" mean jurisdiction to try. Jurisdiction may be defined to be the power of a Court to hear and determine a cause and to adjudicate or exercise any judicial power in relation to it. Such jurisdiction naturally divides itself into three broad heads, namely, with reference to (1) the subject matter, (2) the parties, (3) the particular question which calls for decision. See *Sukh Lal v. Tara Chand*, 33 O. 68; 2 C. L. J. 241, referred to in *Gurdeo Singh v. Chandrikah Singh*, 36 C. 193, p. 206: 5 C. L. J. 611. The word "competent" in this section has reference only to the pecuniary jurisdiction, of which the limitations vary in several provinces according to the provisions of the Civil Courts Act in force in each province, as has already been explained above, under heading "Court of the lowest grade."

Apart from the question of pecuniary extent of a Court's jurisdiction there are certain classes of cases under special provisions or Acts, which are exclusively triable by Courts of special jurisdiction, independent of the pecuniary value of suits. As for instance, suits for public charities under s. 92 of the C. P. Code; suits under s. 14 of the Religious Endowments Act XX of 1863; suits under the Copy Right and Inventions and Designs Acts; Probate Cases; Admiralty Cases; Divorce Cases; Insolvency Cases and some others. All these cases are exclusively triable by District Courts or High Courts whatever may be the pecuniary value of such suits.

**Effect of Instituting a Suit in a Court of Lower Grade Where it Ought to have been Instituted in a Court of Higher Grade.**—If in such a case, the Court of lower grade, instead of returning the plaint to the plaintiff for presentation to the proper Court under Or. VII, r. 10, hears the case, the decree will be set aside in appeal because, under s. 99 of the Code, it amounts to want of jurisdiction and not mere irregularity.—*Matra Mandal v. Hari*, 17 C. 155.

The jurisdiction of a Court is the authority to hear and determine a cause. Such authority is conferred by sovereign power and can only be given by law and cannot be conferred by consent. If a Court of a limited pecuniary jurisdiction, takes cognizance of a suit in which the sum claimed is larger than the amount over which the Court has jurisdiction, any judg-

the decree was binding upon him; *Rama Aiyar v. Krishna Patter*, 39 M. 733: (1916) 2 M. W. N. 83: 30 M. L. J. 148; 32 I. C. 597. (F. B.)

A British subject who has been properly served cannot object to a judgment of the King's Bench Division on the ground of want of jurisdiction, where the contract on which the suit was based was one in which the price was payable in England; *S. King v. D. J. Buchanan*, 9 Bur. L. T. 106: 35 I. C. 741 (28 C. 641, 5 C. W. N. 741, *refd. to*).

The mere making of a contract within the jurisdiction of a foreign Court does not necessarily render the Court competent to adjudicate upon all the obligatory relations, which flow directly or indirectly from it.—*Mathappa v. Chellappa*, 1 M. 196.

The rule that in the case of personal claims, it is residence alone that gives jurisdiction in a suit against a foreigner, applies where the country in which the judgment was passed and that in which it is sought to be enforced have separate and distinct systems of administration and judicature, though owing allegiance to the same Sovereign. Thus a judgment of the Ceylon Court against a native of British India who was not, at the time of the action, resident in Ceylon and had not submitted to the jurisdiction of such Court, must be treated as a nullity when sued upon in Courts in British India.—*Shaik Atham v. Davud Sahib*, 32 M. 469. Even if in such a case there be any special territorial legislation giving jurisdiction to the Foreign Court, no effect could be given to the judgment of such Court in a suit brought upon the judgment in a Court in British India, because no State can by its legislation confer jurisdiction upon its Courts to entertain a suit in respect of a personal claim against foreigners who at the date of the suit neither resided in that State nor owed any allegiance or obedience to the State.—*Christien v. Delanney*, 26 C. 931; *Hinde v. Ponnath*, 4 M. 359. But British Indian subjects, though foreigners, owe allegiance to the Sovereign of England, and the British Parliament is therefore competent to confer by legislation jurisdiction upon the Courts of England against British Indian subjects in British India; it was held therefore that an *ex parte* decree passed by the Queen's Bench Division of the High Court of Justice in England against a British Indian subject in an action for breach of contract committed within the jurisdiction of that Court, is not a nullity, and effect may be given to it in a suit on the judgment instituted in British India.—*Hossein Khan v. Raphael*, 28 C. 641; *Viswanatha Reddi v. Keymer*, 39 M. 95, on appeal 40 M. 112: 44 I. A. 6: 21 C. W. N. 358: 19 Bom. L. R. 206: 38 I. C. 683.

K sued C, a resident of British India, upon a bond executed by C within the territory of P, a Native State, and obtained a decree. After part-satisfaction, K sued C upon the judgment in a British Indian Court at T. Held that the Court at P had jurisdiction and K could sue upon the judgment of that Court in the Court at T.—*Kaliyugam Chetti v. Chokalinga Pillai*, 7 M. 105.

In a suit on a judgment of the Kandy Court it appeared that the defendant was domiciled and a resident of British India, and that he had not appeared to defend the suit at Kandy and was not at the date of the suit even temporarily resident in Ceylon; but he was a partner in a firm which carried on business at Kandy. Held the Court at Kandy had no jurisdiction over the defendant.—*Nalla Karuppa Settiar v. Mahomed Iburam*, 20 M. 112.

Where the amount of mesne profits assessed in execution proceedings exceeds the pecuniary jurisdiction of the Munsif, it was held that the Munsif had jurisdiction to award the mesne profits, *Panchuram v. Kinoo*, 40 C. 56. (21 C. 550, *followed*). See however *Bhupendra v. Purna*, 18 C. L. J. 132.

Section 6 of the Code prevents a Court from executing a decree which has been passed in a suit the value of which exceeds the pecuniary limits of its jurisdiction. See, the cases noted under that section.

In a suit to have it declared that certain property valued at Rs. 400 was liable to sale in execution of plaintiff's decree for Rs. 1,500, held that the case was triable by the Munsif, and that it was immaterial that the amount of the decree was higher than the limit of his jurisdiction.—*Durga Prasad v. Rachla Kuar*, 9 A. 140 (2 A. 799, *distinguished*).

In a suit under Or. XXI, r. 63 by a creditor to establish his debtor's right to attached property, the amount which is to settle the jurisdiction of the Court, is the amount which is in dispute, and which the creditor would recover if successful, *viz.*, the amount due to him and not the value of the property attached, unless the two amounts happen to be identical.—*Modhu Sudan Koer v. Rakhal Chunder*, 16 C. 104 (*distinguished in Dwarka Das v. Kameshar Prasad*, 17 A. 69). See also, 19 M. L. J. 236; 30 M. 335, 35 C. 202 and 1014) M. W. N. 910.

Where a claim has been preferred under Or. XXI, r. 99 of the C. P. Code of 1908, it must be investigated by the Court executing the decree, and no question of valuation arises for consideration. Proceedings under r. 99 is not a suit; *Kadambini v. Dayaram*, 11 C. L. J. 478. See also 8 M. 541; 6 B. L. R. 301. But see 22 C. 830; 4 M. 220; 14 B. 627.

**Jurisdiction of Appellate Court.**—Where a Sub-Judge being of opinion that the suit has been under valued, valued the suit at over Rs. 5,000, but the plaintiff throughout contended that the value was below Rs. 5,000 as stated in the plaint; appeal from the decision of the Sub-Judge, dismissing the suit for non-payment of additional court-fee, lies to the District Court; *Prakash Chandra v. Bishambar*, 14 C. W. N. 343.

For the purpose of an appeal, whether from a decree in a regular suit or from an order passed in execution, the test of jurisdiction is the valuation of the original suit in which the decree was passed, and not merely the actual amount affected by the order sought to be appealed.—*Nasir Husain v. Kesrimal*, 12 A. 581.

Where the original value of a suit was over Rs. 5,000, and by a consent decree, the plaintiff accepted a sum less than Rs. 5,000; an appeal against an order passed in execution of such decree by the Subordinate Judge lies to the High Court and not to the District Judge.—*Jogendra Nath v. Saraswati Debi*, 6 C. L. J. 38.

Where in a suit for possession of land and mesne profits, which was originally valued at a sum below Rs. 5,000, and which was instituted in a Court of a Subordinate Judge, but in which the whole amount actually found due, inclusive of mesne profits payable by the defendant to the plaintiff, was over Rs. 5,000, an appeal would lie to the High Court and not to the District Court; *Ijtatulla v. Chandra Mohan*, 34 C. 954 F. B. See also *Gulab Khan v. Abdul Wahab*, 31 C. 365 and other cases referred to in the Full Bench Case. The above Full Bench Case has been followed in *Ramjit Misser v. Ramadar Singh*, 17 C. W. N. 116.

The question whether a submission to jurisdiction is voluntary or under duress is one of fact in each case. Submission is not voluntary if the appearance is only made for saving property seized by a Foreign Court in attachment or other proceedings; in such a case the judgment of the Foreign Court is not binding on the party.—*Verraraghara v. Muga Said*, 89 M. 24 : 26 I. C. 287.

In a suit in a foreign Court, the defendant took no objection to the jurisdiction, but appeared and defended the suit on the merits. In a suit upon the decree of the said Court, he is estopped from taking any exception to the jurisdiction.—*Fazal Shau Khan v. Gafar Khan*, 15 M. 82; *Ganga Prasad v. Gancshi*, 21 A. L. J. 890.

A defendant, who objects to jurisdiction, though under protest, and also pleads on the merits, thereby taking the chance of getting a decree in his favour, will be deemed to have submitted himself to the jurisdiction of the Court.—*Har Chand v. Gulab Chand*, 39 B. 34; *Rama v. Krishna*, 30 M. 733 F. B. : 32 I. C. 597 (overruling *Parry & Co. v. Appasami*, 2 M. 407).

Where a defendant sued in foreign tribunal takes no exception to the jurisdiction, he cannot question the jurisdiction afterwards. Irregularity of procedure on the part of a foreign tribunal, which ordinarily proceeds in accordance with recognized principles and judicial investigation, is not a sufficient ground for refusing to give effect to its judgment.—*Nallatambi Mudaliar, v. Punnusami Pillai*, 2 M. 400.

Where defendants apply to set aside an *ex parte* decree passed against them in a Foreign Court having no jurisdiction and appeal against that decree, that amounts to submission to the jurisdiction of such Court; *Hari Singh v. Muhammad Said*, 8 Lah. 54: A. I. R. 1927 Lah. 214.

Where defendants submitted to the jurisdiction of a Foreign Court by giving a power of attorney to an agent, and a decision was passed against them after service of summons of the suit on them while they were out of jurisdiction, by order of Court, the defendants are *prima facie* bound by the judgment; and where no other defence is raised but that of non-submission and non-service of notice, both of which were found against, a decree against the defendants in accordance with the foreign judgment must necessarily follow.—*Ramanathan v. Kalimuthu*, 37 M. 163: 24 M. L. J. 619: 18 I. C. 189; *Jannot v. Mohamed*, 47 M. 877: 47 M. L. J. 356: A. I. R. 1925 M. 155: 82 I. C. 425.

The plaintiff sued the defendant in a French Court. The defendant employed a vakil to defend the suit, but at the time of hearing the vakil stated that he had no instructions and *ex parte* decree was passed. An application by the defendant to have the decree set aside was held to be time-barred. The plaintiff now sued on the judgment of the French Court to recover the amount decreed. Held, that the suit was not maintainable for the reason that the decree had been passed against the defendant in *absentum* by a foreign Court, to which he had not submitted himself.—*Sivaraman Chetty v. Iburaam Shaheb*, 18 M. 327. But see, *Shaik Atham v. Davud*, 32 M. 469, where it has been held that a person who appears in obedience to the process of the foreign court and applies for leave to defend the action without objecting to the jurisdiction of the court when he is not compellable by law to do either, must be held, to have voluntarily

Where, exception being taken to the Court's jurisdiction to entertain a suit, an issue was raised, but the objection was overruled, and on appeal to the High Court, the defendant did not raise the question, but did so before the Judicial Committee; *held* that in as much as the question was one of jurisdiction and did not depend upon disputed facts, the Judicial Committee could not decline to entertain it, especially as it necessarily presented itself in argument; *Maha Prasad v. Ramani Mohan*, 18 C. W. N. 994 P. C.: 20 C. L. J. 231: 27 M. L. J. 459: 16 Bom. L. R. 824: 42 C. 116.

**Court of Inferior Grade can Declare the Decree of a Superior Court to be Nullity on the Ground of Fraud.**—A Court of inferior jurisdiction is competent to declare a decree of a Superior Court to be a nullity on the ground of fraud, if otherwise it has jurisdiction to entertain the suit.—*Sarthakram Maiti v. Nundo Ram*, 11 C. W. N. 579. (10 C. 612; 5 C. W. N. 559 and 7 C. W. N. 353: 80 C. 369, *referred to*). On this point, *see*, the cases noted under s. 44 of the Author's Evidence Act.

**Principles for Determining Pecuniary Jurisdiction.**—The question of jurisdiction, whether with reference to the nature of the suit or with reference to the pecuniary limits of the claim, are matters to be governed by the statements contained in the plaint. The valuation of the claim as preferred by the plaintiff, and not as set by the plea in defence, would govern the action, not only for the purposes of the original court, but also for the purposes of the appeal; *Jag Lal v. Har Narayan*, 10 A. 524.

The valuation given by the plaintiff in his plaint must always be taken to determine the *forum*, except in cases where the plaintiff has misrepresented the value with the intention of getting a trial in a different Court from that intended by the legislature, or has acted recklessly in valuing his suit or has adopted a wrong method of valuation.—*Lakshman v. Babaji*, 8 B. 31; *Nilmony v. Jagabundhu*, 23 C. 536; *Mahabir v. Behari*, 18 A. 320; *Bhagavantrao v. Mehta Bajeeval*, 18 B. 40; *Koti Pujari v. Manjaya* 21 M. 271; *Thakur Sheodut v. Bishunath*, 6 O. C. 260; *Jaglal v. Hamarain*, 10 A. 524; *Madho Das v. Ramji*, 16 A. 286; *Ibrahimji v. Bejanji*, 20 B. 265 (*doubted* in 22 B. 963) *Hamidunnissa v. Gopal*, 24 C. 661: 1 C. W. N. 558; *Ijjatulla v. Chandra Mohan*, 34 C. 954 F. B.: 11 C. W. N. 1183: 6 C. L. J. 255: 101 P. R. (1900): 6 O. C. 255: 3 C. L. J. 143; 31 B. 73; *Khiatomal v. Fateh Muhammad*, 32 I. C. 629.

**Over-valuation and Under-valuation.**—Although the valuation given by the plaintiff in his plaint must always be taken to determine the *forum*, a plaintiff is not at liberty to assign an arbitrary value on his suit in order to bring it in a Court which otherwise would not have jurisdiction to try it. In other words, a plaintiff cannot give jurisdiction to or take away jurisdiction from a Court by adding to his claim something to which he is not entitled.—*Hamidunnissa v. Gopal*, 24 C. 661 (666); *Boidya Nath v. Makhan*, 17 C. 683; *Dayaram v. Gordhandas*, 31 B. 78, 79; *Rajkrishna v. Bipin*, 40 C. 245 (249). Where the over-valuation or under-valuation is apparent on the face of the plaint, it is the duty of the Court to return it to the plaintiff for presentation to the proper Court under Or. VII, r. 10. If the over-valuation or under-valuation is not patent on the face of the plaint, but there are *prima facie* grounds for believing that the suit has not been properly valued, the Court may require the plaintiff to satisfy that the suit has been properly valued.—*Appa Rao v. Sobhanadri*, 24 M. 158; *Hamidunnissa v. Gopal*, 24 C. 661 (667); *Koti Pujari v. Manpaya*, 21 M. 271.

*Pichai Ammal*, 11 L. W. 609: (1920) M. W. N. 411: 57 I. C. 742; *George Summerly Carmichael Cole v. Catherine & Harper*, 41 A. 521: 17 A. L. J. 501: 50 I. C. 780.

The plaintiff sued as the adopted son of C to recover certain property in British territory. The defendants disputed the plaintiff's adoption. The plaintiff relied on a decree of a Native Court against defendant No. 2 in a suit for possession of certain other property belonging to C. In that suit the question of plaintiff's adoption had been raised and decided in his favour. *Held* that the judgment of the Native Court being one on the merits was *res judicata* as between the plaintiff and defendant No. 2.—*Bababhat v. Narharbhat*, 13 B. 224.

The plaintiff obtained a judgment in a French Court against the father of the defendant. Plaintiff sued defendant on that judgment in the same Court as representative of his father and obtained a decree. He brought the present suit on the judgment. *Held* that the defendant was bound by the judgment in the French Court against him as representative of his father.—*Kandasami Pillai v. Moidin Saib*, 2 M. 837.

A plaint was filed in Ludhiana Court, and it was returned for presentation to the Nabha Court for want of jurisdiction in the presence of all the parties. Subsequently, the Nabha Court passed an *ex parte* decree against the defendant. In a suit upon the *ex parte* foreign judgment in British Court, *Held* that the Court of Nabha Native State had jurisdiction to try the case, that the fact of the decree being *ex parte* was immaterial, and the decision was on the merits and is conclusive; *Udhe Singh v. Puranchand*, 165 P. W. R. 1909: 41 P. L. R. 1910.

A suit was brought by one B, in England against A, residing in Burma. A was summoned and entered appearance and was granted time on condition of his paying a certain amount in Court within six weeks. A failed to do so, and judgment was entered for B. Subsequently B brought a suit upon the judgment in British India. *Held*, that the judgment was given on the merits of the case, and the case cannot be re-opened; *C. Burn v. Keymer*, 20 I. C. 971: 7 L. B. R. 56: 6 Bur. L. T. 160.

The only point decided by the judgment of the foreign court in this case was that *qua* the property left by the plaintiff's father in Mandi, he as the son can by custom succeed to half, and though the judgment may be conclusive on this point, the conclusiveness does not extend to grounds on which it proceeded. Hence it is not a conclusive adjudication on the matter of plaintiff's legitimacy. Moreover in the present case, the plaintiff did not base his claim on any custom but under Hindu Law. There had been no adjudication as to the plaintiff's right to succeed to the property of his father under Hindu Law; *Indar Singh v. Thakur Singh*, 2 Lah. 207: 8 Lah. L. J. 317: 63 I. C. 887 (18 M. 329; 39 M. 95; 40 M. 112 P. C.; 15 W. R. 500; 29 P. R. 1883: 40 P. R. 1890; 1 B. 97 and 2 B. 140 *refd. to*).

Clause (c).—A foreign judgment may be impeached on the ground that it is, upon its face, founded on an inaccurate view of the law of British India, or of International Law.—*Bikrama Singh v. Bir Singh*, 191 P. R. 1888, 501. Where a cause of action in a suit in a foreign Court did not arise within the jurisdiction of the Court and the defendant did not reside in the foreign territory (no circumstance appearing in the case which, in proper view of international law, could give the foreign court jurisdiction

An error in valuation is not an error, defect or irregularity which affects the merits of the case, *see* section 99 of the Code and notes thereunder.

**Valuations for Stamp Duty and for Jurisdiction are Two Different Things.**—The valuation of suits for the purpose of jurisdiction is perfectly distinct from their valuation for the fiscal purpose of Court-fees.—*Daya Chand v. Hem Chand*, 4 B. 515; *Aukhil Chunder v. Mohiny Mohan*, 5 C. 489; 4 C. L. R. 491; *Thiagaraja Undali v. Ramanuja*, 6 M. 151; *Kirtya Churn v. Annath Nath*, 8 C. 757; 11 C. L. R. 95. For the purpose of determining the question of the jurisdiction, the valuation of a suit should be computed according to the market-value of the subject-matter of the suit, and not by the special rules applicable to the valuation laid down in the Court fees Act, VII of 1870.—*Nanhoon Singh v. Tofanee Singh*, 12 B. L. R. 113; 20 W. R. 33; *Jeebraj Singh v. Indeerjeet*, 12 B. L. R. 115 note; 18 W. R. 109; *Chunder Nath v. Brindabun*, 25 W. R. 39; *Kalu Bin v. Vishram*, 1 B. 543; *Bai Mahkor v. Bulakhi*, 1 B. 538. *See also* *Bai Varunda v. Bai Manegavri*, 18 B. 207.

In a suit for possession of a share in a revenue-paying estate, the valuation for the purpose of jurisdiction is to be computed according to the market value of the share claimed, and the Court-fee on the plaint is to be calculated at ten times the proportionate revenue annually payable for share, whether a separate account for share has been opened in the Collector's register or not; *Buniad Lal v. Shyam Lal*, 12 C. W. N. 990; *Hubibul Hossein v. Mahomed Reza*, 8 C. 192.

**Mode of Valuation and Computation of Value.**—Though the valuation of suits for the purpose of jurisdiction is distinct from their valuation for the fiscal purpose of Court-fees, still s. 8 of the Suits Valuation Act (VII of 1887) provides that when in suits other than those referred to in the Court-fees Act (VII of 1870), s. 7, paras. V, VI, IX and X, Cl. (d) *ad valorem* Court-fees are payable, the value as determinable for the computation of Court-fees and the value for the purposes of jurisdiction shall be the same. The words "as determinable" in s. 8 of the Suits Valuation Act (VII of 1887) mean, as determinable by the Court which has to try the case. *Dayaram Jagjivan v. Gordhondas*, 31 B. 73; 8 Bom L. R. 885; *Umatul Batul v. Nanjikuvar*, 6 C. L. J. 427; 11 C. W. N. 705.

A suit should be valued according to its real character. Where a plaint is so worded that, taken strictly, the valuation would be such that the Court in which the plaint was filed would have no jurisdiction, the mere miswording of the plaint will not oust the court of its jurisdiction.—*Ajoodhia Lal v. Gumani Lal*, 2 C. L. R. 134.

In a suit to recover a share of inheritance, the share claimed being less than Rs. 2,500, while the value of the whole estate exceeded that amount; *held*, that the suit was to be valued according to the share claimed and not according to the value of the whole estate, and the suit was therefore within the jurisdiction of a District Munsiff.—*Khansa Bibi v. Abba*, 11 M. 140. *See also* *Chakrapani Asari v. Nara Singa Rau*, 19 M. 56.

(a) **In Redemption Suits.**—In a suit for redemption it was held that the value of the subject-matter was not the market-value of the land but the amount of the mortgage money:—*Kubair Singh v. Atma Ram*, 5 A. 332; *Zamorin of Calicut v. Narayana*, 5 M. 284, and 287 note; *Gobind Singh v. Kollu*, 2 A. 778; *Bahadur v. Nawab Jan*, 8 A. 822.

A foreign judgment, may always be impeached on the ground of fraud or collusion, or for want of jurisdiction, or that the defendant had no notice of the suit, or that the judge was an interested party; *Sama v. Annamalai*, 7 M. 164.

The decision of a Foreign Court is conclusive between the parties and their successors in title provided there was a direct adjudication upon any point and provided also that the judgment is not disqualified by any of the flaws set forth in s. 13. But where the decision is obtained by fraud, it is not *res judicata* between the parties; *Goor Bachan Singh v. Gian Singh*, A. I. R. 1922 Lah. 175

Clause (f).—This clause lays down that the judgment of a foreign Court will not be conclusive if it sustains or upholds a claim founded on the breach of any law in force in British India. For instance, where a foreign Court allowed a claim founded upon a contract on the basis of which a suit was brought after the period of limitation prescribed for such a suit by the Indian Limitation Act, such judgment will not be conclusive in British India. In other words, the British Indian Courts will not be bound to give conclusive effect to such foreign judgment. But where limitation is merely prohibitive of the remedy and not destructive of the right, the foreign judgment is not open to objection on the ground that a suit on the contract would be barred by the law of limitation applicable in the country in which the contract was made. *Nallatambi v. Ponnusami*, 2 M. 400.

A claim that would be barred by limitation in British India cannot be said to be a claim founded on a breach of any law in force in British India; *S. King v. D. J. Buchanan*, 9 Bur. L. T. 106: 35 I. C. 741.

**How Foreign Judgments may be Enforced in British Indian Courts.**—There are two modes for enforcing judgments in British India, *vis.*, (1) it may be enforced in execution-proceedings after the issue of a notification under section 44 of the C. P. Code of 1908 by the Governor-General in Council. But the British Indian Courts have discretion to enforce it in execution-proceedings or not; they are not bound to enforce it in execution proceedings, as the word "may" used in that section gives full discretion to British Indian Courts either to enforce it in execution or to refuse to do so. Where it is shown that the foreign judgment was passed without jurisdiction or was obtained by fraud then they can refuse to enforce it in execution. (2) A suit may be brought in British Indian Courts to enforce it. There was however a divergence of judicial opinion as to whether a suit will lie in British India upon the judgment of a Court of Native State, or whether a suit should be brought upon the original cause of action. The Bombay High Court in *Himmat Lal v. Shivajirav*, 8 B. 593, following *Bhavani-shankar v. Purnadri Kalidas*, 6 B. 292, held, that a suit will not lie in any of the British Courts in India on a judgment passed by a Court in Native State. The reason for the decision was that the administration of justice in the Courts of Native States does not generally command that amount of confidence which is necessary to raise the implied obligation upon which the action on a foreign judgment rests, and which is therefore a condition precedent of English Courts entertaining an action on one of their judgments. To obviate the danger contemplated by the Bombay High Court, a paragraph was added to section 14 of the Old Code by section 5 of Act VII of 1888 declaring that where a suit is instituted in British Indian Courts on the basis of the foreign judgment, that Court is not precluded from enquiring



Government revenue.—*Reference under the Court Fees Act, 1870, section 5; 16 A. 493.*

A claim for pre-emption of an indigo factory must be valued according to the value of the buildings constituting the factory, and not according to the value of the site. The term "land" in the Court Fees Act does not include buildings.—*Durga Singh v. Bisheshar Dayal, 24 A. 218.*

(c) *In Suits for Partition: Valuation.*—In a suit for partition, the value of the entire estate sought to be partitioned, and not the value of the plaintiff's share of the property, determines the jurisdiction.—*Biraj Mohini v. Chintamani, 3 C. L. J. 197; Bhagwat Sahai v. Pashupati Nath, 3 C. L. J. 257 (8 C. 757 and 17 C. 680, explained); Dalglish v. Ramdhary, 4 C. L. J. 509. See also, Lakshman v. Babaji, 8 B. 81; Krishnasami v. Kanakasabai, 14 M. 183; Narayanan v. Narayanan, 15 M. 69; Chakrapani Asari v. Narasingha Rau, 19 M. 56, and Hikmat Ali v. Waliunnessa, 12 A. 506; Moti Bai v. Hari Das, 22 B. 315; Dinesh Chandra v. Sarnamayi, 1 C. W. N. 186; Wajihuddin v. Waliullah, 24 A. 881; and Sheo Singh v. Baldeo Snigh, 25 A. 277. But see Vyidianath v. Subramanya, 8 M. 235. Followed in Nagamma v. Subra, 11 M. 197; distinguished in Ramayya v. Subrarayudu, 18 M. 25. See also Boidya Nath v. Makhan Lal, 17 C. 680 (8 C. 757; 11 C. L. R. 95, followed) and Dagdu v. Totaram, 33 B. 658.*

In a suit by the member of a joint Hindu family for partition and delivery of possession of his share, the value of the suit for the purpose of jurisdiction is the amount at which the plaintiff values his share.—*Velu Goundan v. Kumaravelu, 20 M. 289.*

In a partition suit, the value of the suit is the difference between the value after partition of the plaintiff's share which he requires to be partitioned and the value of the same share not partitioned.—*Kirtee Chunder v. Anath Nath, 18 C. L. R. 253.*

*Court-fees where the only prayer is for partition.*—In a suit for partition where the only relief prayed for is partition, the Court-fee stamp of Rs. 10 is sufficient.—*Mohendra Chandra v. Ashutosh, 20 C. 762. Followed in Bidhata Roy v. Ram Charitra, 6 C. L. J. 651; 12 C. W. N. 37; Tarachand v. Afzal, 34 A. 184. See, however, Valvan Ganesh v. Nana Chintaman, 18 B. 209, and Wali Ullah v. Durga Prasad, 28 A. 340; 3 A. L. J. 181. Where the possession is not proved, the full Court-fee must be paid; Rangamani v. Jogendra, 9 C. L. J. 128.*

(d) *In Suits for Accounts, Administration and Dissolution of Partnership.*—When the plaintiff fixes a certain sum as the amount of his claim approximately, and prays that the amount of his claim may be ascertained in the course of the suit, the amount found by the Court to be due to him must be regarded as the value of the original suit for the purpose of determining the *forum* of appeal.—*Gulab Khan v. Abdul Wahab, 31 C. 365; 8 C. W. N. 233. See also Ijjatulla v. Chandra Mohan, 34 C. 954, F. B.; 6 C. L. J. 255; 11 C. W. N. 1133.*

By section 7, Clause (f) of the Court Fees Act, VII of 1870, the plaintiff in a suit for accounts, must state the amount at which he values the relief sought; but he is free to fix it as he thinks proper, subject to the provisions of section 11, which preclude the execution of the decree in case it exceeds such value until the execution-fee has been paid.—*Govindas v. Dayabhai, 9 B. 22. Followed in Khatija v. Sheikh Adam, 39 B. 545.*

enforceable in British Court or not. It is not open to the Court to grant execution where it finds that a valid objection to the decree has been made out. *Veeraraghava v. Muga Scit*, 89 M. 24 F. B.: 14 M. L. T. 90: (1918) M. W. N. 605: 20 I. C. 704: 27 M. L. J. 535.

The judgment of the Baroda Court against one partner (the first defendant) is no bar to a fresh suit against the other partners on the same cause of action.—*Laksmishankar v. Vishuram*, 24 B. 77.

The foreign judgment constitutes no foundation for an action, if the judgment on which the action is brought is not judgment for an ascertained sum of money.—*Smith v. Calho*, 22 M. 382.

An order under s. 12 of the Arbitration Act (52 and 53 Vict., c. 49) enforcing an award made in England is not such a judgment that a suit in a Court in this country can be instituted on it as on a foreign judgment. But on the facts as stated above, the Court was at liberty to make the decree it did, on the footing that the suit was one based on the award and not on the order made under s. 12 of the Arbitration Act.—*Deep Narain Singh v. Dietert*, 31 C. 274.

A obtained a decree against B and C in Ceylon, and having obtained part satisfaction by sale of property in Ceylon, brought a suit for balance upon the foreign judgment in British India against B, C, D, E, F and G, alleging that all were members in one firm. *Held*, that the suit would not lie against D, E, F and G, upon the foreign judgment; *Lakshmanan v. Karuppan*, 6 M. 273.

A suit upon a foreign judgment is not cognizable by a Court of Small Causes.—*Anakattil Narayana v. Kocheri Pilo*, 6 M. 191. (6 B. 202, referred to).

A foreigner who does not personally reside within the local limits of the jurisdiction of any Court in British India, and who carries on business in British India can be sued when cause of action arose in foreign country. *Annamalai Chetty v. Morugesa*, 26 M. 544 P. C.: 7 C. W. N. 754. Followed in *Tadepalli Cubba Rao v. Mir Gulam*, 29 M. 69, where it has been held that a British Indian Court has jurisdiction to entertain a suit, if the cause of action has arisen within the local limits, though the defendant does not reside within such limits, but is a foreigner, domiciled and residing in a protected Indian State. Considered in *Sreenivasa v. Venkata Varada*, 29 M. 230: 16 M. L. J. 238.

It is only suits on foreign judgments that the question of the effect of those judgments can properly arise. A foreign judgment as such has no force in British India. Certain claimants of the estate of a deceased person, which was situated partly in the Bareilly district and partly in the state of Rampur, sued in Bareilly to recover the portion situated there, and obtained a decree. Other claimants filed a similar suit in Rampur in respect of the portion situated there. *Held*, on suit by the plaintiffs in the Bareilly Court for a declaration that the judgment of that Court operated as *res judicata* in respect of the suit in Rampur and for an injunction restraining further proceedings in the Rampur Court, that neither relief could be granted; *Maqbul Fatim v. Amir Hasan Khan*, 37 A. 1: 12 A. L. J. 1074 (confirmed on Appeal by the P. C. in 20 C. W. N. 1213: 34 I. C. 710 P. C.).

**Onus of Proving Want of Jurisdiction.**—In a suit upon *ex parte* judgment of a foreign Court, the onus of proving want of j.

(g) **In Declaratory and Injunction Suits: Valuation—Court-fee.**—In a suit to declare title to four paid offices in a temple it was found that the fourth office carried with it the right to the other three. Held, that the value of all the four offices must be taken for the purposes of jurisdiction.—*Sundra v. Subba*, 10 M. 371.

For the purposes of jurisdiction, the value of a suit for a mere declaratory decree must be taken to be what it would be if the suit were one for possession of the property regarding which the plaintiff seeks to have his title declared.—*Ganapati v. Chathu*, 12 M. 223. Followed in *Ibrayan Kunhi v. Komamutti Koya*, 15 M. 501.

A suit for declaration and injunction is a suit in which a consequential relief is prayed. An injunction is in the nature of consequential relief. In a suit of the above nature full Court-fee is to be paid.—*Umatul Batal v. Naiju Kuar*, 11 C. W. N. 705; 6 C. L. J. 427; see also, *Rajkrishna v. Bepin*, 16 C. L. J. 194; 40 C. 245; 17 C. W. N. 591, and *Harihar v. Shyam Lal*, 40 C. 615; *Jageshra v. Durga Prasad*, 36 A. 500; 12 A. L. J. 844, and *Arunachalam v. Rangaswamy* 38 M. 922 F. B.; 28 M. L. J. 118; 17 M. L. T. 154; (1915) M. W. N. 118; 28 I. C. 79, and *Fulkumari v. Ghansyam*, 31 C. 511. Reversed in 35 C. 202; 12 C. W. N. 169, P. C., in which it has been held that a Court-fee of Rs. 10 is sufficient.

In a suit for declaratory decree only, without consequential relief, a Court-fee of Rs. 10 is sufficient.—*Gobind Nath v. Gajraj Mati*, 13 A. 389. See also *Sagaji Rao v. Smith*, 20 B. 786.

A suit by a third person under clause (3) of s. 194, Bengal Tenancy Act, is not a title suit, and need not be stamped as such. Such a suit is in the nature of a suit for injunction, or else a declaratory suit.—*Jagadamba v. Protap Ghose*, 14 C. 537.

When reversioners sue to have declared invalid as against them alienations made by a Hindu widow, a Court-fee of Rs. 10 must be paid in respect of each of the alienations in question.—*Daiva Chilaya Pillai v. Pannathal*, 18 M. 459 (16 A. 308, F. B., approved).

Suit by heir-presumptive against a life-tenant to restrain waste—Claim for injunction, for declaration of title and for appointment of receiver—Court-fee payable in such a suit.—*Monmatha Nath v. Rohini Moni*, 27 A. 406, p. 410.

In a declaratory suit under Or. XXI, r. 63, the property attached must be regarded as the subject-matter of the suit and the value of the suit must be the value of the property attached.—*Dwarka Das v. Kameshar Prasad*, 17 A. 96. See, *Moti Singh v. Kaunsilla*, 16 A. 308, and *Gobind Nath v. Gajraj Mati*, 13 A. 389 and *Narayana v. Ayyasawamy*. (1914) M. W. N. 910.

In a suit for possession by declaration of title and also for injunction and damages, the Court must accept the value of the relief stated in the plaint for the purposes of Court-fees as well as for the purpose of jurisdiction.—*Hari Sankar v. Kali Kumar*, 32 C. 734; 9 C. W. N. 690; *Chelasani v. Chelasani*, 24 M. L. J. 233; F. B.; 13 M. L. T. 128; 18 I. C. 363. Followed in *Vachani v. Vachani*, 33 B. 307. But the plaintiff's valuation should not be arbitrary, *Mohendra v. Dinabadhu*, 19 C. L. J. 15; *Hyder Ali v. Hussain*, 24 I. C. 816. But see *Barru v. Lachman*, 23 P. L. R.

## COMMENTARY.

This section corresponds with Explanation VI to Section 13 of the C. P. Code, of 1882, with some modifications and it declares that where a foreign judgment is relied on, the production of the judgment duly authenticated is presumptive evidence that the Court which pronounced it had jurisdiction, unless the contrary appears on the record; but such presumption may be removed by proving want of jurisdiction. This section is to be read with ss. 70 and 80 of the Indian Evidence Act, which relate to the presumption as to certified copies of foreign judicial records.

It should be noted here that the words "shall presume" used in this section, give no option to the Court, and it is bound to presume that the judgment was pronounced by a Court of competent jurisdiction, until evidence is given to disprove it, and the party who disputes the jurisdiction must produce such evidence. (*See* the definition of the words "shall presume" in s. 3 of the Indian Evidence Act). Thus in a suit upon a foreign judgment in British India, the defendant, if he disputes the jurisdiction of the foreign Court, must prove that fact. This section has thrown the onus upon the defendant, but that was not the case under the old section. *See Udhe Singh v. Puran Chand*, 165 P. W. R. (1909): 41 P. L. R. 1910.

**The Following Cases were Decided under the Old Code.**—There is a distinction between a case in which a defendant puts forward a foreign judgment as a bar to a suit and a case in which a plaintiff seeks to enforce a foreign judgment. In the former, it may fairly be supposed that the party submitted to the jurisdiction of the Court.—*E. Christien v. P. J. Delanny*, 26 C. 931; 3 C. W. N. 614.

The production of an authenticated copy of a judgment of a foreign Court is presumptive evidence that the Court which made the judgment was a Court of competent jurisdiction.—*Bababhat v. Narharbhat*, 13 B. 224. *See also Kassim v. Isuf*, 29 C. 509; 6 C. W. N. 829.

In a suit based upon foreign judgment to recover money due for board, lodging, and tuition, the plaintiff cannot recover more than what appears on the face of the judgment, and when such judgment is silent as to interest, he cannot make the defendant liable for interest on the amount of the English judgment.—*Syed Moazim Hossein v. Raphael Robinson*, 28 C. 641; 5 C. W. N. 741. (22 C. 222, P. C., referred to.)

**Onus of Proving Plea of Want of Jurisdiction in Suits on Foreign Judgment.**—Where a suit is brought on a foreign judgment, every presumption is made in favour of such judgment, and therefore the onus is on the defendants to prove that they had not submitted to the jurisdiction of the Foreign Court; *Ramanathan Chetty v. Lakshmanan Chetty*, 24 M. L. T. 244; 40 I. C. 202.

## PLACE OF SUING.

15. Every suit shall be instituted in the Court of the lowest grade competent to try it.  
[S. 15]

Court in which  
suits to be instituted.

(l) **In Suits to Enforce Registration.**—A suit for registration of document does not fall for purposes of Court-fees within s. 7, cl. (4) of the Court Fees Act, but under art. 17 (6) of Sch. II of the Act. It is a suit in which it is not possible to estimate at money value the subject matter in dispute.—*Ramu Aiyar v. Sankara Aiyar*, 31 M. 89 (8 C. 515; 12 M. L. J. 88; 13 M. 56, *followed*). In a suit to enforce registration, where two documents are executed by one and the same person, and they create the same interest in the same property standing to each other in the relation of an operative and a superseded document, the value of the suit for purpose of jurisdiction is the value of the interest intended to be created by the operative document.—*Ramakrishnamma v. Bagamma*, 1 M. 56.

(m) **In Suits to Remove Trustees or Managers.**—In a suit, under Act XX of 1863, to remove the managers of an endowment from office the subject-matter was held to be one, which did admit of valuation and the Court-fee payable was Rs. 10.—*Veerasami Pillay v. Chokappa*, 11 M. 148 and 149-note. See however, *Muhammad Sirajul Hug v. Imamuddin*, 1 A. 104.

A prayer in a plaint that the plaintiffs themselves may be appointed trustees, is not a prayer for possession requiring to be stamped at the value of the trust property.—*Thakuri v. Brahma Narain*, 19 A. 60. See also *Muhammad Sirajul Hug v. Imamuddin*, 19 A. 104, and *Girdhari Lal v. Ram Lal*, 21 A. 200.

(n) **In Suits Between Landlord and Tenant.**—In a suit to eject a defendant as being a tenant at will, the Court-fee upon the plaint or memorandum of appeal is annas 8 under Sch. II, Cl. (5) of Act VII of 1870.—*Nurjhan v. Marfan Mundal*, 11 C. L. R. 91.

A suit to eject a tenant at fixed rates is a suit for possession of the land and the valuation of such suit for the purposes of Court-fees and of jurisdiction is the value of the subject-matter of the suit, that is to say, of the tenant's right, not of the land itself nor of merely one year's rent.—*Ram Raj Tewari v. Girmandan*, 15 A. 63. Followed in *Ram Ekbal v. Baldeo*, 19 C. L. J. 418; *Nandan v. Debidin*, 12 A. L. J. 933; *Balasidhan-tam v. Perumal*, 27 M. L. J. 475.

In a suit for possession of an occupancy-holding brought by the tenant against the landlord as well as the person whom the landlord has inducted into the land, the Court-fee payable on the plaint must be computed on the market value of the property.—*Furzund Ali v. Mohanth Lal Puri*, 82 C. 263.

(o) **In Reference under the Land Acquisition Act.**—Court-fee payable on a memorandum of appeal from an order of reference under the Land Acquisition Act is that prescribed by Art. 11 of the Second Schedule of the Court-fees Act.—*Harrish Chandra v. Bobo Tarini*, 8 C. W. N. 321.

**Suits Embracing Two or More Distinct Subjects.**—Alternative claims, forming different matters which could have been made the grounds of separate suits are "distinct subjects" within the meaning of s. 17 of the Court Fees Act, VII of 1870.—*Neelakandhan v. Anatha Krishna*, 30 M. 61; 16 M. L. J. 462; *Hushmatunnissa v. Abdul Karim*, 29 A. 155; 4 A. L. J. 127; see also 9 A. 252 and 18 M. 459; *Shidappa v. Rachappa*, 36 B. 628; 14 Bom. L. R. 757.

of them must be instituted in the Munsif's Court.—*Maashollah Khan v. Ram Lal*, 9 C 6.

**Court of the Lowest Grade.**—We have in British India a number of Courts of different grades for the trial of civil suits. In each of the towns of Calcutta, Patna, Allahabad, Bombay, Madras, Lahoro and Rangoon, we have a High Court established by a Royal Charter. Besides these High Courts, we have in the different provinces of India, other Courts constituted by Acts of the Governor-General of India in Council. The provisions prescribing the pecuniary jurisdiction of different grades of Civil Courts of different provinces are to be found in the Civil Courts Acts of each province. See the following Acts:—(1) The Bengal, N. W. P. and Assam Civil Courts Act XII of 1887; (2) Bombay Civil Courts Act XIV of 1869; (3) Madras Civil Courts Act III of 1879; (4) Central Provinces Civil Courts Act XVI of 1895; (5) Oudh Civil Courts Act XIII of 1879; (6) Punjab Civil Courts Act XVIII of 1894; (7) Burma Civil Courts Act VI of 1900; (8) Jhansi Civil Courts Act XVIII of 1867.

The High Courts in the exercise of their ordinary original civil jurisdiction are competent to try all suits of any value except suits falling within the jurisdiction of the Presidency Small Cause Courts of which the value does not exceed Rs. 100.—The pecuniary jurisdiction of the three Presidency Small Cause Courts in Calcutta, Bombay and Madras is limited to suits of which the value does not exceed Rs. 2,000.

In all the different provinces there are, generally, three grades of Civil Courts, viz., (1) District Judge's Court; (2) Subordinate Judge's Court; (3) Munsif's Court. The jurisdiction of District Judges and Subordinate Judges extends to suits of any value; and the jurisdiction of Munsifs in suits of which the value does not exceed Rs. 2,000. In the Madras Presidency, the jurisdiction of District Munsifs extends to all original suits up to the value of Rs. 2,500. In the Bombay Presidency there are no Munsifs, but 1st and 2nd. class Subordinate Judges and the jurisdiction of the latter extends to all original suits up to the value of Rs. 5,000. Although the District Judge and the Subordinate Judge have concurrent jurisdiction to try all original suits of which the pecuniary value exceed the jurisdiction of a Munsif, the Subordinate Judge's Court is of inferior grade. All original suits of any value exceeding the jurisdiction of the Munsif, are by the provisions of this section, instituted in the Court of the Subordinate Judge.

It will be seen from the above that in a Presidency Town both the High Court and the Presidency Small Cause Court are competent to try a suit for damages for libel suit valued at Rs. 800. But under this section, the suit must be instituted in the Court of the Presidency Small Cause Court because it is, of the two, the "Court of the lowest grade." Similarly, though both a subordinate Judge and a Munsif have jurisdiction to try a suit for money due on a Pro-Note valued at Rs. 800, it is the Munsif's Court that is competent to try the suit being, of the two, the "Court of lowest grade." The suit should therefore be instituted in the Court of the Munsif under this section.

The term "Court of the lowest grade" in this section refers only to Courts to which the C. P. Code is applicable, and consequently S. C. Courts have concurrent jurisdiction with the Courts of Village Munsifs to hear suits which are cognizable by the latter.—*Mir Khan v. Kadarsa*, 18 M. 145.

to (f) are to be instituted in the Court within the local limits of whose jurisdiction the property is situate. The general rule embodied in this section is that immoveable property is exclusively subject to the laws and jurisdiction of the Courts within the local limits of whose jurisdiction it is situate.

S. 16 does not preclude all Courts other than the Court within whose local jurisdiction certain immoveable property is situated from trying any question relating to title to that property where it is merely incidental to the reliefs which the plaintiff seeks by his suit; *Somdagar Nabhakan v. Muhammad Hussain*, 10 I. C. 267; 9 M. L. T. 372.

Sections 18 and 17 are not confined to suits involving only immoveable property, but they apply equally to suits for immoveable property as well as moveable property, provided that the immoveable property is situate wholly or in part within the local jurisdiction of the Court.—*Shiv Ram v. Prahlad Rai*, 27 P. L. R. 398; 96 I. C. 691; A. I. R. 1926 Lah. 503.

**High Courts.**—This section and sections 17 and 20 do not apply to the Chartered High Courts in the exercise of their original civil jurisdiction; see section 120. The High Courts are governed by clause 12 of the Letters Patent, under the provisions of which they have jurisdiction to entertain suits for land, whether the land is situated, wholly or in part only within the local limits of their ordinary civil jurisdiction, the leave of the Court having been first obtained in the latter case.

**Subject to the Pecuniary or Other Limitations.**—This expression has reference to sections 9 and 15; the former prescribes that Civil Courts shall have jurisdiction to try all suits of civil nature, and the latter prescribes that all civil suits shall be instituted in the Court of the lowest grade competent to try.

**Immoveable Property.**—The term property means an actual physical object and does not include mere rights relating to physical objects.—*Matadin v. Kazim Hossein*, 18 A. 432, F. B.

“Immoveable property” shall include land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth. General Clauses Act (X of 1897), section 3, clause (25).

Trees standing on land are immoveable property.—*Sakharam v. Vishram*, 19 B. 207; see also *Krishnarao v. Babaji*, 24 B. 31.

Standing timber is immoveable property.—*Umed Ram v. Daulat Ram*, 5 A. 564; *Abdullah v. Asraf Ali*, 7 C. L. J. 152.

“Immoveable property” includes benefits to arise out of land (s. 3, cl. 25, General Clauses Act); hence rent that is to accrue due is immoveable property, but rent that has already accrued due is moveable property because it is a benefit that has arisen out of land.

A *hat* is a benefit arising out of land and, therefore, within the definition of immoveable property as given in section 2, clause (5) of the General Clauses Act (I of 1867).—*Surendra Narain v. Bhai Lal*, 22 C. 752. See however, *Fuzlur Rahman v. Krishna Prasad*, 29 C. 614. A *mela* or a fair is not an immoveable property within the meaning of s. 4 of the Road Cess Act.—*Secretary of State v. Karuna Kant*, 85 C. 82, F. B.:

ment it may give will be void. The Court of the Munsif is not competent to make a decree in a suit for accounts valued at less than Rs. 1,000, for an amount in excess of Rs. 1,000, which is the pecuniary limit of its jurisdiction: *Golap Singh v. Indra Kumar*, 9 C. L. J. 367; 18 C. W. N. 403. But see *Rameswar v. Dibe*, 21 C. 550 which has been explained and distinguished in the above case. See also *Panchuram v. Kinoo*, 40 C. 50. (21 C. 550, *followed*.)

Section 6 of the present Code now expressly provides that nothing in this code gives any Court jurisdiction over suits the amount or value of the subject matter of which exceeds the pecuniary limits of its ordinary jurisdiction: See notes under s. 6.

**Effect of Instituting a Suit in a Court of Higher Grade Where it Ought to have been Instituted in a Court of Lower Grade.**—If in such a case the Court of the higher grade (say Subordinate Judge's Court), instead of returning the plaint to the plaintiff for presentation to the Court of the lower grade (say Munsif's Court), tries the suit in spite of objections taken by the defendant and passes a decree, the decree would not be a nullity, because it is a mere irregularity under s. 99 and not a case of want of jurisdiction—the Subordinate Judge's Court having jurisdiction to try the suit. A Subordinate Judge is not precluded by the provisions of this section from trying a suit within the jurisdiction of the Munsif's Court. The error in instituting a suit in a Subordinate Judge's Court rather than in that of the Munsif's, is not an error which affects the jurisdiction of the former Court. But, if a case cognizable only by a Sub-Judge is instituted in a Court of a Munsif, it is a case of want of jurisdiction; *Matra Mondal v. Hari Mohan*, 17 C. 155; *Nidhi Lal v. Mashar Husain*, 7 A. 230; *Suryanarayana v. Bullayya*, 52 M. L. J. 929; 25 M. L. W. 367; A. I. R. 1927 Mad. 568. When a suit, which should have been instituted in the Sub-Judge's Court, is instituted in the District Court, the District Judge has jurisdiction to try it; *Augustine v. Medlycott*, 15 M. 241, p. 246.

**Transfer of Pending Suit Once Instituted in Court Competent to Try It, If Proper.**—S. 15 of the C. P. Code requires every suit to be instituted in the Court of the lowest grade competent to try it. Once the institution takes place in accordance with this provision the operation of the section is exhausted. The section gives no authority to transfer a pending suit, merely because in the course of the trial it is found that plaintiff is entitled only to a part of the claim which would have been cognizable by a lower Court; *Sheikh Nur Khan v. Shaikh Rahim*, 54 I. C. 655.

**Jurisdiction in Execution and Claim Cases.**—In execution of a money-decree for Rs. 1,317-4-0, a certain immoveable property was attached to which a person preferred a claim, alleging that he had a mortgage lien on the property for Rs. 10,368, and that it might be sold subject to his lien and possession as mortgagee. *Held*, that the Sub-Judge had jurisdiction to try the case.—*Purshotam v. Dhondu Amrit*, 6 B 582.

The plaintiffs obtained a decree in the Court of second class Sub-Judge for a sum less than Rs. 5,000, which with accumulations of interest, subsequently exceeded Rs. 5,000. The plaintiff applied for execution which was rejected by the Sub-Judge on the ground of want of jurisdiction. *Held* that the mere circumstance that the amount actually due by process of accumulation exceeded Rs. 5,000, could not oust him from the jurisdiction he hitherto had over the suit.—*Shamrav Pandaji v. Niloji Ramaji*, 10 B. 200.



By a deed of endowment, certain lands were given to idols named therein and the plaintiffs and the defendants were appointed *shebait*s. In a suit by some of the trustees against their co-trustees for a declaration that the plaintiffs were entitled to be *shebait*s jointly with the defendants, for a settlement of a scheme for the performance of the worship, for an injunction to restrain the defendants from interfering with the property, for an account, held that the suit was not a suit for land or other immoveable property.—*Juggodumba v. Puddomoney*, 15 B. L. R. 318.

**Clause (a)—Suits for Recovery of Immoveable Property With or Without Rent or profits.**—This clause refers to suits to recover possession of immoveable property where the title to that property is alleged by one side to be in him and by the other side to be in him.—*Durgadas v. Jai Narain*, 41 A. 518: 17 A. L. J. 567: 50 I. C. 156.

The insertion of the words "with or without rent or profits" is intended to remove any difficulty there may be where the defendant does not reside within the local limits of the Courts, within whose jurisdiction the property is situate.—*See Report of the Select Committee.*

**Clause (b)—Suits for Partition of Immoveable Property.**—A suit for partition of land is a suit for land within the meaning of clause 12 of the Letters Patent.—*Padamani Dasi v. Jagadamba*, 6 B. L. R. 134. Applied in *Punchanun v. Shib Chunder*, 14 C. 835.

A plaintiff may maintain separate suits for partition of immoveable property where property is situate within the limits of different districts.—*Subba Rau v. Rama Rao*, 3 M. H. C. 376. *See also Bolaram v. Ram Chandra*, 22 B. 922.

A suit for partition of family property, which consisted both of moveable and immoveable property, should be brought in the Court within the jurisdiction of which the immoveable property is situate.—*Jairam Narayan v. Atmaram*, 4 B. 482. *See also, Seshagiri Rau v. Rama Rau*, 19 M. 448.

**Clause (c)—Suits for Foreclosure, Sale or Redemption of a Mortgage.**—A suit for foreclosure or sale of immoveable property is one to obtain "relief respecting immoveable property" within the meaning of this section.—*Michael v. Ameena Bibi*, 9 C. 733: 18 C. L. R. 161.

A suit for foreclosure is a suit for land.—*Blaquiere v. Ramdhone*, Bourke, O C 319. *See also, Bibee Jaun v. Mahommed Haide*, 1 Ind Jur. (N. S.) 40. But see *Sorabji Cursetji v. Rattonji*, 22 B. 701.

A suit for the enforcement of the mortgage lien and for a decree that the money due, be realized from the property, is a suit for immoveable property and must be brought in the Court within the jurisdiction of which the property is situated.—*Ram Lall v. Chittro Coomeree*, 15 W. R. 277; *Ahmedee Begum v. Dabee Persaud*, 18 W. R. 287; *Mahomed Khuleel v. Sona Koorer*, 23 W. R. 123; *Leslie v. Land Mortgage Bank*, 18 W. R. 269: 9 B. L. R. 171. Followed in *Lalum Lakshimkantham v. Krishna-sawami*, 27 M. 157; *Gudri Lal v. Jagannath*, 8 A. 117, and *Vithalrao v. Vaghoji*, 17 B. 570. But see *Venkoba v. Rambhaji*, 9 B. 12, and *Sorabji Cursetji v. Rattonji*, 22 B. 701.

A suit which prays for any relief with reference to any specific immoveable property is a suit for land. A suit for maintenance in which the plaintiff prays that the amount may be charged on specific land is a suit for land; *Suridara Bai v. Trumai*, 33 M. 131.

**Jurisdiction Cannot be Conferred by Consent of Parties or by Their Waiver.**—Where a Court has no jurisdiction, no consent of parties can give it jurisdiction.—*Aukhil Chunder v. Mohiny Mohun*, 5 C. 489; *Government of Bombay v. Ranmal Singji*, 9 B. 242; *Babaji v. Lakshmbai*, 9 B. 265; *Maha Prasad v. Ramani Mohan*, 42 C. 110.

When a Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process.—*Ledgard v. Bull*, 9 A. 191 (P. C.) Followed in *Minakshi Naidu v. Subramanya*, 11 M. 26 P. C. (Referred to in *Ram Narain v. Parmeswar Narain*, 25 C. 39). See also, *Allemannessa v. Mahomed Hatem*, 31 C. 849; 8 C. W. N. 705; *Nara v. Anpurnabai*, 11 B. 160; *Sankumani v. Ikaran*, 13 M. 211; *Rewa v. Ram Kishan*, 14 C. 25 P. C.

If a Court has no jurisdiction over the subject matter of the litigation, its judgment and orders, however precisely certain and technically correct, are mere nullities, and not only voidable; they are void and have no effect either as estoppel or otherwise, and may not only be set aside by the Court in which they are rendered, but be declared void by every Court in which they may be presented. These principles apply not only to original Courts, but also to Courts of appeal. Jurisdiction cannot be conferred upon a Court of appeal by consent of parties, and any waiver on their part cannot make up for the lack or defect of jurisdiction; *Rajlakshmi v. Katyayani*, 38 C. 639; *Golab Singh v. Indra Kumar*, 9 C. L. J. 367; 13 C. W. N. 403.

The consent of parties to a litigation cannot confer on a Court, jurisdiction which it does not possess. The agreement of parties cannot authorize a superior Court to revise a judgment of an inferior Court in any other mode of proceeding than that which the law prescribes.—*Golab Sao v. Choudhuri Madho Lal*, 2 C. L. J. 384; 9 C. W. N. 956. See also *Abdullah v. Asraf Ali*, 7 C. L. J. 152.

Where a Court has no inherent jurisdiction over the subject-matter of a suit, parties cannot by their mutual consent give it jurisdiction. The mere circumstance that the defendant did not renew the plea of want of jurisdiction in the Appellate Court, did not clothe that Court with a jurisdiction not given to it by law.—*Ladli Begam v. Raja Rabia*, 13 B. 650.

As a rule, parties cannot by consent give jurisdiction where none exists. This rule applies only where the law confers no jurisdiction. It does not prevent parties from waiving inquiry by the Court as to facts necessary for the determination of question as to jurisdiction, where that question depends on facts to be ascertained; *Jose Antonio v. Francisco Antonio*, 33 B. 24 (22 C. 483, p. 486, referred to).

Where the suit has been instituted in the wrong Court, the defect of jurisdiction is not cured by its transfer to the court in which it ought to have been brought.—*Panchaoni Awasthi v. Ilahi Baksh*, 4 A. 478.

Where jurisdiction over subject-matter exists, requiring only to be invoked in the right way, the party who has invited or allowed the Court to exercise it in a wrong way cannot afterwards challenge the legality of the proceedings due to his own invitation and negligence. But if there is no jurisdiction over the subject-matter, the acquiescence of the parties cannot create it.—*Vishnu Sakham v. Krishnarao Malhar*, 11 B. 163.

A suit for the recovery of a certain amount on a promissory note, and also for a declaration to the effect that the decretal amount is a charge on a certain property mortgaged as collateral security for the payment of the debt secured by the promissory note, falls within the purview of sec. 16 (a).—*Jai Dev Singh v. Jai Singh* (40 B. 337 *folld.*): 96 I. C. 752: A. I. R. 1926 Lah. 66.

A suit for maintenance with a prayer that maintenance be made a charge on immoveable property, is a suit for right to or interest in immoveable property; *Sitabhai v. Lakshmibai*, 18 Bom. L. R. 67: 40 B. 337: 32 I. C. 985.

A suit to recover payment of sums claimed by certain persons as hereditary officers, and arising out of a grant by the Sovereign proprietor of the territory by which the possessors thereof were bound to contribute to the maintenance of such hereditary officers, is a suit for interest in immoveable property.—*Beema Shunker v. Jamasjee*, 5 W. R. 121 (P. C.); 12 M. I. A. 23.

Where a person claiming to hold land free of Government assessment was compelled by the Collector to pay the same, afterwards brought a suit to establish his right, *held* that the suit was one to recover an interest in immoveable property.—*Bhujang Mahader v. Collector of Belgaum*, 11 B. H. C. 1.

A suit to recover possession of mango trees is a suit for possession of an interest in immoveable property.—*Bapu v. Dhondi*, 16 B. 353. See also *Tofail Ahmud v. Bane Madhub*, 24 W. R. 394; *Seeni Chettiar v. Santhanathan*, 20 M. 58 (F. B.) and *Sakharam Mulshet v. Vishram*, 19 B. 207.

Trees are not moveable properties, but fruits upon trees are moveable properties.—*Nasir Khan v. Karamat Khan*, 3 A. 168. Referred to in *Umed Ram v. Daulat Ram*, 5 A. 564.

A bond whereby the superstructure of a house exclusive of the land beneath, is hypothecated, created an interest in immoveable property.—*Narajana Pillay v. Ramasawmy*, 8 M. H. C. 100.

A suit for declaration that a mortgage in favour of the defendants is invalid is to be instituted in the Court having territorial jurisdiction over the area affected by the mortgage; *Arunchellam v. Muthia*, 23 M. L. J. 679: (1914) M. W. N. 52: 17 I. C. 758.

A suit for *baluta* or *aya* is a claim in respect of a *hak* belonging to, and forming the emoluments of an hereditary office amongst Hindus, and one in respect of immoveable, and not moveable or personal property.—*Appana v. Nagia*, 6 B. 512.

A suit for a *malikana* allowance concerns the proprietary right in land. A dispute concerning it may be regarded in the same light for the purpose of jurisdiction as a dispute concerning the proprietary right itself.—*Mahomed Karumutollah v. Abdool Majeed*, 1 N. W. 205.

A right to possession and management of a *saranjam* is an interest in immoveable property.—*Narayan Jaganath v. Vashdeb Vishnu*, 15 B. 247.

A suit brought against the owners of a mine adjacent to a mine belonging to plaintiffs, to restrain the defendants by injunction from

Where a suit, owing to over-valuation or under-valuation, is brought in a Court whose grade is higher or lower than that of the Court in which it should have been instituted if it had been properly valued, and a decree is passed, such a decree is not liable to be set aside or reversed by the appellate Court unless the objection as to jurisdiction due to over-valuation or under-valuation was taken by the defendant in the Court of first instance before the issues were framed or unless the appellate Court finds that such over-valuation or under-valuation has prejudicially affected the disposal of the suit on the merits.—*S. 11 of the Suits Valuation Act, 1887*, and *Sheodani v. Tulshi*, 15 A. 378 (380); *Raman v. Secy. of State*, 24 M. 427; *Jose Antonio v. Francisco*, 35 B. 21. Where, owing to under-valuation of a suit in the Sub-Judge's Court, the appeal from the decree in the suit is heard by a District Court instead of by a High Court, the decree passed by the District Court being without jurisdiction, is a nullity.—*Rajlakshmi v. Katyayani*, 38 C. 639 (666-668): 12 I. C. 464.

**Where Satisfactory Valuation of Subject-matter of Suit not Possible.**—There are certain classes of suits of which the subject-matter is not capable of being estimated at a money value, e.g., suits for restitution of conjugal rights, suits for public religious trust or public charities; suits brought under s. 77 of the Indian Registration Act to enforce registration of a document, etc. The Court-fee in such suits is Rs. 15 as provided by the Court Fee Act 1870, Sch. II. Art. 17, Cl. (vi). In cases where the subject-matter of a suit is not capable of being estimated at a money value, section 9 of the Suits Valuation Act VII of 1887 provides that such suits should be valued, for purposes of jurisdiction, according to Rules that the High Courts may frame under that section. Where no Rules have been framed by the High Courts as provided by s. 9, the safest and most convenient course to follow would be to accept the plaintiff's valuation as the true valuation, unless it appears that the plaintiff has purposely over-valued or under-valued his claim. In the latter case the Courts would decide what should be the proper value.—*Zair Hussain v. Khurshed Jan*, 28 A. 545; *Jan Mohummad v. Mashar Bibi*, 34 C. 852.

**Improper Valuation and Its Effect.**—Whether or not a suit has been properly valued, is a preliminary question which ought to be disposed of before the case goes to trial—*Joytara Dasee v. Mahomed Mobaruck*, 8 C. 975: 11 C. L. R. 399.

The valuation of a suit must be taken from the statement in the plaint, and if, after going into the evidence it is found that a particular item is improperly claimed, the Court has means of punishing the plaintiff by saddling him with costs; but the whole suit should not be dismissed for incorrect valuation.—*Mohes Lall v. Khetarm*, 26 W. R. 76. Followed in *Hamidunnissa Bibi v. Gopal Chandra*, 24 C. 661: 1 C. W. N. 556.

The mere fact that a suit has been over-valued does not deprive the Court in which it is brought, of jurisdiction, if the over-valuation was *bona fide* and had not the effect of altering the appellate jurisdiction.—*Rajendro Lall v. Shama Churn*, 5 C. 188: 4 C. L. R. 417.

Where it appears that the relief sought is under-valued, and that the Court is not competent by reason of the real value, to try the suit, the suit should not be dismissed, but the plaint should be returned for presentation to the proper Court.—*Khogendro Narain v. Gouri Kant*, 11 C. L. R. 300. See also, *Bhadeswar v. Gouri Kant*, 8 C. 834, and *Moshingan v. Mozari Sajad*, 12 C. 271.

**Proviso.**—This proviso is based upon the maxim "*Equity acts in personam*," that is, it regards its decrees as commands addressed to the defendant personally. Courts of Equity in England exercise jurisdiction in *personam*, and accordingly they entertain suit, relating to land, though situate outside their jurisdiction, if the person or the personal property of the defendant is within their jurisdiction. In other words, if the personal obedience of the defendant can be enforced by attachment of his person or personal property, then a suit to obtain relief respecting, or for compensation for wrong to immoveable property held by or on behalf of the defendant may be instituted either (1) in the Court within the local limits of whose jurisdiction the property is situate, or (2) in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business or works for gain. Thus the proviso gives option to the plaintiff to bring his suit of the nature described in it, in any of the two places mentioned therein. In the case of *mofussil* Courts, the power to make orders in *personam* in respect to suits of the kind mentioned in the proviso is governed by the limitations to jurisdiction imposed by this section, and in the case of High Courts by the limitations imposed by the Letters Patent.

Suits for injunction, for specific performance of contracts for sale of land, etc., are the classes of suits contemplated by the proviso. An injunction is a personal remedy and does not run with the land. See, *Sakarlat v. Bai Parvatibai*, 26 B. 263 and 140; *Jamsetji v. Hari Dayal*, 32 B. 181.

The proviso has no application to a case where the relief is not one that can be rendered to plaintiff by the personal obedience of the defendant; *Arunachella v. Muthia*, 23 M. L. J. 679.

*The following cases will explain the meaning of the proviso:—*

**Suits for Which Relief can be Entirely Obtained Through Personal Obedience.**—The plaintiff sued in the Court of the Recorder of Rangoon to recover damages for trespass on land situate outside the limits of the original jurisdiction of the Recorder's Court, and for an injunction. Both the parties resided within the jurisdiction of Recorder's Court. *Held*, the plaintiff, having alleged that the land was in his possession, was not entitled to the benefit of the proviso to s. 16, C. P. Code, 1882 and that a suit for damages to land cannot be said to be a suit for which relief can be entirely obtained through the personal obedience of the defendant, even though it may be joined with a claim for an injunction. 20 C. 689. Referred to in *Keshav v. Vinaya*, C. P. L. R. 48.

A British Indian Court can entertain a suit to recover mesne profits of lands instituted outside British India against a defendant residing within its jurisdiction. The proviso to s. 16 of the C. P. Code makes it clear that although a wrong to immoveable property is alleged yet where the relief sought can be entirely obtained through the defendants' personal obedience the suit can be instituted either in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business or personally works for gain; *Mahadeo Govind Suktankar v. Ramchandra Govind*, 23 Bom. L. R. 903.

The proviso to this section requires not only that the relief should be entirely obtainable through the personal obedience of the defendant, but

In suits for redemption of mortgages, the mode in which the value of the subject-matter should be calculated for purpose of jurisdiction pointed out.—*Amanath Begam v. Bhajan Lal*, 8 A. 438.

The valuation of a suit for redemption for purposes of jurisdiction is the amount remaining due on the mortgage, or claimed on it by the mortgagee.—*Rup Chand Khem Chand v. Balwant Narain*, 11 B. 591. Followed in *Amirta Bin v. Naru Bin*, 13 B. 489, and in *Ram Chandra Baba v. Janardhan*, 14 B. 10.

In a suit to redeem the *kanom* and to recover arrears of rent, held that for the purposes of determining the jurisdiction of the Court of Appeal, the value of the subject-matter of suit was the aggregate value of the two heads of relief.—*Konna Kar v. Karuna Kar*, 10 M. 528. See also 14 M. 480.

In a redemption suit against a mortgagee in possession, when the mortgagee has not paid rent which has been stipulated for, and the plaintiff asks for an account, in taking which the arrears of rents should be deducted from the mortgage amount. Held that the Court-fee should be computed according to the principal sum expressed to be secured by the mortgage.—*Eacharan Patter v. Appu Patter*, 10 M. 16.

For the purpose of jurisdiction, the subject-matter of a suit to establish the validity of a charge upon property is, when the property is in excess of the charge, the amount of the charge; when the charge is in excess of the property, the value of the property.—*Krishnama Charyar v. Srinivasa*, 4 M. 339.

Section 7 (e) Cl. IX of the Court-fees Act, applies only to "suits" and not to appeals. In case of appeals in mortgage suits, Article I of Schedule I of the Act applies. The Court-fee in such cases is payable on the value of the subject-matter in dispute in the appeal and not on the subject matter in dispute in the suit.—*Reference under Court Fees Act*, 29 M. 367; 16 M. L. J. 287 (10 B. 41, *dissented from*), see also, *Nepal Rai v. Debi Prasad*, 27 A. 447 (13 A. 94, *dissented from*); and *Jagatdhar Narain v. Brown*, 33 C. 1133; 4 C. L. J. 21. See also, *Mahadeo v. Gorakh*, 30 A. 547.

(b) In Pre-emption Suits.—In pre-emption suit, the subject-matter is the right of pre-emption, the value of which, and not the property itself, determines the question of jurisdiction under section 20, Act VI of 1871.—*Naun Singh v. Rash Behary*, 13 C. 255.

Suit for pre-emption of two villages out of a larger number conveyed by the same sale-deed.—The words "distinct subjects" in section 17 of the Court Fees Act must be taken to mean "distinct cause of action."—*Durga Prasad v. Purander Singh*, 27 A. 186.

In a suit for pre-emption the valuation of the property sued for, is to be calculated at the market-value for which it would sell, and not at ten times the value of the *sudder jumma*—*Anjud Singh v. Depun Singh*, 3 B. L. R. Ap. 143; 14 W. R. 230-note; *Nunhoo Singh v. Tojan Singh*, 14 W. R. 228.

In a suit for pre-emption of separate plots of land not being a fractional share of a revenue-paying unit, the Court-fee payable should be paid on the market-value of the land in suit and not on five times the

**17.** Where a suit is to obtain relief respecting, or compensation for wrong to, immoveable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate.

Suits for immoveable property situate within jurisdiction of different Courts.

Provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such Court. [S. 19]

## COMMENTARY.

**Alterations in the Section.**—This section corresponds with section 19 of the C. P. Code of 1882. The changes introduced in this section are the omission of the words "*within the limits of a single district but*" from the first para and the entire omission of the third para of s. 19 of the old Code.

**Scope and Object.**—This section provides that where a suit is to obtain any kind of relief respecting immoveable property or compensation for wrong to such property which is situate within the local limits of the jurisdiction of two or more Courts, either in the same or in different districts, then the plaintiff is at liberty to institute his suit in any court within the local limits of whose jurisdiction any portion of such property is situate: Provided the value of the subject-matter of the suit is within the cognizance of such Court. This section is intended for the benefit of the suitors and it gives option to them to institute their suits in any Court according to their convenience and its object is to prevent multiplicity of suits.—*Harchandra v. Lal Bahadur*, 16 A. 359 and *Balgonvind v. Gajalakhmi*, 21 I. C. 438. The section gives jurisdiction to a Court to entertain a suit in respect of properties partly situated within its territorial limits and partly out of it, when the same relief is sought in respect of the whole of it.—*Maseyk v. Steel*, 14 C. 661.

Where a suit may be filed in more than one of several Courts, it is a general principle of law that the plaintiff may select the *forum* in which to bring the suit; *Ratnagiri Pillai v. Vava Ravuthan*, 19 M. 477.

**Property in Different Districts.**—Where one property was situated in Bhagulpore, and the other property in Tirhoot, and no leave had been obtained to include the property in Bhagulpore, *held*, a decree in the Tirhoot Court could have no effect as against the property in Bhagulpore.—*Bungsee Singh v. Soodist Lall*, 7 C. 739; 10 C. L. R. 263. See also *Ram Ratan v. Lalla Prasad*, 17 A. 483. The same principle applies to a suit to enforce mortgage lien on properties situate in different districts—*Bolakee Lall v. Thakoor Pertam*, 5 C. 921; 6 C. L. R. 370.

A suit for possession of immoveable property is one for obtaining relief respecting that property. It can be entertained by any Court within the local limits of whose jurisdiction any portion of the property is situate, if the entire claim is cognizable by such Court. But a suit relating to several properties situate within the jurisdiction of different Courts and based on separate and distinct causes of action cannot be tried any where, being bad for multifariousness, until it is confined to the property, claim to which is

In a suit for account filed in a Munsif's Court, if it be found by the Commissioner, that the plaintiff is entitled to a larger sum, which exceeds the jurisdiction of the Munsif, still the Munsif has jurisdiction to try the suit.—*Arogya Udayan v. Appachi Rowthan*, 25 M. 513. But see, *Golap Singh v. Indra Coomar*, 9 C. L. J. 367: 18 C. W. N. 493.

In a suit for account and for balance that may be found due, the approximate amount of the claim, as stated in the plaint, must be taken to be the value of the subject-matter of the suit for the purpose of jurisdiction.—*Khushal Chand v. Nagindas*, 12 B. 675, and *Balucantrar v. Bhima Shankar*, 13 B. 517.

In a suit for an account the valuation entered in the plaint for the purpose of fixing Court-fees determines the question of jurisdiction, the valuation for both purposes being the same under s. 8 of Act VII of 1877.—*Bhagvantraï Munshi v. Mehta*, 18 B. 40. See also, *Bai Amba v. Pranjivandas*, 19 B. 193.

The mode of valuation of suits for account of partnership dealings after winding up and adjustment of accounts, pointed out.—*Ibrahimji v. Benjanji* 20 B. 265, and *Dhani Ram v. Bhagirath*, 22 C. 692.

As to Court-fee payable in an appeal from a preliminary decree in a suit for dissolution of partnership, see *Bhola v. Parsotam*, 32 A. 517.

As to Court-fee payable in a suit for administration and accounts, see 24 I. C. 643; 100 P. R. 1914.

(e) In Suits for Arrears of Rent.—A suit for recovery of rent due on a tenure for a sum not exceeding Rs. 1,000 is recognizable in a Munsif's Court although a suit for recovery of possession of the tenure lies in Sub-Judge's Court, the capital value of the tenure being Rs. 4,500.—*Chowdhury Fazlur Rahim v. Dwarka Nath*, 30 C. 453; 7 C. W. N. 402. See section 144 of the B. T. Act of 1885.

(f) In Suits for Mesne Profits.—In a suit for possession and mesne profits, valued at sum below Rs. 5,000, and instituted in a Sub-Judge's Court when it is found that the whole amount actually due to plaintiff from the defendant (exclusive of interest) is over Rs. 5,000, an appeal lies to the High Court.—*Ijjatulla v. Chandra Mohan*, 6 C. L. J. 255, F. B.; 84 C. 954; 11 C. W. N. 1193 (31 C. 865: 8 C. W. N. 233, followed).

In a suit for possession and mesne-profits, the value of the original suit for the purposes of section 21 of Act XII of 1887 depends not merely upon the property sought to be recovered, but also upon the value of amount of the profits recoverable.—*Mohini Mohan v. Satish Chandra*, 17 C. 704.

Section 11 of the Court Fees Act applies to a claim for mesne-profits for which an amount can be and has been claimed by the plaint, and in respect of which some fee has been actually paid.—*Ram Krishna Bhikaji v. Bhimabai*, 15 B. 416.

No additional stamp is required on account of the claim for future mesne profits.—*Vithal Hari v. Gobind Vasudeo*, 17 B. 41.

A memorandum of appeal from a decree for ejectment and mesne-profits is chargeable with Court-fees calculated both on the land and on the mesne-profits.—*Brahmamyia v. Lakshminarasimha*, 16 M. 310.



*Churn v. Bilash Chunder*, 18 C. 526. Distinguished in 22 C. 871 and referred to in *Keshav v. Vinayak*, 23 B. 22 p. 31 See also notes under s. 88, *post*.

**Jurisdiction of the High Court in respect of Property Situate Partly Within, and Partly Outside, its local limits.**—The provisions of this section are not applicable to the High Court in the exercise of its original civil jurisdiction, *see* s. 120. The procedure of the High Court in such cases is laid down in clause 12 of the Letters Patent.

**18. (1)** Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts any immoveable property is situate, any one of those Courts, may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction :

Place of institution of suit where local limits of jurisdiction of Courts are uncertain.

Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction.

(2) Where a statement has not been recorded under subsection (1), and an objection is taken before an appellate or revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the appellate or revisional Court shall not allow the objection unless in its opinion there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice. [S. 16 A.]

## COMMENTARY.

**Alterations in the Section.**—This section corresponds with s. 16-A of the C. P. Code of 1882. The changes introduced in this section are the substitution of the word 'where' for the word 'when' in the beginning; the substitution of the word 'unless' for the word 'if' and the substitution of the word 'no' for the word 'any' in the latter part of clause (2); and also the addition of the words 'and there has been a consequent failure of justice' after the word 'thereto' in the last line. These words have been added with a view to prevent the taking of technical objections to jurisdiction; in other words, unless there has been a consequent failure of justice, technical objections as to jurisdiction should not be entertained.

A suit for rent of a fishery is a suit for immoveable property within the meaning of this section. The condition required by this section is

1913; 22 I. C. 503 F. B.; 111 P. R. 1018 where it has been held that the plaintiff had an uncontrolled discretion to value the relief, except in cases when rules have been framed by the High Court under s. 9 of the Suits Valuation Act.

(h) **In Suits to Set Aside Adoption.**—A suit to set aside an adoption is incapable of valuation, and it is competent to the plaintiff in such a suit to value the relief claimed; *Prahlad v. Duvarkanath*, 37 C. 860: 14 C. W. N. 929.

For the purpose of determining the jurisdiction over a suit to set aside an adoption, the loss which would accrue to the adopted person, should the adoption be declared invalid, is the measure of the value of the subject-matter of the suit.—*Keshava Sanabhaga v. Lakshminarayan*, 6 M. 192. Dissented from in *Shedoni Ram v. Tulshi Ram*, 15 A. 378, and held that the value of the subject-matter in dispute is the value put upon his plaint by the plaintiff.

(i) **In Suits for Restitution of Conjugal Rights.**—A suit for restitution of conjugal rights is incapable of valuation, but the plaintiff can put his own valuation. A money value, however, arbitrary can be placed on all suits. A Munsif can therefore try such a suit, the value of which as fixed by the plaintiff, is within his pecuniary jurisdiction.—*Zair Husain Khan v. Khurshed Jan*, 28 A. 545, F. B.; 3 A. L. J. 268. A. W. N. (1906), 99. (31 C. 849: 8 C. W. N. 705, dissented from): see also, *Jan Mahomed v. Mesher Bibi*, 34 C. 352: 11 C. W. N. 458: 5 C. L. J. 400. Followed in *Josoda v. Chhotu*, 34 B. 236. See also 14 C. W. N. 929.

A suit for restitution of conjugal rights is not one to which any special money-value can be attached for the purpose of jurisdiction.—*Golam Rahman v. Fatima Bibi*, 13 C. 232. Followed in *Mowla Newaz v. Sajidunnissa*, 18 C. 278. Mode of computation of Court-fees in a suit for declaration of the validity of marriage and for possession of wife discussed.—*Amirul Hossein v. Khairunnissa*, 28 C. 567.

(j) **In Suits for Removal of Karnavan.**—A suit for the removal of a karnavan of a Malabar *tarwad* on the ground of misfeasance, is incapable of valuation, and falls under cl. 6, art. 17 Sch. II of the Court Fees Act. VII of 1870.—*Naranjoli Chirakal v. Marainjoli Chirakal*, 4 M. 814, and *Govindan Nambiar v. Krishnan*, 4 M. 146, and *Kunhan v. Sankara*, 14 M. 78. See, however, *Krishna v. Raman*, 11 M. 266.

(k) **In Suits for Cancellation of an Instrument.**—The value of the subject-matter of suit for the cancellation of a bond is to be determined with reference only to the principal amount, and not that amount together with the interest payable thereon.—*Golub Rai v. Mangli Lal*, 6 A. 71. See also, *Kali Charan v. Ajudhia*, 2 A. 148.

The amount of Court-fee payable in a suit to cancel an instrument affecting land; see *Kanaran v. Komappan*, 14 M. 169; the amount of Court-fee payable in a suit for cancellation of an agreement to sell, see, *Parathayi v. Sankumani*, 15 M. 294: and the amount of Court-fee payable in a suit for declaring invalidity of a document; see *Chingacham v. Chingacham*, 30 M. 18: 1 M. L. J. 412.

In suits for cancellation and delivery of document, the Court cannot revise the valuation, but is bound to accept the plaintiff's valuation.—*Ohinnammal v. Madarsa*, 27 M. 460.

Other suits to be instituted where defendants reside or cause of action arises.

20. Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

- (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain : or
- (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution : or
- (c) the cause of action, wholly or in part, arises.

*Explanation I.*—Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

*Explanation II.*—A corporation shall be deemed to carry on business at its sole or principal office in British India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place. [S. 17.]

#### *Illustrations.*

(a) A is a tradesman in Calcutta. B carries on business in Delhi. B, by his agent in Calcutta, buys goods of A and requests A to deliver them to the East Indian Railway Company. A delivers the goods accordingly in Calcutta. A may sue B for the price of the goods either in Calcutta, where the cause of action has arisen, or in Delhi, where B carries on business.

(b) A resides at Simla, B at Calcutta and C at Delhi. A, B and C being together at Benares, B and C make a joint promissory note payable on demand, and deliver it to A. A may sue B and C at Benares, where the cause of action arose. He may also sue them at Calcutta, where B resides, or at Delhi, where C resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the Court.

### COMMENTARY.

**Changes Made in the Section.**—This section corresponds with s. 17 of the C. P. Code, of 1882. Several changes have been introduced in this

A suit for possession and mesne-profits is one for "distinct subjects."—*Kishore Lal v. Sharut Chunder*, 8 C. 593, F. B.; see also 10 A. 401, and 3 A. 181.

Where the plaintiff sues, in the alternative, for one of two reliefs, the larger of the two reliefs sought determines the amount of the stamp. Section 17 of the Court Fees Act, VII of 1870, does not apply to such a case. That section is applicable only to a case of cumulative relief sought by the plaintiff.—*Kashinath Narayan v. Govinda Bin*, 15 B. 82 (8 B. 802, followed).

Suits to be instituted where subject matter situate.

16. Subject to the pecuniary or other limitations prescribed by any law, suits—

- (a) for the recovery of immoveable, property with or without rents or profits,
- (b) for the partition of immoveable property,
- (c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immoveable property,
- (d) for the determination of any other right to or interest in immoveable property,
- (e) for compensation for wrong to immoveable property,
- (f) for the recovery of moveable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate :

Provided that a suit to obtain relief respecting or compensation for wrong to, immoveable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

*Explanation.*—In this section "property" means property situate in British India. [S. 16.]

## COMMENTARY.

**Changes Introduced in the Section.**—This section corresponds with section 16 of the C. P. Code, 1882. The changes introduced in the section are, the addition of the words, "with or without rents or profits" in clause (a); and the addition of the words "sale" "in the case" and "or charge upon" in clause (c)

**Scope of the Section.**—This section deals with local or territorial jurisdiction and it declares that all suits of the classes specified in clauses (a)

of the Court of the Munsif at R, it was held that the Court of the Munsif at R had jurisdiction to entertain the suit. Clauses (a) and (b) of this section allow a landlord to institute a suit for rent where the tenant resides.—*Kunja v. Manindra*, 27 C. W. N. 542; A. I. R. 1823 Cal. 619; 77 I. C. 252 (*Chintaman v. Madhavray*, 6 B. H. C. R. 29 *relied on*). The term "residence" is not identical with ownership—it means where a person eats, drinks and sleeps or where his family or his servants eat, drink and sleep.—*Kumud v. Jatindra*, 38 C. 394; 13 C. L. J. 221.

When a person resides in a place of his own free will, having power to go, wherever he likes, he is said to reside there voluntarily. A compulsory residence in a place is not sufficient to give a Court jurisdiction over him. As for instance, if a person is confined in a jail, his residence there is not voluntary, but compulsory, therefore it cannot be said that he resides in the jail voluntarily. A person who is in confinement in a certain place, is not voluntarily residing in that place.—*Ram Labhaya v. Bishan Das*, 77 P. R. 1909; 124 P. L. R. 1909.

The fixed and permanent home of a man's wife and family, and to which he has always the intention of returning, will constitute his dwelling-place.—*Fatima Begum v. Sakina Begum*, 1 A. 51, and *Kasheenath v. Debkhisto*, 6 W. R. 240.

What constitutes "dwelling" within the meaning of the Civil Procedure Code.—A person might "dwell" at more places than one within the meaning of the Code of Civil Procedure.—*Orde v. Skinner*, 3 A. 91, P. C.

A temporary residence in Calcutta, for purposes of pleasure, with the intention of remaining there for a month, without having at the time a residence out of the jurisdiction, is a sufficient dwelling within the meaning of this section.—*Morris v. Baumgarten*, *Bourke*, O. C. 127; Cor. 152. See also *Mayhew v. Tulluck*, 4 N. W. 25. But see *Emrit Lal v. Kidd*, Cor. 46; 2 Hyde 117 and *Kavasji Framji v. Wallace*, 1 B. H. C. 113; *Kadir Rowther v. Vencatachellapathy*, 14 I. C. 573.

A party spending his time alternately in the mofussil and Calcutta, and resident in the latter for some days previous to, and on the day of, filing his plaint, is subject to the ordinary original civil jurisdiction of the High Court.—*Nishadiney v. Kally Kristo*, Cor. 24.

Where a defendant took up his abode with his wife and family in a hired house in Madras meaning to remain there several months and was actually living there when the suit was instituted, it cannot be said that he was not dwelling within the jurisdiction of the High Court; *Srinivasa v. Venkata*, 34 M. 257 P. C. 14 C. L. J. 64; 15 C. W. N. 741 (29 M. 239; 16 M. L. J. 238, *affirmed*).

The defendant, who was resident of Nathdwar, in the territories of the Maharana of Oodeypore, came to Bombay on a visit, and was sued in the High Court on a cause of action which arose in Oodeypore. Held, that the defendant was neither dwelling nor carrying on business, nor personally working for gain in Bombay, and the Court had no jurisdiction.—*Goswami Shri v. Govardhan Lalji*, 14 B. 541; 6 B. 100. (19 W. R. 341; 23 W. R. 223, *referred to*). But see *Everet v. Frere*, 8 M. 205 where it has been held that temporary residence was sufficient to render

6 C. L. J. 342 (28 C. 637 *disapproved*, 31 C. 257 *approved*). See also, *Golam Mohiaddin v. Parbati*, 36 C. 665: 13 C. W. N. 590.

Growing grass is immoveable property within the definition of s. 2 of the General Clauses Act (I of 1878).—*In re Hormasji Irani*, 18 B. 87.

A *jalkar* or right of fishery, as being a benefit arising out of land covered by water, is immoveable property within the definition as set out in the General Clauses Act.—*Ram Gopal v. Narumuddin*, 20 C. 416. See also *Shibu Halder v. Gupi Sundari*, 24 C. 440: 2 C. W. N. 169. See however, *Fadu Jala v. Gour Mohun*, 19 C. 541 (F. B.), in which the majority of the Full Bench were of opinion that a fishery does not come within the meaning of the term "immoveable property" as used in s. 9 of the Specific Relief Act (I of 1877). The same view is also taken in *Natabar v. Kubir*, 18 C. 80.

A right of way is not "immoveable property" within the meaning of s. 9 of the Specific Relief Act (I of 1877).—*Mangal Das v. Jowanram* 23 B. 673.

A right of ferry is immoveable property or an interest therein within the meaning of the Specific Relief Act (I of 1877), s. 9.—*Krishna v. Akilanda*, 18 M. 54. See also, *Abdul Hamid v. Babu Lal*, 35 A. 150.

A suit by a creditor against the trustees to have trusts carried out, for removal of trustees, for appointment of a receiver, to carry out the trusts and to compel sale of land, is a suit for land; *Delhi and London Bank v. Wordie*, 1 C. 249; 25 W. R. 272. See also, *Hara Lall v. Nilambini*, 29 C. 315.

The terms "immoveable property" and "interest in immoveable property" are to be held to include not only land and houses and such other things as are physically incapable of being moved, but also such incorporeal hereditaments as are connected with immoveable property such as rights of common, rights of way, and other profits such as rents, pensions, and annuities secured upon land.—*Collector of Thana v. Krishna Nath*, 5 B. 322; on appeal in 6 B. 546. Referred to in *Keshav v. Vinayak*, 23 B. 22 and in 33 B. 373 Distinguished in *Kashi Nath v. Ananth*, 24 B. 407.

The equity of redemption of the mortgagor is immoveable property.—*Parashram Har Lal v. Govind Ganesh*, 21 B. 226. But a decree upon a mortgage is not immoveable property; *Baijnath v. Binoyendra*, 6 C. W. N. 5.

Tiled huts are immoveable properties.—*Deno Nath v. Adhor*, 4 C. W. N. 470. See also *Amrito v. Nibaran*, 31 C. 340. But see *Denonath v. Nuffer*, 26 C. 778.

An allowance granted by the Peshwa in permanence, whether secured on land or not, being according to Hindu law, *nibadha*, is immoveable property; *Krishnaji v. Gajanan*, 33 B. 378 (6 B. 546 followed).

A suit for the recovery of *joshipan* income is a suit relating to immoveable property; *Balwant v. Tulsibai*, 46 I. C. 782.

A suit to recovery title-deeds although it may involve a question of title is not a suit to obtain possession of land.—*Juggernath v. Brijanath*, 4 C. 322: 3 C. L. R. 875 Referred to in *Rungalal v. Wilson* 2 C. W. N. 718, p. 725. But see *Zuleka Bai v. Ebrahim*, 37 B. 494.

fixed in the sea below low-water mark, and within three miles of it.—*Baban Mayacha v. Nagu*, 2 B. 19.

An application for restoration of a minor was made to the District Judge of Allahabad under s. 1, Act XI of 1861, by his relative, alleging that the minor had, by the acts and assistance of the defendants at Allahabad, been removed from his custody and guardianship at Allahabad. At the time of the application, the minor was at Lahore. *Held* that, under ss. 1 and 4 of the Act read with s. 17, C. P. Code, 1882 (s. 20), the application was cognizable by the District Judge of Allahabad, where the cause of action arose.—*Sarat Chandra v. Forman*, 12 A. 213. *See also Mrs. Annie Besant v. Narayaniah*, 25 M. L. J. 661: 15 M. L. T. 1: 21 I. C. 789.

One who sues for damages caused by a collision at sea and out of the jurisdiction of the High Court, subjects himself to cross-suit for damages caused by the same collision, though himself residing out of the jurisdiction of the Court.—*Bombay Coast and River Steam Navigation Company v. Heleuz*, 4 B. H. C. 149.

Under s. 2 of the Indian Divorce Act (IV of 1869), a District Court has jurisdiction to make a decree for dissolution of marriage upon being satisfied that the adultery charged has been committed in India without going into evidence as to the place of the marriage of the parties.—*Kyte v. Kyte*, 20 B. 362, (L. R. 2 P. and M. 376, *followed*).

Where the cause of action arises in the jurisdiction of a court other than that in which the suit is brought, the *onus* lies upon the plaintiff to show that the defendant, at the time of the commencement of the suit, actually and voluntarily resided, or carried on business, or personally worked for gain, within the jurisdiction of the Court in which the suit was brought.—*Modhu Sudon v. Cochrane*, 6 C. L. R. 417; where the plaintiff gave no evidence of the contract, the defendant's plea of want of jurisdiction prevailed; *Lalta Prasad v. Ram Sarup*, 40 I. C. 505.

"Carries on business."—These very words are also used in cl. 12 of the Letters Patent, and the cases decided under that clause will therefore equally apply to the cases arising under ss. 16, 19 and 20 of the G. P. Code. *See the cases noted below.*

To determine whether a defendant is carrying on business, it must first be ascertained what his particular trade, calling or occupation is, and then we can examine whether the facts proved amount to a carrying on of that particular trade, calling or occupation within the jurisdiction.—*Framjee v. Hormasjee*, 1 B. H. C. R. O. C. 220. A person residing in the mofussil, who goes once or twice a week from the mofussil to a friend's house in Calcutta and does business there, will be said to "carry on business" in Calcutta. It is not necessary that he should have an office or regular place of business in Calcutta.—*Grees v. Collins*, 2 Hyde 79. It is not also necessary that the business should be carried on by him personally.—*Muthaya v. Allan*, 4 M. 209.

The expression "carry on business," in Cl. 12 of the Letters Patent of 1865, is intended to relate to business in which a man may contract debts, and ought to be liable to be sued by person having business transactions with him.—*Goswami Shri Girdhariji v. Shri Govardhanlalji*, 18 B. 290, 294.

A suit for redemption of mortgage is a suit for land.—*Kanti Chunder v. Kissory Mohun*, 19 C. 361 note. *Lall Money v. Judhoo Nauth*, 1 Ind. Jur. (N. S. 319. Not followed in *Sorabji Cursetji v. Rattonji*, 22 B. 701.

In a suit for redemption, where mortgage includes other lands out of jurisdiction, account of all the mortgaged lands can be taken by the Court within the jurisdiction of which a portion of the mortgaged property is situate.—*Girdhari v. Sheoraj*, 1 A. 331.

A suit for a declaration that the plaintiffs are the persons beneficially interested in a decree for sale on a mortgage, although the decree did not run in their names is not a suit within the meaning of cl. (c) of s. 16, C. P. Code, 1882.—*Ahmad Khan v. Abdul Rahman*, 26 A. 603.

Clause (d)—Suits for the Determination of Any Other Right to, or Interest in, Immoveable Property.—A claim to an easement is one relating to an interest in land.—*Deo Sarun v. Mahomed Ismail*, 24 W. R. 300. See also *Sultan Nawaz Jung v. Rustomji*, 20 B. 704, p. 715.

A suit for a declaration of the plaintiffs' right to rent, where such right is claimed, comes under this clause and must be instituted in the Court within the local limits of whose jurisdiction the property is situate.—*Keshav v. Vinayak*, 23 B. 22.

A right of way is an interest in immoveable property; *Bejoy Chandra v. Banku Behary*, 9 C. L. J. 336: 13 C. W. N. 451.

A suit for the recovery of unpaid purchase-money under a contract for the sale of a land is a suit for the determination of any right to or interest in immoveable property within the meaning of s. 16 (d) of the C. P. Code.—*Maturi Subbayya v. Kota Krishnayya*, 28 M. 227. Approved in *Abdool v. Jagannath*, 5 N. L. R. 128. Followed in 122 P. R. 1908.

The term *Jalkar* signifying water-right, includes the right to drift and stranded timber as well as to fishing or other interest of a similar kind in the produce of the river.—*Amriteswari Devi v. Secretary of State*, 24 C. 504 (P. C.).

A suit for opening a water-course through land alleged to have been stopped by the defendant is a suit for interest in immoveable property.—*Odoyessurree v. Huro Kishore*, 4 W. R. 107.

A suit for declaration of right and for possession of a *talao* (tank) is a suit for land.—*Vaghoji Kunerji v. Camaji Bomanji*, 29 B. 249.

The expression "immoveable property" must not be construed as identical with "lands or houses". It comprehends all that would be real property according to English Law and possibly more. A *todagirashak* being a right to receive an annual payment, the liability for which is not a mere personal liability but one which attaches to the *inamdar* into whatsoever hands the village may pass, is interest in immoveable property.—*Futtehsangji v. Desai Kullianraji*, 13 B. L. R. 254: 21 W. R. 178 P. C.

A suit for dissolution of partnership with the usual ancillary relief does not fall under cl. (d) of s. 16 of the C. P. Code merely because part of the partnership assets consists of a factory, and can be brought in the court within whose jurisdiction the parties reside or the cause of action arises; *Durgadas v. Jai Narain*, 41 A. 513: 17 A. L. J. 567: 50 I. C. 156: A. I. R. 1922 Bom. 188.



**"Business."**—It is doubtful whether the mere letting of house property through an agent can be said to be "carrying on business"; *Sohan Singh v. Riddick*, 66 I. C. 805.

The word "business" does not mean Commercial business alone, it also includes other kinds of business. A person who receives presents or offerings and reckons and keeps account of them, cannot, merely on that account, be considered to carry on business.—*Shri Goswami v. Govardhanlalji*, 14 B. 541. A zemindary business is not within the meaning of the term.—*Nobin v. Baroda*, 19 W. R. 841.

**"Leave of the Court."**—The leave to sue referred to in cl. (b) need not be obtained prior to the institution of the suit and may be given even after the institution of the suit.—*Narayan v. Secy. of State*, 30 B. 570: 8 Bom. L. R. 543. Leave to sue may be granted under s. 20 (b) even without previous notice to the defendant.—*Indo-Burma Oil Fields v. Burma Oil Co.*, 64 I. C. 794; *Ahmed Khan v. Abdul Rahman*, 26 A. 603. But if the Court refuses to grant leave as against the defendants outside its local limits, the plaintiff cannot go on with the suit unless he gets those defendants to acquiesce in the institution of the suit.—*Mahomedbhai v. Adamjee*, 23 Bom. L. R. 1086: 64 I. C. 919.

**"Acquiesce in such institution."**—Under the old Code of 1882, it was held that if a non-resident defendant did not apply for a stay of proceedings under s. 20 of that Code, he should be deemed to have "acquiesced" within the meaning of clause (b), even though he had objected to the jurisdiction in his written statement.—*Venkata v. Krishnaswami*, 6 M. 344; *Ramappa v. Ganpat*, 30 B. 81: 7 Bom. L. R. 289. But s. 20 of the old Code, which provide for a stay of proceedings, has been omitted from the present Code, because sufficient provision for transfer has been made under s. 22 of this Code.

**"The cause of action wholly or in part arises."**—Cause of action means every fact which is necessary for the plaintiff to prove in order to succeed in his suit and everything which if not proved, gives the defendant an immediate right to judgment must be part of the cause of action. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved to entitle him to a decree; *Read v. Brown*, L. R. 22 Q. B. D. 128, 131. *Murti v. Bholaram*, 16 A. 165 F. B.

The term cause of action as used in this section means the whole of material facts which it is necessary for a plaintiff to allege and prove in order to entitle him to a decree.—*De*, 11 B. 649; *Musa v. Manilal*, 29 B. 368; 22 C. 451; *Rajabhai v. Karim*, 35 M. L. J. 111: 22 C. 708; *Joharmal v. Sundar Lal*, 78 I. C. 991. It has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour.—*Chandkour v. Partab Singh*, 16 C. 98 (102) 15 I. A. 156. A cause of action must be antecedent to the institution of the suit.—*Mohant Gobind v. Rani Debendrabala*, 4 P. L. J. 387 (393); 52 I. C. 231.

The expression "cause of action" defined; *Deep Narain v. Dieterl*, 81 C. 274; *Mohomed Hamidullah v. Fakarjahan Begum*, 65 I. C. 452.

working their mine beyond a certain distance of a boundary line, is a suit for land.—*The E. I. Railway Co. v. The Bengal Coal Co.*, 1 C. 95. But in *Raj Mohan v. E. I. Railway Co.*, 10 B. L. R. 241, it has been held that a suit for an injunction to restrain a nuisance caused by certain workshops, forges, and furnaces, created by the defendants and for damages for injury done thereby is not a suit for land or other immoveable property.

In a suit on a mortgage bond mortgaging *sayer* compensation payable at the General Treasury in Calcutta in respect of a certain *hat* within the Diamond Harbour Sub-division, held that the *sayer* compensation did not partake of the nature of *malikana*, that it was neither immoveable property nor any interest in such property within the meaning of this section and that the Munsif of Diamond Harbour had therefore no jurisdiction to entertain the suit.—*Surendra Prosad v. Kedar Nath*, 10 C. 8.

A suit for recovery of the price of land sold to defendant, is not a suit for the determination of right to or interest in immoveable property; *Sowdager v. Md. Hussai*, 9 M. L. T. 372: 10 I. C. 267.

A suit for a declaration of a right to, and to recover money as compensation for, land taken up under the Land Acquisition Act, over which the plaintiff had a mortgage lien, is not a suit for the determination of any right to or interest in immoveable property, but is a suit for money.—*Venkata Viraragaver v. Krishnasami*, 6 M. 344.

An agreement to grant a lease cannot be said to create an interest in immoveable property, nor can a suit upon it be said to be one for the recovery of such property or of an interest in it.—*Lalla Ram Sahoy v. Chowbin* 22 W. R. 287.

**Clause (e)—Suits for Compensation for Wrong to Immoveable Property.**—Refers to torts affecting immoveable property, such as trespass, nuisance, infringement of easements, etc.—*Mahadeo v. Ramchandra*, 23 Bom. L. R. 903.

The expression suits for land or other immoveable property, must be construed as extending to a suit for compensation for wrong to land, where the substantial question is right to the land; *Sudindih Coal Co. v. Empire Coal Co.*, 42 C. 942.

**Clause (f)**—This clause is an exception to the general rule laid down in section 20, and the reason is that moveable property after actual attachment and distraint remains in the custody of the Court by whose order it is attached or distrained (see Or. XXI, r. 43 of the C. P. Code, and Chapter XII of the B. T. Act VIII of 1885); consequently such property is incapable of change of position and is not removeable, and therefore suits for recovery of moveable property actually under distract or attachment are to be instituted in the Court within the local limits of whose jurisdiction such property is situate. In the case of moveable property not under attachment or distraint, suits for its recovery are to be instituted under the provisions of section 20 of the Act.

This clause lays down the rule only for the regulation of proceedings in Municipal Courts, and does not apply to cases where moveable property is under attachment in a foreign territory; *Kattick Ramunni v. Udaya*, (1912) M. W. N. 524: 14 I. C. 279.

*sawmy*, 27 M. 855; *Firm of G. S. Bhargava & Co. v. Firm of Jagannath Bharavan Dass*, 17 A. L. J. 718: 41 A. 602: 51 I. C. 331; *Thanawala v. Shahazada*, 12 O. C. 17: 1 I. C. 325; *Vishinji Gobardhandas Co. v. Jasrai*, 12 S. L. R. 93; 50 I. C. 146.

A, who resided and carried on business in the Upper Provinces, sent cotton for sale to B in Calcutta, and drew *hundis* against it upon B payable in Calcutta. The *hundis* were negotiated, and afterwards presented to B's *gomasta* in Calcutta, and there accepted and paid by him for B. In a suit by B against A for balance of account, *held* that the whole cause of action arose in Calcutta.—*Dhunraj v. Govindaram*, 1 B. L. R. O. C. 76.

An action for damages for breach of a contract of carriage of goods can at the option of the plaintiff be brought either in the place where the breach was committed or in the place where the contract was made; *Firm of Mulchand Sanwal Das v. B. B. and C. I. Railway*, 64 P. L. R. 1919: 43 P. W. R. 1919: 50 I. C. 139.

Where plaintiff brought an action to recover money paid by him in Calcutta, on *hundis* drawn by the defendant beyond the local limits, but sent by him to Calcutta, and there accepted and paid by the plaintiff, *held* that the whole cause of action arose within the local limits of Calcutta, so as to give the High Court jurisdiction.—*Joan Mull v. Munnoo Lall*, 1 Ind. Jur. N. S., 219; *Gowri Shankar v. Ganputram*, 47 C. 583: 59 I. C. 539.

In a suit on a contract though the place where the contract was made is not within the jurisdiction of the Court, the Court still has jurisdiction if the place where the contract was to be performed or where in its performance the money to which the suit relates was expressly or impliedly payable, is within the jurisdiction of the Court: *Meqhray Ramniranjandas v. Thakurdas*, 44 I. C. 609; *Abdul Rashid v. The Sizing Material Co., Ltd.*, 42 A. 480: 18 A. L. J. 566: 56 I. C. 191.

In a suit upon a contract, the offer is a part of the cause of action and the suit can be instituted in the Court within whose jurisdiction the final offer is made: *Kuthiravettam Appu v. Foulkes*, 10 L. W. 445: 54 I. C. 260.

Contract between firms at Ranchi and Cawnpore—goods to be delivered at Ranchi. *Held* that the Courts at Ranchi had jurisdiction to entertain a suit for damages for breach of the contract by the defendant; *A. T. Bhuttacharji and Co. v. Cawnpore Woollen Mills and Co.*, 16 C. W. N. 325: 13 I. C. 943.

Where a contract is entered into between two persons residing in different places by means of correspondence or otherwise, the contract is concluded where the offer is accepted; and the Court of such place has jurisdiction to take cognizance of a suit for damages for breach of the contract under s. 20.—*Sitaram Marwar v. Thompson*, 2 C. L. J. 66: 32 C. 884.

Where the contract was made at Karachi and the plaintiff's offer was accepted, the performance of the contract had to be completed at Karachi and the money due was payable there and the defendant contracted as the plaintiff's agent at Karachi for the purpose of purchasing and despatching goods. *Held* that the cause of action for compensation for defendant's

also that the defendant should reside within the jurisdiction of the Court in which the suit is filed.—*Isak v. Khatija*, 23 B. 756.

A Court of Equity can only restrain a person from proceeding with a suit in a foreign Court, if the person sought to be restrained is within the jurisdiction of the Court; *Vulcan Iron Works v. Dishumbhur*, 30 C. 233: 18 C. W. N. 346. But it has been held in *Mungle Chand v. Gopal Ram*, 84 C. 191 that the High Court has jurisdiction to grant injunction *in personam* even if the person sought to be restrained is out of the jurisdiction of the Court. In this connection the case of *Ganoda Sundary v. Nalini Ranjan*, 36 C. 28; 12 C. W. N. 1065, may be consulted, where an injunction was granted by the High Court against the defendants residing at Mymensingh. See also *Mrs. Annie Besant v. Narayaniah*, 25 M. L. J. 66; 15 M. L. T. 1: 21 I. C. 78, which was a suit for custody of minors and for injunction.

“Held by or on behalf of the defendant.”—The word “defendant” in the proviso to s. 16 means all the defendants where there are more than one defendant in the suit; *Mahomed Yasin v. Bimola Prasad*, 78 I. C. 405. (21 W. R. 303, *folld.*).

**Suits for Specific Performance of Agreement.**—In a suit for specific performance of an agreement made in Bombay, but relating to land situate outside the jurisdiction of the High Court, and to realize a mortgage-debt by sale of the said land—*held*, that the Court had jurisdiction to try the suit and to order sale of the mortgaged land.—*Maharaja of Holkar v. Dadabhai Cursetji*, 14 B. 353. Followed in *Sorabji Cursetji v. Rattonji*, 22 B. 701. See also *Land Mortgage Bank v. Sudurudeen Ahmed*, 19 C. 358. But see *Sreenath Roy v. Cally Doss*, 5 C. 82.

A suit for specific performance of an agreement to grant a putni lease and for possession of the land covered by the lease is maintainable in the Court of the Sub-Judge, within the local limits of whose jurisdiction, a portion of the land lies.—*Jagadis Chandra v. Saturughan Deo*, 83 C. 1065: 4 C. L. J. 238.

**Explanation.**—The explanation lays down that the Courts of this country have jurisdiction in respect of suits relating to immoveable property situate within British India, and that they have no jurisdiction in respect of immoveable property situate outside British India.

A Court in British India has no jurisdiction to try a suit for the determination of a right to or interest in immoveable property situated outside British India, when the right is denied.—*Krishnaji v. Gajanan*, 33 B. 873; *Keshav v. Venayak*, 23 B. 23. But Courts in British India are not debarred from granting relief where a question of title incidentally arises but the claim is for money due for a share in foreign land received by the defendant on his own and plaintiff's account; or where the suit is by a lessor to recover rent of foreign land in a British Indian Court—*Ratan Shankar v. Gulab Shankar*, 4 B. H. C. R. 173; *Bhujbal v. Nanheju*, 19 A. 450.

“Actually and voluntarily resides or carries on business or personally works for gain.”—The expressions “*actually and voluntarily resides*,” “*carries on business*,” or “*personally works for gain*,” have been fully explained in the notes under section 20.

*der*, 16 C. L. J. 279. *Ganesh Prasad v. Bansidhar*, 15 A. L. J. 518: 41 I. C. 904. See however *Moti Lal v. Surajmal*, 30 B. 167; *Yar Mahomed v. Amiruddin*, 6 Bur. L. T. 143: 20 I. C. 683; *Chiranji Lal v. Jit Mal*, 96 P. L. R. 1909. Where payment was according to the contract to be made in one place that was made in another owing to the plaintiff's own default, advantage cannot be taken of that fact to give him a choice of jurisdiction; *Firm of Damri Shah Thakur Ram v. Firm of Ralla Mal Dogor Mal*, 2 Lah. L. J. 556. A suit to recover money due on a balance of account when no place of payment is specified should be brought in the place where the whole cause of action arises.—*Darragh & Co. v. Parshotom*, 4 M. 872.

**Suit for Accounts.**—The cause of action in a suit for accounts against an agent arises at the place where the contract of agency was made, or where it was to be performed, and where the refusal to account took place.—*J. M. V. Rowther v. K. M. M. Rowther*, 12 Bur. I. T. 193: 55 I. C. 266; *Gordhandas Kalidas v. Dowlatram*, A. I. R. 1926 Sind 238: 94 I. C. 287.

**Suits on Bonds, Promissory Notes, Hath Chittas, etc.**—A suit on a promissory note is properly instituted in the place where payment is to be made; *Mahant Damodar Das v. Benares Bank, Ltd.*, 5 Pat. L. J. 536.

In an action on a promissory note, when the note was payable to A who resided in Calcutta, and was executed and delivered to him in Calcutta, *held*, that the whole cause of action arose in Calcutta.—*Ram Gopal v. Blaquiere*, 1 B. L. R. O. C., 35.

Where a promissory note is executed in one district and is agreed that the amount of the note shall be paid in another, the Courts of the latter district have jurisdiction to entertain the suit on the note. Illustrations to s. 17 of the C. P. Code, 1882 (s. 20) afford no safe guide as to what is meant in the Code by the term "cause of action."—*Laljee Lal v. Hardey Narain*, 9 C. 105: 11 C. L. R. 125. See also *Muhammad Abdul Kadar v. E. I. Ry. Co.*, 1 M. 375.

The jurisdiction of a court to entertain a suit on a *Hath Chitta*, the parties to which were residents of a place within its jurisdiction at the time of the execution and the consideration for which was advanced at that place, is not ousted by the fact that in the notice of demand the debtors were called upon to pay the money at another place outside the jurisdiction. To such a place ss 49 and 50 of the Indian Contract Act were not applicable. The money was presumably repayable at the place where it was advanced and where both the parties resided at the time of the transaction; *Sailendra Nath v. Ram Sunder*, 16 C. L. J. 279: 15 I. C. 885; *Maung Ba Tu v. Baman Khan*, 39 I. C. 132.

Where a pronote was executed outside the jurisdiction of a Court and the executant also resided out of the jurisdiction of that Court, but the pronote was delivered to the payee within the jurisdiction of the Court and it was intended that the money should be paid within that jurisdiction. *Held*, that the Court had jurisdiction to entertain a suit on the pronote under s. 20 (c) of the C. P. Code; *Muhammad Ishaq Khan v. Muhammad Islam Ullah Khan*, 2 P. R. 1916: 10 P. W. R. 1916: 31 I. C. 698; *Subramanian Chetty v. Maung Po Tha*, 4 Bur. L. T. 183: 11 I. C. 851.

Where a promissory note was dated and signed within the jurisdiction of one Court and countersigned and sealed elsewhere.—*Held*, that the

based on one of the causes of action; *Chiranji Lal v. Bankta Chari*, 12 P. W. R. 1910; 59 P. L. R. 1910; 5 I. C. 835.

In suit for partition and possession of undivided share of property situated partly within and partly without the jurisdiction, the claim, with regard to the property situated within the jurisdiction, was withdrawn: *Held* that the withdrawal did not operate to take away the jurisdiction of the Court to adjudicate on the plaintiff's suit—*Khatija v. Ismail*, 12 M. 380 Referred to in 16 A. 359.

In an application to file an award concerning a partnership business entered into for the purpose of carrying on cultivation and manufacture of tea on a tea estate at Darjeeling, *held* that s. 525, C. P. Code, 1882 (Second Schedule) gives jurisdiction to file an award in any Court in which a suit in respect of the subject-matter of the award might be instituted.—*Kelli v. Frazer*, 2 C. 445. Followed in *Ebrahim v. Provash*, 36 C. 59.

When properties are situated in two districts, and the suit is brought in the Court of one of the districts; the subsequent withdrawal of the claim in regard to property situated in one of the districts on the ground that a compromise has been entered into with the defendants, with regard to that property, in the absence of fraud or a contrivance to defeat the provisions of the law, cannot operate to take away the jurisdiction once vested; *Kubrajan v. Ram Bali*, 30 A. 500 F. B., and *Khatija v. Ismail*, 12 M. 380. See also *Har Chandra v. Lal Bahadur*, 16 A. 359.

"Courts."—Courts in s. 17 of the C. P. Code must be held as meaning Courts to which the Code applies; *Sri Raja Satra Cheria v. Maharaja of Jeypore*, 42 M. 818; 23 C. W. N. 1033; 30 C. L. J. 209; 46 I. A. 151; 51 I. C. 185 (P. C.).

**Validity of Sale of Property Partly Within, and Partly Without, the Jurisdiction.**—A suit was instituted, on a mortgage of a single revenue paying estate, part of which lies in Bakherganj and part in Fareedpore, in the Sub-Judge's Court at Bakherganj under this section, and a decree was obtained for sale of the mortgaged property; *held* that the Court was competent to order a sale of the whole of mortgaged property, though only a portion of it was situated in the district of Bakherganj.—*Shuroop Chunder v. Amceerunnissa*, 8 C. 703. (11 B. L. R. 56; 19 W. R. 434, *followed*). See also *Ram Lal v. Bama Sundari*, 12 C. 307; 11 B. L. R. 56; 19 W. R. 343, *followed*; *Shib Narain v. Gobind Das*, 23 W. R. 154; and *Gunga Narain v. Annada Moyee*, 12 C. L. R. 404. (11 B. L. R. 56; 19 W. R. 343, *followed*.) See, however, *Unnool Chunder v. Hurry Nath*, 2 C. L. R. 334.

In execution of a mortgage decree in a suit brought under the provisions of section 19, C. P. C., 1882 (sec. 17) in the Court of the Sub-Judge of Rajshahye, properties situated in the districts of Rajshahye and Nyadumka were sold by the Rajshahye Court—*Held* that the authority given by s. 19, C. P. Code, 1882 (s. 17) included an authority to make the order for the sale of the properties, and that the Rajshahye Court was within the jurisdiction in directing and carrying out of sale.—*Maseyk v. Steel & Co.*, 14 C. 661 Referred to in *Gopi Mohun v. Doybaki Nundan*, 19 C. 13. The latter case has been followed in *Tin Cowri Debya v. Shib Chandra*, 21 C. 689; and also in *Jagernath Sahai v. Dip Rani Koer*, 22 C. 871. See however, *Prem Chand v. Mokhoda Debi*, 17 C. 699, F. B. (12 C. 225 P. C. *followed*, 15 C. 667 *distinguished*) followed in *Dakhina*

applies may be instituted where some material portion of the cause of action arises. (16 A. 165; 4 A. 423; 5 A. 277; 18 B. L. R. 461; 14 B. L. R. 867; 9 C. 105, and 22 C. 833, *referred to*). A suit for a declaration that a compromise and a decree founded thereon are null and void as against the plaintiff, and for an injunction restraining execution may be instituted in the Court where the execution of the decree is being taken out and the property is being attached; *Banke Behari v. Polhe Ram*, 25 A. 48. (26 C. 891, and 18 B. L. R. 91, *referred to*; 4 C. L. R. 386, *distinguished*).

A suit by a Hindu reversioner for a declaration that a will set up by the widow of the last male owner was a forgery and for its cancellation can be instituted under s. 20 (c), C. P. Code in a Court having jurisdiction over any one of the places where any part of the properties dealt with by the will is situate. Such a suit is not one falling within s. 16 (d) of the C. P. Code; *Nittala Achayya v. Nittala Yellamma*, 72 I. C. 920; A. I. R. 1923 M. 109.

The plaintiff who was resident of Murshidabad district, sold and delivered, to the defendant at the latter's factory in the district of Nadia, indigo seeds in pursuance of an agreement entered into in the district of Nadia. The defendant refused to pay for it. *Held*, that the Murshidabad Court had jurisdiction to entertain the suit for the price of the seeds. The refusal of payment, which was to have been made in the Murshidabad district was a sufficient cause of action. The words "cause of action," do not mean the whole cause of action.—*Hills v. Clark*, 14 B. L. R. 337; 23 W. R. 63. See *Harri Mohun v. Goburdhoun*, 3 C. L. R. 459. See also *Sheriff v. Manners*, 7 C. W. N. 912.

The plaintiffs were employed by the defendants as agents to sell their goods in certain districts of the Madras Presidency. In breach of their agreement with the plaintiffs, the defendants sold their goods in some of these districts through other agents. *Held* that in a suit for damages for breach of contract, the sale by the defendants through the other agents was part of the cause of action and that such a suit was rightly filed under s. 20 in the district in which the alleged wrongful sale took place; *Raipur Manufacturing Co., Ltd. v. Joolaganti Venkatasubba Rao*, 14 L. W. 341.

G, having obtained by fraud certain jewellery from the plaintiff's place of business at Calcutta, pledged them to K, who resided outside the jurisdiction of the High Court. In a suit against G and K to recover the jewellery or its value, *held* that, as a part of the cause of action (obtaining jewellery by fraud) against K arose in Calcutta, the suit was maintainable in the High Court after obtaining leave.—*Kartick Churn v. Gopal Kisto*, 3 C. 264.

In a suit for damages for breach of contract for sale of goods instituted by the plaintiff at the Gujranwalla Court, *held* that the goods had to be delivered under the contract at Gujranwalla, that the non-delivery formed a part of the cause of action and that the plaintiff's suit was maintainable in the Gujranwalla Court; *Firm of Jagannath Diwan Chand v. Jagannath Moti Lal*, 71 I. C. 88.

A suit for damages for malicious prosecution is to be instituted in the place where the material part of the cause of action arises.—*Musa Yakub v. Muni Lal*, 29 B. 268; 7 B. L. R. 20.

that there must be reasonable ground for uncertainty as to which Court has jurisdiction.—*Shibu Haldar v. Gupi Sundari*, 21 C. 440: 2 C. W. N. 169.

Where an objection as to jurisdiction is taken for the first time before the appellate Court, and it becomes at least one upon which there is a reasonable ground for uncertainty, the Court should proceed under the sub-section and refuse to allow the objection to be taken at the appellate stage.—*Abdullah Sarkar v. Asraf Ali*, 7 C. L. J. 154. (21 C. 440, referred to.).

**Execution Proceedings.**—Although this section applies in terms only to suits, the execution applications would be within the principle.—*Veerappa v. Ramasami*, 43 M. 135: 37 M. L. J. 442: 53 I. C. 570.

**19.** Where a suit is for compensation for wrong done to the person or to moveable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts. [S. 18.]

Suits for compensation for wrongs to person or moveables.

#### Illustrations.

(a) A, residing in Delhi, beats B in Calcutta, B may sue A either in Calcutta or in Delhi.

(b) A, residing in Delhi, publishes in Calcutta statements defamatory of B. B may sue A either in Calcutta or in Delhi.

### COMMENTARY.

This section corresponds with section 18 of the C. P. Code, of 1882. No material alteration has been made except the substitution of some words, without any change in the meaning of the old section.

This was a suit for damages for wrongful seizure of two cargo boats of the plaintiff, alleged to be seized in Rangoon by order of a magistrate of some other place where all the defendants resided. The question to be decided was, whether on the allegations in the plaint "the wrong was done" in Rangoon so as to bring the suit within the jurisdiction of the Chief Court. *Held*, the seizure of the boats having been made at Rangoon, it was the place where "the wrong was done," within the meaning of this section and the Chief Court of Rangoon, consequently, was competent to entertain the suit.—*May Myit v. Shew Tha*, 3 L. B. R. 164.

**Suits on Torts Committed Outside British India.**—This section is applicable to cases of tort committed within British India. Cases of torts committed beyond the limits of British India fall within s. 20, and a Court in British India has jurisdiction to entertain a suit for damages for such tort, provided the defendant resides within the local limits of the Court at the time of the suit.—*Govindan Nair v. Achutha Menon*, 39 M. 433: 28 M. L. J. 810: 28 I. C. 394.



in *Foolibai v. Rampratab*; 17 B. 466; *Jivan Lal v. Oudh Commercial Bank, Ltd.*; 8 O. L. J. 182: 84 I. C. 191.

On failure of the defendant to pay the amount of the *hundi* drawn by the defendant at Cawnpore on plaintiff's firm carrying on business at Cawnpore and Calcutta and accepted by the plaintiff in Calcutta and payment made there, the plaintiff brought a suit in Calcutta against the defendant to recover the amount of the *hundi*. Held that part of the cause of action arose within the local limits of the ordinary original jurisdiction of the Calcutta High Court and that court had jurisdiction to entertain the suit; *Ramchander Gowri Sankar v. Ganputram*, 47 C. 583: 59 I. C. 599.

**Suit to Recover Money Due on Life Insurance Policy: Cause of Action Where Arises.**—A suit to recover money due on a Life Insurance Policy can be instituted in the place where the insured died; for death in such cases is part of the cause of action within the meaning of s. 20 of the C. P. Code [*Read v. Brown*, (1889) 22 Q. B. D. 128, *folld.*]; *Vishvendia v. National Insurance Co., Ltd.*, 41 I. C. 392; *The Bengal Provident & Insurance Co. v. Kamini Kumar*, 22 C. W. N. 517: 44 I. C. 694.

**Suit for Damages for Breach of Contract of Marriage and Restitution of Conjugal Rights.**—In a suit for damages for breach of contract to marry, part of the cause of action arises at the place where the marriage is to take place, though the agreement to marry is entered into at another place; *Mathura Prasad v. Satyanarayana*, 65 I. C. 812.

A suit for the breach of a contract of marriage can be tried by a Court within the local limits of whose jurisdiction the breach takes place, even though the defendants reside elsewhere.—*Bhag Singh v. Labh Singh*, 93 P. R. 1916.

A suit for restitution of conjugal rights may be brought in the Court of the place where the husband resides, or it may be brought in the Court of the place where the wife resides.—*Lalitagar v. Bai Suraj*, 18 B. 316. In a suit for recovery of dower, the cause of action arises in the place where the marriage and divorce take place and not where the defendant resides or works for gain; *Zamiran v. Fateh Ali*, 32 C. 146.

**Suit for Infringement of Trade-mark or Copy-right.**—In a suit for infringement of a trade-mark made by means of advertisement, a part of the cause of action was held to arise where the advertisement was published and distributed.—*Khestrupal v. Pancham Singh*, 37 A. 446; 18 A. L. J. 697: 29 I. C. 987. In a suit for infringement of a copy-right, the cause of action was held to arise where the infringement took place.—*Ram Kishen v. Piari Lal*, 7 I. C. 101.

**Suit to set aside a Decree on the ground of Fraud.**—A suit to set aside a decree on the ground of fraud, may be brought in the Court within whose jurisdiction the fraud was perpetrated or within whose jurisdiction the defendant ordinarily resides or personally works for gain.—*Abdul Haq v. Abdul Hafiz*, 11 C. L. J. 636. There has been a conflict of decisions on the question whether a suit can be instituted in one District for setting aside a decree passed by a Court in another District. It has been held by the Allahabad High Court that where a decree passed by one Court is transferred for execution to another Court and nothing is done beyond transferring the decree, a suit to set aside the decree on the ground of fraud can only be

section. The word 'every' has been substituted for the words 'all other' in the first line; the order in which the clauses (a), (b) and (c) stood in the old Code has been changed; the words "or each of the defendants where there are more than one," have been added to clause (a); the words "where there are more than one," have been added to clause (b); and the words, "wholly or in part" have been added to clause (c). In Explanation I, the word "residence" has been substituted for the word "lodging" and the word "company" of the old Code has been omitted from Explanation II.

Explanation III, in section 17 of the old Code, has been omitted, as it has become unnecessary owing to the addition of the words "wholly or in part" to sub-clause (c).

The language of the section has been altered in the present Act. In place of the words "The cause of action arises" and Explanation III of section 17, the words "The cause of action wholly or in part arises" have been substituted. This has not altered the law as to what is the cause of action in suits arising out of contract. Explanation III of section 17, Act XIV of 1892, though it does not appear in the present Act, is a correct statement of what the law still is and shows clearly the true meaning of the words "cause of action" in the case of suits arising out of contracts—*Saligram v. Chaha Mal*, 34 A. 49 p. 53.

**Scope of the Section.**—The provision of this section are to be read subject to the provisions of sections 16 to 19. This section provides that "Every suit," that is other than a suit mentioned in ss. 16 to 19, shall be instituted in a Court within the local limits of whose jurisdiction (a) the defendant (at the time of the commencement of the suit) actually and voluntarily resides or carries on business or personally works for gain, or (b) any of the defendants (when there are more than one) actually and voluntarily resides or carries on business or personally works for gain and either the leave of the Court is taken or the other defendants acquiesce in such institution, or (c) the cause of action wholly or in part arises.—*Fazlur Rahim v. Dwarkanath*, 30 C. 453.

"Actually and voluntarily resides."—The word "reside" has been used in the Code. But in clause 12 of the Letters Patent the word "dwell" occurs. The words "dwell" and "reside" express the same idea and the word "reside" is synonymous with the word "dwell"; but in some cases it has been held that the word "dwell" has a more extended meaning than the word reside.—*Mahomed v. Laldin*, 3 B. 227, 229; *Shri Goswami v. Govardhanlalji*, 14 B. 541, 547; *Emrit Lall v. Kidd*, 2 Hyde 187. Whatever difference of opinion there may be with regard to the signification of the above two words, we would take for the purposes of this Code that the terms are synonymous and accordingly proceed to note all the cases bearing upon both the terms.

Except in the cases mentioned in s. 16, the mere residence of a person within the local limits of a Court gives that Court jurisdiction to entertain a suit against him. Thus one partner may sue another partner for dissolution of partnership in the Court at B if the latter resided in B at the date of the suit, although the partnership commenced and was carried on in a foreign territory.—*Ismailji v. Ismail*, 45 B. 1228; 63 I. C. 959. Similarly, in a suit for rent, where it was proved that at the time the suit for rent was instituted, the defendants resided within the local limits

in cases arising out of contracts (34 A. 49, p. 53). It is therefore reproduced below for reference. Cases bearing on it are good law and have been retained.

**Explanation III.**—In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely:—

- (i) the place where the contract was made;
- (ii) the place where the contract was to be performed, or performance thereof completed.
- (iii) the place where, in pursuance of the contract, any money to which the suit relates was expressly or impliedly payable.

**Suit against Non-Resident Foreigners.**—It is now settled law that a British Indian Court is entitled to exercise jurisdiction over a non-resident foreigner when the cause of action arises within its jurisdiction.—*Ram Ranji v. Prahladdas*, 20 B. 133; *Girdhar v. Kastigar* 17 B. 662; *Talwar v. Naureb Syed*, 29 M. 69; *Annamalai v. Murugesu*, 25 M. 544; 30 I. A. 220; *Rambhat v. Shanker*, 25 B. 528; *Maistry Rajabhai v. Karim*, 35 M. L. J. 192. But it is not settled whether a British Indian Court has jurisdiction to entertain a suit against a foreigner who does not reside in British India and the cause of action arises in a foreign Country but he carries on business through his Agent within the local limits of the British Indian Court; This point arose in a Privy Council Case but it was not decided; *Annamalai v. Murugesu*, 25 M. 544; 30 I. A. 220.

**Revisional Powers of Court under S. 115 in Questions of Jurisdiction.**—No hard and fast rule as to revision can be laid down in cases of decisions as to jurisdiction under s. 20 and each must be decided on its own merits. Ordinarily, interference in revision is inadvisable in such cases and should only be exercised in exceptional cases to remedy an injustice. *The Firm of Sita Ram Ram Dhan v. The Firm Beniarsi Das Puran Chaud*, A. I. R. 1923 Lah. 565.

## 21. No objection as to the place of suing shall be allowed

**Objections to jurisdiction.** by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice. [New.]

## COMMENTARY.

This section which is somewhat similar to s. 11 of the Suits Valuation Act is new. It provides that objection as to jurisdiction, that is, as to the place of suing will not be allowed to be taken either in the appellate or in the revisional Court, unless such objection was taken in the Court of the first instance at the earliest possible opportunity. It refers to the territorial and not to the pecuniary jurisdiction, and is confined to objections to jurisdiction as to place of suing.

**Scope of the Section.**—This section forbids any appellate or revisional Court to allow any objections as to the place of suing unless it was taken in the original Court at the earliest possible opportunity, and even then

a person liable to arrest before judgment under s. 180. In *Mahomed Shuffi v. Laldin Abdula*, 8 B. 227, it has been held that the meaning to be given to the word "residence" in legislative enactments depends upon the intention of the Legislature in framing the particular provision in which the word is used.

The defendant was Political Agent at Kolhapur, and he resided there up to the evening of the 6th March. Having obtained a year's furlough, he left Kolhapur on that evening, and arrived in Bombay on the 7th March, and remained there until the 10th March. In a suit filed against the defendant on the 8th March in the Bombay High Court for damages for false imprisonment and malicious prosecution.—*held*, that the temporary residence of the defendant in Bombay under the circumstances gave the Court jurisdiction. If a person has no permanent residence he may be said to dwell wherever he may be found.—*Fernandes v. Wray*, 25 B. 176.

The word "dwell" must be construed with reference to the particular object of the enactment in which it occurs. Residence in Bombay merely for a temporary purpose, is not to "dwell" there, so as to give jurisdiction to the High Court under cl. 12 of the Letters Patent. *Held*, that the mere fact that the defendant had purchased the house which he occupied during a temporary visit to Bombay afforded no inference of intention to dwell there.—*Goswami Shri v. Govardhanlalji*, 18 B. 29.

The rules stated in the various portions of s. 20 are alternative. Where at the commencement of an action in *personam*, the defendant is resident (or present) within the jurisdiction of a court, it has jurisdiction to entertain the action and absence from its jurisdiction of the object of the claim will not deprive it of jurisdiction otherwise obtained; *Mrs. Annie Besant v. Narayaniah*, 25 M. L. J. 638; 18 M. L. T. 1: 21 J. C. 789.

The plaintiff, resident in Calcutta, sued H, resident in Bombay but carrying on business by his *gomasta* in Calcutta, and others resident in Bombay, to set aside a release, executed in Calcutta, of his interest in certain property situate in Bombay, on the allegation that it had been obtained from him by false representations made by H. *Held* that the whole cause of action did not arise in Calcutta so as to enable the plaintiff to sue in Calcutta without leave of the Court.—*Ismail Hadjee v. Mahomed Hadjee*, 18 B. L. R. 91; 21 W. R. 303.

The High Court has no jurisdiction to entertain a suit on an instrument stipulating for the payment of money generally, when the defendant resides beyond the local limits, and such instrument was signed by him beyond those limits.—*Rajendra Rau v. Sama Rau* 1 M H C. 436; and *Winter v. Round*, 1 M. H. C 202.

*Held* that a suit by a lessor against his lessee to recover rent which had accrued due in respect of land in Gwalior, the plaintiff being a subject of the Gwalior State, but the defendant a British subject resident in the district of Jhansi, was properly brought in a Civil Court in the district of Jhansi.—*Bhujbal v. Nanheju*, 19 A. 540, (22 C 222, *referred to*)

The District Court may, when the defendants reside within its local jurisdiction, try a suit for damages and injunction to restrain illegal interference with plaintiff's right to fish and use fishing stakes and nets.

there is on the record sufficient material to substantiate it; *Nidhi Lal v. Mazhar Hussain*, 7 A. 230; or the objection is patent on the face of the proceedings; *Sidheswar v. Harihar* 12 B. 155.

Section 21 of the C. P. Code is not applicable to proceedings under the Provincial Insolvency Act, therefore an objection as to the place of suing may be taken at any time; *Madho Prasad v. Walton*, 18 C. W. N. 1050: 20 I. C. 870.

"Unless there has been a consequent failure of justice."—In order to ascertain whether there has been a "consequent failure of justice" within the meaning of s. 21 C. P. Code, by reason of a case having been tried in a Court not having territorial jurisdiction to try it, it is necessary to arrive at some decision on the merits. It is a question which involves a consideration of the whole of the merits in the suit, and without going into the merits and forming some opinion upon the justice or otherwise of the decision of the first Court, it is impossible for the Appellate Court to conform to the provisions of s. 21; *Lachha Ram v. Virji*, 19 A. L. J. 805: 62 I. C. 899.

Suit to recover money due on Life Insurance Policy—Death of assured—Part of the cause of action—*Held* that in the absence of anything to show that there had been a failure of justice, the trial cannot in view of s. 21 of the C. P. Code be set aside as without jurisdiction; *The Bengal Provident and Insurance Co. v. Kamini Kumar*; 22 C. W. N. 517: 44 I. C. 694.

An objection as to the place of suing should not be allowed by an appellate Court, unless there has been consequent failure of justice; *Suraj Bhan v. Punjab Cotton Press Co.*, 40 P. W. R. 1913: 45 P. L. R. 1913: 18 I. C. 130; *Madari v. Misir*, 9 Bur. L. T. 119: 36 I. C. 431; *Chockalingam v. Kurunathappan*, (1918) M. W. N. 661: 47 I. C. 764; *Gregory v. Albert*, 21 P. W. R. 1919: 49 I. C. 441.

Suit for damages for breach of contract of marriage—Trial in wrong Court. *Held*, that even if the Munsif had no jurisdiction to entertain the suit, his judgment should not have been set aside unless the District Judge was satisfied that there had been a failure of justice by reason of the suit being instituted at the wrong place; *Bhag Singh v. Labh Singh*, 93 P. R. 1916: 36 I. C. 114

An order passed by an appellate Court allowing an objection as to the place of suing should consider and decide whether there has been a failure of justice consequent on the suit having been instituted in the wrong Court; *Nand Kishore v. Abdul Rahman*, 17 A. L. J. 1034: 12 A. 74: 52 I. C. 801.

**Submission to Jurisdiction.**—The fact of a defendant not subject to the jurisdiction of a Court having waived his privilege in previous suits brought against him, does not give the Court jurisdiction to entertain a suit against him, in which he pleads that he is not subject to such jurisdiction.—*Beer Chunder v. Nobodeep Chunder*, 9 C. 535: 12 C. L. R. 465.

If a defendant who appears in a suit chooses not to raise the plea of want of jurisdiction, he must be taken to submit to the jurisdiction, and cannot be allowed to take the plea at the latest stage of the suit, or in the execution proceedings.—*Raj Narain v. Rowshan Mull*, 22 W. R. 126; *Radha Gobind v. Ooma Sundaree*, 24 W. R. 868; *Modun Mohun v. Baroda Sundari*,

A Non-British subject resident out of the jurisdiction, but carrying on business in Bombay through agent, is not liable to be sued in the High Court of Bombay where the cause of action has arisen wholly outside the jurisdiction.—*Kessowji Damodar v. Khimji Jairam*, 12 B. 507. Impliedly over-ruled by *Girdhar Damodar v. Kassigar Hiragar*, 17 B. 662. Distinguished in 20 M. 514, P. C. It has been held by the Madras High Court that the expression "carrying on business" in cl. 12 of the Letters Patent includes carrying on business through an agent in British India by foreigners living outside jurisdiction.—*Janoo v. Batchoo*, 45 M. L. J. 471, dissenting from 12 B. 507 and following 17 B. 662.

In s. 20 (a) of the C. P. Code "carrying on business" is used as distinct from personally working; it does not necessarily involve personal presence or personal effort and a man may carry on a business in a place e.g., through an agency or through a manager or by his servants, without having gone there. It means having an interest in a business at that place, a voice in what is done, a share in the gain or loss and some control, if not over the actual method of working, at any rate upon the existence of the business; *Kripa Ram Sita Ram v. Mangal Sen*, 19 A. L. J. 696; 3 U. P. L. R. 18.

Where goods are sent from the mofussil to be sold in town by brokers or commission-agents, held that such sale of goods by brokers or agents does not constitute carrying on business in the latter place—*Chinnamal v. Tulukannattammal*, 3 M. H. C. 146, *Khimji Chaturbhuj v. Forbes*, 8 B. H. C. 102; *Harjiban Das v. Bhagwan Das*, 7 B. L. R. 535; 16 W. R. O. C. 16 (reversing on appeal 7 B. L. R. 102).

A retail dealer in European goods, residing and carrying on business at an up-country station, is not within the jurisdiction of the High Court on the ground that he was an agent in Bombay for the purpose of purchasing and forwarding goods to be used in his trade.—*Framji Kavasji v. Hormasji Kavasji*, 1 B. H. C. 220.

Where the defendants had no permanent office at Amritsar but there was only a travelling agent residing at that place who secured orders for them and forwarded them to the Head Office at Calcutta, but he had no power to enter into any contract or to receive any money on behalf of the defendants. Held that the defendants cannot be said to be carrying on business at Amritsar; *Firm of Hira Nand Murlidhar v. Firm of Gurmukh Rai*, 73 I. C. 205.

In order to give jurisdiction, it is not necessary that the defendant should personally carry on business within the local limits of the Court.—*Muthaya Chetti v. Allan*, 4 M. 209.

A Civil Court has jurisdiction under s. 20 to entertain a suit for the dissolution of a partnership which commenced and was carried on in foreign territory, if the partners reside within the jurisdiction of the court; *Haji Rahimbhai v. Ismail*, 45 B. 1228; 23 Bom. L. R. 543; 63 I. C. 959.

Where it was proved that the defendant had lived and carried on business in P for forty years and there was apparently no intention of their ever returning to their original home at N, their place of residence under s. 20 of the C. P. Code is in P and not at N, although they had an ancestral abode and some ancestral land at the latter place; *Guranditta Mal v. Ramdas*, 112 P. R. 1916; 38 I. C. 62.

transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any) shall determine in which of the several Courts having jurisdiction the suit shall proceed. [New.]

## COMMENTARY.

This section is new. It has been substituted for s. 20 of the C. P. Code, 1882; but its provisions are quite different from the provisions of that section, which contained provisions as to "*stay of proceedings*" which have been altogether omitted from this section.

"We have omitted clause 22 of the Bill, (which corresponded with s. 20 of the old Code) as to our opinion it is unnecessary. We think that sufficient provision is made for transfers under the succeeding clause."—*See the Report of the Select Committee.*

**Scope of Section.**—It is only when a suit may be brought in one or other of two Courts both of which have jurisdiction, that an application can be made under ss. 22 and 23 of the C. P. Code. Where the jurisdiction of one Court is denied, an application for transfer under these sections cannot lie; *The National Engineering Co. v. The Rattan Engineering Co.*, 71 I. C. 268.

**Grounds for Transfer.**—The omission of s. 20 of the Code of 1882 leaves unfettered the discretion of the Court to determine in which Court the suit shall proceed. The venue will not be changed from the place where the plaintiff has laid his suit unless there is a manifest preponderance of convenience in trying the cause elsewhere; *Muthia Chetty v. Arunachellam*, 7 Bur. L. T. 1: 23 I. C. 345.

The plaintiff sued the defendant in the Bombay High Court for defamation alleged to be contained in a notice that appeared in the Bombay Gazette. The defendant was the Chairman of the Hinganghat Mill Company within the jurisdiction of the district of Wardha in the Central Provinces. The defendant contended that neither he nor the plaintiff resided or carried on business in Bombay, and that all his witnesses resided at Wardha. *Held*, that the plaintiff was entitled to sue in Bombay.—*Geffert v. Ruck Chand*, 13 Bom. 178.

An application to transfer a case from one city to another should not be granted, where there is no balance of convenience on the side of a trial in other city, nor are there grounds to suppose that greater justice would be done by a trial there. Then plaintiff should not, without sufficient cause, be deprived of the right given him by law to select the Court in which he will sue.—*Bohitram v. Chimunbuz*, 8 I. C. 449.

Where the dealings all took place at Karachi, the persons from whom goods were bought and to whom goods were sold by the petitioners were at Karachi, and all the accounts relating to the dealings in question were at Karachi.—*Held*, the balance of convenience was greatly in favour of the case being tried at Karachi; *Banarsi Das v. Kashi Lal*, 72 I. C. 592: A. I. R. 1923 Lah. 883.

Sections 22 and 23 do not apply when the suit sought to be transferred is one instituted on the original side of the High Court, but the Court has in-

**Cause of Action in Suits or Contracts.**—For the purposes of s. 20, C. P. Code, the words "cause of action," so far as suits on contract are concerned, include the making of the contract and the performance or completion of performance of the contract and the payment of money under the contract. In cases based on a Policy of Insurance, they do not include the loss or damage of the property insured which is merely a cause of the cause of action; *Jupiter General Insurance Co. v. Abdul Aziz*, 1 R. 231: 76 I. C. 482: A. I. R. 1924 R. 2.

In a suit for damages for breach of contract, the cause of action consists of the making of the contract and of its breach at the place where it ought to be performed.—*Dhunjisha v. Fforde*, 11 B. 649; *Doya v. Secy. of State*, 14 C. 256; *Rampurab v. Premasuk*, 15 B. 93; *Dobson v. Bengal Spinning & Weaving Co.*, 21 B. 126; *Seshajiri v. Nawab Askur*, 27 M. 494. If the whole cause of action arose at a particular place, say Calcutta, e.g. if the contract was made in Calcutta and also the breach took place in Calcutta, a suit on the contract could be brought in Calcutta. But if part only of the cause of action arose in Calcutta and part in Patna e.g. if the contract was made in Calcutta and the breach took place in Patna, a suit on the contract would lie either in Calcutta or in Patna; *Bhagsingh v. Labh Singh*, 1916 P. R. 281: 37 I. C. 114; *Punjab Mutual Hindu Family Relief Fund v. Sardari*, 1918 P. R. 325: 45 I. C. 900; *Sitaram v. Ram Chandra*, 1918 P. R. 105: 44 I. C. 863.

The words "cause of action," mean all those things necessary to give a right of action; and, in a suit for breach of contract, where leave to sue has not been obtained, it must be established that the contract, as well as the breach, have taken place within the local limits of the Court—*Doya Narain v. Secretary of State*, 14 C. 456. Approved in *Roghoo Nath Misser v. Gobind Narain*, 22 C. 451.

A non-resident foreigner, who is a subject of a protected Native State, may be sued in the Courts of British India, if the cause of action arose within the jurisdiction of any such Court. Even apart from the provisions of s. 17 of the C. P. Code, 1882 (s. 20), the cause of action in the case of contracts arises at the place of performance.—*Tadepalli Subba Rao v. Nawab Syed*, 29 M. 69. (26 M. 544, followed).

The jurisdiction conferred by clause 12 of the Letters Patent, whether the cause of action arises wholly or in part within Madras, extends to suits against absent foreigners. Further, in this case, the presence of the defendant within the jurisdiction, when the plaint was filed, would give jurisdiction. According to the general principles of English jurisprudence, temporary presence and the accrual of the causes of action within the limits of the Court would each by itself be a ground of jurisdiction.—*Srinivasa Moorthy v. Venkata Varada*, 29 M. 239: 16 M. L. J. 238. Affirmed in 34 M. 257 P. C.: 14 C. L. J. 64: 15 C. W. N. 741.

Where a contract was made in Bengal for delivery of goods in Bengal, the mere despatch of goods from a place in the U. P. does not give rise to a cause of action enforceable in the Courts of the U. P. in respect of the breach of the contract: *Purnachand Amir Chand v. Jodh Raj Ram Kumar*, 63 I. C. 501: A. I. R. 1922 All. 448.

Where the suit is one arising out of a contract within the meaning of s. 17 of the C. P. Code, 1882 (s. 20), the cause of action arises at the place where the contract is made.—*Kamisetti Subtab v. Katha Venkata-*



for transfer under ss. 22 and 23 C. P. Code, the question of want of jurisdiction of the trying Court could not be raised; *Ram Kumar Sheo Chand v. Tula Ram Nathuram*, 1 Pat. L. T. 277; 56 I. C. 920 (34 I. C. 707; 48 I. C. 105 *folld.*). See also *Purna Chundra v. Dhon Kristo*, 12 A. L. J. 896; 24 I. C. 318.

"After notice to the parties."—The words used in s. 22 of the C. P. Code are mandatory. The words "after notice to the parties." indicate that the notice must be given prior to the making of an application for transfer of a case and that a notice of the application issued by the Court to which the application is made is not what is intended. In a case where issues are settled, the application must be made at or before such settlement is made and a delay in making such an application would render the application incompetent; *Gulab Chand v. Sher Singh*, 150 P. W. R. 1916: 11 P. R. 1917: 16 P. L. R. 1917: 35 I. C. 616.

**23.** (1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under S. 22 shall be made to the Appellate Court.

*To what Court application lies.*

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court.

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate. [ss. 22, 23, 24.]

## COMMENTARY.

The provisions contained in ss. 22, 23 and 24 of the C. P. Code, of 1882, have been summarized in this section.

**Power of High Court to Transfer Suits.**—This section does not empower a High Court to transfer a suit instituted within its own jurisdiction to the jurisdiction of another High Court, but only to declare in which Court a suit shall proceed, and if necessary, to stay all further proceedings within its own jurisdiction.—*Tula Ram v. Harjiwan Dass*, 5 A. 60 Followed in *Thulsi Ram v. Shiam Sundar*, 5 I. C. 588.

Where two suits between the same parties are pending in two Courts subordinate to two different High Courts, either High Court may direct the suit pending in the Court subordinate to it to be transferred to the other Court.—*Venkata v. Maksudan*, 35 C. 541.

This section does not empower a High Court to direct the transfer of a suit brought in a Court subordinate to one High Court, to a Court subordinate to another High Court; but the High Courts acting in concurrence may direct such transfer.—*Skinner alias Nawab Mirza v. Orde*, 2 A. 241.

The authority given to a High Court by s. 23 (3) to determine in which of several Courts having jurisdiction a suit shall proceed, does not empower

negligence and misconduct arose at Karachi; *Salagram v. Chaher Lal*, 84 A. 49; 8 A. L. J. 1160; *Lal Singh v. Firm of Haji Hadir Bakhsh*, 8 Lah. L. J. 499.

The plaintiff, residing at Karwar, sent money to defendant No. 1 at Bombay to send him certain goods. The defendant informed the plaintiff that he had not the goods required; thereupon the plaintiff telegraphed to defendant No. 1 to pay the amount to defendant No. 2, a resident of Bombay, provided he shipped the goods. On failure of defendant No. 2, the plaintiff sued defendants Nos. 1 and 2 in the Court at Karwar to recover the amount. Held that, as the contract between defendants Nos. 1 and 2 was both entered into, and intended to be performed in Bombay, the cause of action, therefore, arose in Bombay, and the Court at Karwar had no jurisdiction.—*Dadabhai Dajibhai v. Diogo Saldanha*, 18 B. 43; *Firm of Asa Ram Kalu Ram v. Firm of Bakhis Ram Kanhaiya Ram*, 53 I. C. 331.

In a suit by the plaintiff in the Calicut Court claiming (1) refund of freight (2) the price of the bundles short delivered or (3) the amount due to him on a general average account, it was objected by the defendant that the Court at Calicut had no jurisdiction to entertain the suit. Held, overruling the objection (1) that the freight having been collected in Calicut, the cause of action for its refund arose in that place; (2) that the cause of action for the price of goods short delivered arose partly in Calicut as that was the place where the goods were to be delivered according to the terms of the charter party; and (3) that the fact that the voyage safely came to an end was part of the cause of action for general average and that having taken place at Calicut, the Calicut Court had jurisdiction to try the whole suit; The terms "cause of action" in s. 20 means the whole bundle of material facts which is necessary for a plaintiff to allege and prove to entitle him to succeed; *Maistry Raja Bai Narain v. Hirji Karim Mamood*, 35 M. L. J. 180; 47 I. C. 708.

The cause of action for damages for short supply of goods ordered by plaintiff from defendant arises at the place where the latter carries on business; *Har Parshad Dalip Singh v. Sewa Jado Rai*, 60 I. C. 481.

Plaintiff sent to defendants some articles in excess of what defendants had ordered and the latter returned them but the goods failed to reach the plaintiffs who brought this suit for the price of the same. Plaintiffs were residents of Kumbakonam and defendants of Mysore. Held that the suit relating to the excess goods was one for damages and the Kumbakonam Court had no jurisdiction to try the same; *Manjappa v. Raja Gopalachariar*, 24 M. L. T. 95; (1918) M. W. N. 378; 45 I. C. 779.

The plaintiff sued in Court at Nasick in British India to establish his right to a share in the income derived from certain grants of land situate outside British India, but received by the defendant within the jurisdiction of the Nasick Court. Held that the suit was within the jurisdiction of the Court, there being no dispute as to title.—*Kashinath v. Anant*, 24 B. 407.

**Suits for Recovery of Money.**—In suits for recovery of money, the place where the cause of action arises, is the place where the money is payable, expressly or impliedly, under the contract itself and not under any general rule of law that where a contract is silent as to the place of payment, it is the duty of the debtor to seek out his creditor and pay him.—*Raman v. Gopala*, 31 M. 223. Approved in *Sailendra v. Ram Sun-*

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

(3) For the purpose of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes. [S. 25.]

## COMMENTARY.

**Changes Introduced in the Section.**—"The words at any stage have been added to clause (1) to remove the difficulty created by the view that a suit cannot be transferred after the hearing was once commenced, as to which there is a conflict of decision."—*Notes on Clauses.*

This section corresponds with s. 25 of the C. P. Code of 1882. Material changes have been made in this section to set at rest the conflicting decisions. Under the old Act, there was a diversity of judicial opinion as to whether the District Judge had power to transfer execution proceedings and hence the words "*other proceeding*" have been added. Then there was also diversity of judicial opinion as to whether the District Judge after withdrawing a suit or appeal could re-transfer it or not, and hence the word "*re-transfer*" has been added.

**"On the application of any of the parties."**—In the absence of a duly appointed guardian *ad litem*, the next friend of a minor can apply for the transfer of suit from a mufussil Court to the High Court.—*Jotindra Nath v. Rajkristo*. 16 C. 771.

**"After notice to the parties."**—Under this section it is not absolutely necessary that notice should be given in all cases, as the next sentence shows that the Court may of 'its own motion' without giving notice, transfer a case. It is only in cases where a party to a suit or proceeding applies for transfer of a case, on the grounds of convenience of the parties or witnesses, the disqualification of a Judge or intricate and difficult questions of law, that a notice should be given to the parties; but where a District Judge for the sake of administrative convenience transfers cases from one Court to another, as for instance, where the file of one Court is heavier than another and for the sake of equal distribution of work amongst his subordinates, in such cases no notice is necessary, the District Court can of its own motion transfer cases. See *Bellary Press Co., Ltd. v. Venkata Row*, 8 M. L. T. 374.

Where an order of transfer is made without issuing notice, the order is one without jurisdiction and must be set aside; *Fatema v. Imdad Ali*, 18 A. L. J. 351; 58 I. C. 560; *Dwarka v. Tara Prasanna*, 19 C. W. N. 68n; *A. S. De Mello v. New Victoria Mills Co.*, A. I. R. 1926. All. 17.

Court within the jurisdiction of which it was dated and signed had jurisdiction to entertain the suit for recovery of the money.—*Meenakshi Ginning and Pressing Co. v. Myle Sreeramullu Naidu*, 28 M. 10 (1 C. 202 referred to).

The assignee of a promissory note can sue in the Court having jurisdiction where his assignment is made. The assignment is a part of the cause of action with the meaning of s. 20, C. P. Code; *Manepalli Mangamma v. Manepalli Sethiraju*, 31 M. L. J. 816: 5 L. W. 210: 87 I. C. 681.

Where proposal was made at Aligarh and after negotiations by correspondence it was finally accepted at Calcutta, held that the cause of action arose at Calcutta; *Baroda Prasad v. Piare Lal*, 6 A. L. J. 213.

**Cause of Action:** Goods ordered by V. P. Post.—Plaintiff, a resident of K in U. P. ordered certain goods of a firm in Delhi. The goods were sent by V. P. Post but on taking delivery plaintiff found that the goods he had ordered had not been sent and accordingly instituted a suit at K against the firm for damages. Held, that the suit had been correctly instituted at K and although the contract was entered into at Delhi, it was not completed till delivery was made and the goods paid for at K. Until actual delivery and payment was made at K, the goods remained the property of the firm at Delhi and the K Court had jurisdiction to entertain the suit; *Ram Lal v. Bholanath*, 42 A. 619: 18 A. L. J. 749: 69 I. C. 859.

In a suit to compel registration of a deed of mortgage of lands situated within the jurisdiction of the Munsif of Perambalur, executed at Combaconum, held that, as the defendant was under an obligation to plaintiff to get the document registered at Perambalur, and that as breach of the obligation was the cause of action, consequently the Court at Perambalur which was the place of the fulfilment of the obligation, had jurisdiction.—*Sami Ayyangar v. Gopal Ayyangar*, 7 M. H. C. 176.

A suit for injunction may be filed in the Court within whose jurisdiction the plaintiff's rights were interfered with, although the defendant does not live therein, *Mahadeo v. Nabi Baksh*, 25 I. C. 104.

A suit for injunction for infringement of trade mark by advertisement may be brought either in the place where the advertisement was published or in the place, where advertisements and hand bills are distributed; *Kheshtupal v. Pancham Singh*, 37 A. 446: 13 A. L. J. 697.

**The Accrual of the Material Part of the Cause of Action is Sufficient to Give Jurisdiction to a Court.**—The words "wholly or in part" have been added to clause (c), in the present Code. It embodies the principle laid down previously in the following cases that a Court can try a suit within whose jurisdiction part of the cause of action arose.—The expression, "cause of action," as used in this section, does not mean the whole cause of action, but includes material part of the cause of action. In a suit for compensation for breach of contract, the making of the contract is a material part of the cause of action.—*Bishunath v. Ilahi Baksh*, 6 A. 277. See also *Llewellyn v. Chuni Lal*, 4, A. 423; *Gopi Krishna v. Nil Komul*, 13 B. L. R. 461: 22 W. R. 79; *Naina Marayyar v. ...* L. W. 593.

The term "cause of action" does not necessarily mean the cause of action, but a suit to which s. 17, C. P. C.

A District Judge has the power under s. 24 (3) to transfer a case pending before him to the Court of the Additional District Judge; *O'Brien v. Abdul Rahman*, 28 P. W. R. 1012: 14 P. L. R. 1012: 13 I. C. 6

"Sult."—The word suit in this section includes execution proceedings; *Muhammad v. Tikamchand*, 47 A. 57: A. I. R. 1925 A. 276: 85 I. C. 746: *Raja Gopala v. Tripathia*, 49 M. 746: A. I. R. 1926 Mad. 421.

"Other proceeding."—A Court has under this clause power to withdraw any suit (*Abdul Rahman v. Cooper*, 34 B. 411); appeal (*Ram Narain v. Parmeswar*, 25 C. 39); or other proceeding, e.g., execution proceedings (*Velliappa v. Subrahmanyam*, 39 M. 485: 29 I. C. 119), or a proceeding under the Indian Companies Act (*In re West Hope Town Tea Co.* 9 A. 180).

**Power of Transfer and Re-transfer.**—Under this section the High Court and the District Court have concurrent jurisdiction to transfer a suit. The High Court can direct a transfer even after the application for the same purpose has been referred by the District Court; *Hari Nath v. Debendra Nath*, 11 C. L. J. 218.

It was held under the corresponding section of the old code of 1882 that where a District Judge had once transferred a case to his own file from the file of a Subordinate Court, he could not afterwards retransfer the case to that Court; *Amir Begam v. Prahlad Das*, 24 A. 304. See also *Nandan Prasad v. W. C. Kenney*, 24 A. 356. But these cases have been distinguished in *Gopee Lal v. Mathura Das*, 25 A. 183, where it has been held that where the Sub-Court ceased to exist the District Judge can re-transfer the case to his own file.

The Court of an Additional District Judge is subordinate to the District Judge, and the latter is competent to make over to the former an appeal which he had withdrawn from a Sub-Judge to whose file it had at first been transferred.—*Rakhal Chandra v. Secretary of State*, 10 C. W. N. 141 (32 C. 875: 9 C. W. N. 705, commented on). See *Dewan Shibnath v. Alliance Bank of Simla*, 215 P. L. R. 1914. 110 P. W. R. 1914.

The mere transfer of a suit for the convenience of the public, or for the acceleration of business, from one Subordinate Court to another, does not affect the authority of the District Judge to transfer to his own file, or to another Court, or to re-transfer it, if he sees sufficient reason for so doing. The omission of the judge to assign his reason for transferring the case does not vitiate his proceedings.—*Taruck Nath v. Gouree Churn*, 3 W. R. 147.

An assistant Judge has no power to transfer a case, even when the application for transfer, is referred to him by the District Judge for disposal; *Haji Umar v. Gusladji*, 34 B. 411: 12 Bom. L. R. 354

In a suit concerning land dispute, a Court which really had no territorial jurisdiction went into the case elaborately, made local inspections and recorded evidence fully, when the defect was found out. Then the plaint was returned to be presented to the proper Court. Held, it was a proper case in which under s. 24, the High Court should send it for disposal to the first Court itself; *Nand Ram v. Hira Dei*, 21 A. L. J. 86: 73 I. C. 495.

Where the plaintiff in an action for malicious prosecution, alleged that the defendant had instituted criminal proceedings against him before the Magistrate of Moradabad, causing a warrant to be issued by the Magistrate, and having him arrested thereunder in Calcutta, *held* that the whole cause of action did not arise at Moradabad; that part of the cause of action arose in Calcutta so as to entitle the plaintiff, with leave of the Court, to bring an action in the High Court.—*Luddy v. Johnson*, 6 B. L. R. 141.

In a suit upon a dishonoured *hundi*, *held* that the dishonour of the *hundi* by the drawee within the jurisdiction was a material part of the cause of action by the holder against the first endorser; and, consequently, that such material part of the cause of action having arisen within the jurisdiction and the holder having obtained leave to bring his suit, the Court had jurisdiction.—*Mul Chand Joharimal v. Suga Chand*, 1 B. 23 (*affirming* 12 B. 118). Referred to in *Ramraji Jambhekar v. Pralhad Das*, 20 B. 193, 140. See also *Seshagiri Row v. Nawab Askur Jung*, 27 M. 491.

Part of the cause of action cannot be held to arise at a place, where payment was not originally contracted for, merely because after performance of the contract and without any consideration, a promise is made to pay at such place.—*Seshagiri Row v. Nawab Askur Jung*, 30 M. 388: 17 M. L. J. 304.

In the absence of proof of an agreement that accounts should be taken elsewhere, a suit for the taking of accounts of a partnership should be instituted in the Court within whose jurisdiction the business of the partnership was carried out: *Niranjan Singh v. Kundan Singh*, 17 A. L. J. 1015: 52 I. C. 655; *Prem Narain v. Ram Lal*, 1 O. L. J. 561: 26 I. C. 225.

In a suit for an account of partnership-dealings, where the cause of action had arisen in part within the original jurisdiction of the High Court, and the leave of the Court to bring the suit had been obtained, *held* that the Court had jurisdiction to entertain the suit.—*Ravah Meah v. Khajee Meah*, 4 M. H. C. 218. See also *Rivett-Carnac v. Goculdas Sobhanmul*, 20 B. 15.

To give jurisdiction to a Court in a suit for account, it must be shown that the material part of the cause of action arose within the jurisdiction of the Court.—*Kessowji Damodar v. Luckmi Das*, 13 B. 404.

The plaintiffs, who traded in Bombay, had dealings with certain firms at Delhi. It was agreed between the plaintiffs and the defendant that, according to the terms of a composition-deed executed at Delhi, the defendant should remit the amount found due to the plaintiffs when the accounts had been made up. In a suit by the plaintiff in Bombay to recover the amount of such composition, *held* that, if, after the execution of the composition-deed, an oral agreement to pay in Bombay was entered into between the defendant and the plaintiff's *munim*, it was clear that part of the cause of action arose in Bombay and therefore the Court had jurisdiction.—*Pragdas Thakurdas v. Dowlatram*, 11 B. 257. See also *Dobson and Barlow v. Bengal Spinning and Weaving Co.*, 21 B. 126.

In suits upon *hundis* drawn outside the jurisdiction of the High Court upon drawees within the jurisdiction, part of the cause of action arises outside the jurisdiction and leave to sue is therefore necessary for such suits.—*Rampurtab v. Premsukh Chandamal*, 15 B. 93. Distinguished

held that the District Judge is competent to transfer a suit to his own file after it was remanded by the Appellate Court for trial by the first Court.

A case remanded to a District Judge can be transferred to a Sub-Judge for disposal.—*Fatima Bibee v. Abdul Majid*, 13 A. 531; *Gurdeo Singh v. Chandrika Singh*, 36 C. 193; 5 C. L. J. 611; *Raza Hussain v. Sheo Sahai*, 9 N. L. R. 40; 19 I. C. 55. The cases in 21 A. 230 and 15 A. 315 have been overridden by this section.

Under the new Code the powers of transfer are wider than under the old Code. *Singamu Setti v. Bhoppella*, 15 M. L. T. 304; M. W. N. (1915) 317; 23 I. C. 425.

**Transfer of Application for Review.**—S. 24 of the C. P. Code does not contemplate the transfer of an application for review to a Court other than that by which the judgment was pronounced. Therefore an order transferring an application for review to a Court other than that which pronounced the judgment is illegal and the latter Court has no jurisdiction to deal with the application; *Baij Lal v. Sitaram*, 50 I. C. 910.

**Transfer of Applications and Proceedings under Special Acts.**—A District Judge is not authorized to refer applications under special Acts, such as, proceedings under the Land Acquisition Act, to an Assistant Judge for disposal.—*The first Assistant Collector of Prant Bassain v. Ardesir Framji Moos*, 16 B. 277.

A District Judge is authorised to refer a contested probate case to a Subordinate Judge for disposal.—*Kunjo Behari v. Hem Chunder*, 25 C. 340; 2 C. W. N. (S. N.) 91.

As to power of High Court to transfer insolvency cases to District Courts under s. 24, see, *Sreenivas v. Official Assignee of Madras*, 25 M. L. J. 299; 14 M. L. T. 14; 21 I. C. 77.

The inquiry in Proceedings under s. 14 of the Legal Practitioners' Act cannot be delegated or transferred to another officer who is not the presiding officer of the Court in which the mal-practices complained of were committed; *Janak Kishore v. In the matter of Chandra*, 1 Pat. L. J. 576; 37 I. C. 484.

**S. 24 Does not Apply to Proceedings under S. 476 of the Criminal Procedure Code.**—The word "Proceeding" in s. 24 covers all proceedings contemplated at the date when the Civil Procedure Code of 1908 was passed, and not a special proceeding not then in contemplation or established by a subsequent Act, namely, the Criminal Procedure Amendment Act (XVIII of 1923). Hence the section cannot be invoked to allow a Court, other than the Court in the course of proceedings in which a perjury or forgery was committed or a Court to which appeals ordinarily lie from that Court, to entertain the question of preferring a criminal complaint under s. 476 of the Criminal Procedure Code.—*Rameshar Lal v. Rajdhari Lal*, 25 A. L. J. 438; 101 I. C. 247; A. I. R. 1927 All. 469.

**Defect of Jurisdiction not Cured by Subsequent Transfer.**—Held by the Privy Council that, under this section, superior Court cannot make an order of transfer of a case unless the Court from which the transfer is sought to be made has jurisdiction to try it.—*Ledgard v. Bull*, 9 A. 191 P. C. (5 A. 871, reversed); *Peary Lal v. Komal Kishori*, 6 C. 30, approved. Referred to in *Ram Narain v. Parmeswar Narain*, 25 C. 39.

maintained in the Court which passed the decree.—*Umarao Singh v. Hardco*, 29 A. 418. But where the fraudulent decree is threatened to be executed and there is a prayer for an injunction in addition to the relief for a declaration that the decree is null and void, the suit can be instituted in the District where the execution proceedings are threatened.—*Bankebehari v. Pokheram*, 25 A. 48; *India Provident Co. Ltd. v. Govinda*, 27 C. W. N. 359; A. I. R. 1923 C. A. L. 425; *Ballamal v. Jagannath*, 72 I. C. 892.

**Suit for Refund of Fare on Goods Sent through Two Railways.**—The plaintiff sent some grains from Cawnpore to Jagannath and the goods had to travel through two railways. He paid the fare at a higher rate than was necessary and brought a suit at Cawnpore for the recovery of the excess. Held, that the cause of action arose partly at Cawnpore and the Cawnpore Court had jurisdiction to entertain the suit; *East Indian Railway Co. v. Binda*, 18 A. L. J. 66; 20 I. C. 620.

**Explanation I.**—The word 'residence' as usually understood, means a fixed and permanent home of a man's wife and family (*see* 1 A. 51 and 6 W. R. 240). In some cases under Act VIII of 1859 in which the word "dwell" was used, it was held that occasional residence will not bring the defendant within the jurisdiction of a Court. But in 3 A. 91 P. C. and in some other cases under the Code of 1859, it was held that a person might dwell at more places than one within the meaning of the C. P. Code. This explanation gives legislative sanction to the above Privy Council and other cases, to avoid difficulty and diversity of judicial opinion. According to this explanation a temporary residence of the defendant and in respect of a cause of action arising at a place where he has such temporary residence gives jurisdiction.

**Ancestral Home at One Place and Actual Residence in Another.**—The mere fact that the defendants had their ancestral home within the local limits of the jurisdiction of a Court though they actually resided outside such local limits, would not give the Court jurisdiction; *Kishore Lal v. Ram Sunder*, 19 A. L. J. 822.

**Explanation II.**—This explanation settles the residence of a corporation or company and follows the rule laid down by English Courts.

A corporation resides wherever it carries on its business, irrespective of the location of its head office and if a corporation such as a Bank has branch offices in fifty separate and distinct jurisdictions, it can and may be sued in any one of such jurisdictions for the enforcement of a right in respect of which a cause of action exists within the local limits of each independent jurisdiction; *Bank of Bengal v. Sarat Chandra*, 4 Pat. L. J. 141; (1919) Pat. 155: 48 I. C. 948 (39 C. 104. *folld.*).

**Explanation III** of the former Code (which was inserted by the Amendment Act VII of 1888, s. 7) has been omitted. The insertion was then thought necessary to settle the doubt whether "cause of action" meant the whole or a part also. The explanation therefore made the point clear, but as it indicated the places of suing in cases arising out of contracts only, the question arose whether the accrual of part of the cause of action is sufficient to give jurisdiction in cases other than contracts and to leave no room for doubt or ambiguity the words "wholly or in part" have been added to clause (c), making it applicable to all classes of suits. The explanation therefore became unnecessary, and though removed is still good law and contains a correct statement of the meaning of "cause of action"



Prejudice on the part of a Judge against a particular pleader is not sufficient ground for ordering a transfer; *Mula Naramma v. Mula Rangamma*; A. I. R. 1926, Mad. 359; 91 I. C. 559.

Reasonable apprehension on the part of a litigant should receive consideration when a transfer is applied for but at the same time the apprehension must be such as a reasonable man might reasonably be expected to have; *Khwaja Ahad Shah v. Musst. Ayshan Begum*, A. I. R. 1923 Lah. 564.

**Disqualification of Judge.**—Judges should not try cases in which they have any personal interest.—*Calcutta Steam Tug Company v. Hossein Ibrahim Bin, Bourke*, O. C. 273, *Kunja Lal v. Dinabandhu*, 15 C. L. J. 162. Disqualification of a Magistrate to try a case in which he is personally interested.—*Queen-Empress v. Sahadev*, 14 B. 572; and *Griish Chunder v. Queen-Empress*, 20 C. 857; *Nistarini Debi v. Ghose*, 23 C. 44. But a case should not be transferred upon the mere allegation that the presiding officer is interested in the case without notice to that officer and the opposite party; *Dwarka Nath v. Tara Prasunna*, 23 C. L. J. 295.

An officer who exercises executive and judicial functions, having himself dealt with a certain matter, and formed and expressed an opinion upon its merits in his executive capacity, is in consequence, disqualified from dealing as a Judge with this same question when it comes into Court, and has to be dealt with judicially.—*Loburi Domini v. Assam Railway and Trading Company*, 10 C. 915. See *Aloonathoo v. Gagubha Dipsangji*, 19 B. 608.

A District Judge should not withdraw a suit merely because in an analogous case a Sub-Judge had taken what, in his opinion, was an erroneous view of the law. If he does not intend to try a suit finally, the case ought not to be transferred merely to enable him to dispose of it on a preliminary ground—*Bhoja Hari v. Secretary of State*, 15 I. C. 569.

An expression of opinion by a Judge as to the merits of the plaintiff or of a newspaper conducted by him, is no ground of a transfer specially when that expression of opinion was elicited by the conduct of the plaintiff himself; *In re Tanguturu Sriramulu*, 29 I. C. 29.

**Adverse Decision on a Point of Law in a Connected Suit.**—The fact that a Judge has decided a point of law arising in one case is not a good ground for transferring from his Court another case in which the same point arises; *Firm of Jai Narain Babu Lal v. Firm of Johri Mal Chunna Mal*, A. I. R. 1922 L. 369; 67 I. C. 228.

The presiding officer should decline to hear matter when he has personal knowledge of facts.—*Lakshmi Narain v. Guru Datta*, 16 I. C. 859

- 25. (1)** Where any party to a suit, appeal or other proceeding pending in a High Court presided over by a single Judge objects to its being heard by him and the Judge is satisfied that there are reasonable grounds for the objection, he shall make a report to the Governor-General in Council, who may, by notification in the Gazette of India, transfer such suit, appeal or proceeding to any other High Court.

**Power of Governor-General in Council to transfer suit.**

unless there was a consequent failure of justice; *Zemindar of Ethiapuram Chindambaram*, 43 M. 675: 39 M. L. J. 203; *Madari v. Misser*, 9 Bur. L. T. 119: 36 I. C. 431; *Rati Ram v. Kundan Lal*, 87 P. R. (1914), p. 810. S. 21 does not apply to cases of want of pecuniary or exclusive jurisdiction. Its application is confined only to objections regarding want of territorial jurisdiction; *Zaminder of Ethiapuram v. Chidambaram*, 40 M. 675: 39 M. L. J. 203; *Ramani v. Narayanasami*, 47 M. L. J. 192. This section does not apply to objections to jurisdiction but only to such objections as relate to the "place of suing."

**Objection as to the Place of Suing.**—It means objection as to the institution of the suit on the ground that the Court in which it was instituted had no jurisdiction over the subject-matter of the suit.—*Zaminder of Ethiapuram v. Chidambaram*, 43 M. 675: 39 M. L. J. 203.

S. 20 provides that all suits other than suits relating to immoveable property may be brought in the Court, within the local limits of whose jurisdiction the defendant resides, or where the cause of action arose. S. 21 provides that if a suit is brought in a certain Court under the provisions of s. 20, relying solely on the ground that the defendant resides within the local limits of the jurisdiction of that Court, and a decree is passed in the suit without any objection by the defendant as to want of jurisdiction of the trying Court, the defendant will, under this section, be precluded from taking any objection as to jurisdiction in the appellate Court. It must be remembered however that s. 21 has no application where the objection is not as to the place of suing but is an objection going to the nullity of the order on the ground of want of jurisdiction, as was held by their lordships of the Privy Council in *Setru Cheria v. Maharaja of Jeypore*, 42 M. 818 P. C. 46 I. A. 151: 23 C. W. N. 1033. In this case a suit was brought for the sale of mortgaged property which was partly situated in British India and partly in a Scheduled District. No objection was taken by the defendant as to the jurisdiction of the Court, and a decree for the sale of the mortgaged property was passed by the trial Court. On appeal by the defendant, the High Court held that the case was governed by s. 21 and that the defendant, not having raised the plea of jurisdiction before the trial Court, was precluded from taking that objection before the High Court. The defendant appealed to the Privy Council and their Lordships held that, so far as the decree was for the sale of mortgaged property in the Scheduled District, it was a nullity, since the trial Court had no jurisdiction under s. 17 to entertain the suit. Lord Dunedin said in this connection: "The learned Judges of the Court of Appeal thought that the matter was met by s. 21 of the Code. Their Lordships cannot agree with this view. This is not an objection as to the place of suing: it is an objection going to the nullity of the order on the ground of want of jurisdiction."

**Objection as to Jurisdiction When can be raised.**—The plea of want of jurisdiction can be entertained at any stage of a suit; *Nidhi Lal v. Mazhar Hussain*, 7 A. 230; *Sidheswar v. Harihar*, 12 B. 165. It may therefore be urged for the first time in appeal; *Ramayya v. Subbarayudu*, 18 M. 25; *Nyamtula v. Nana Valad*, 18 B. 421; or in second appeal; *Narayan v. Gangaram*, 33 B. 664; *Velayudam v. Arunachala*, 18 M. 273; or in revision; *Bibi Ladli v. Bibi Raji*, 18 B. 650; or after remand in second appeal; *Keshav v. Vinayak*, 23 B. 22; or on appeal to the Privy Council; *Maha Prasad v. Ramani Mohon*, 42 C. 116, 120: 41 I. A. 197, 201; 25 I. C. 461; *Ramlal v. Kishanchand*, 51 I. A. 72: 51 C. 801: A. I. R. 1924 P. O. 95, provided

"Where a suit has been duly instituted."—A suit was instituted on the last day for filing the suit under the Limitation Act. The plaint was insufficiently stamped and the deficit Court-fees not having been put in within the time fixed by the Court, the suit was dismissed. Thereafter on an application for review, the order of dismissal was set aside without any notice to the defendant and time was granted for putting in the deficit Court-fees: *Held*, that at the time the order of dismissal was set aside, there was no opposite party on whom the notice could be served, as the summons in the suit had not yet been issued on the defendant and as, until the suit was registered, the suit could not be said to have been duly instituted. The order of dismissal passed at that stage of the case can be reviewed without notice to the defendant; *Surendra Prasad Lahiri Choudhury v. Aftabuddin*, 26 C. W. N. 391 (8 W. R. 304 and 14 M. L. J. 7 *refd. to*; 43 C. 178 *applied*).

**28.** (1) A summons may be sent for service in another province to such Court and in such manner as may be prescribed by rules in force in that province.

**Service of summons where defendant resides in another province.**

(2) The Court to which summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto. [S. 85.]

*See Notes under Order V, Rules 21 and 23.*

**29.** Summonses issued by any Civil or Revenue Court situate beyond the limits of British India may be sent to the Courts in British India and served as if they had been issued by such Courts:

**Service of foreign summonses.**

Provided that the Courts issuing such summonses have been established or continued by the authority of the Governor-General in Council, or that the Governor-General in Council has, by notification in the Gazette of India, declared the provisions of this section to apply to such Courts. [S. 650-A.]

## COMMENTARY.

This section corresponds to the first part of section 650 A of the C. P. Code, of 1882. The second clause of that section has been omitted.

As for the notification referred to in the last part of this section, see the notification in the Gazette of India, dated 16th March, 1912, Pt. 1, pp 349-352, whereby the provisions of this section have been declared to be applicable in Gwalior, Indore, Bundelkhand, Bhopal, Malwa, Bhagelkhand and Bhonawar Agencies.

8 C. L. R. 261; *Ooma Sundaree v. Dipin Beharee*, 18 W. R. 202; *Venkata Viraragava v. Krishnasami*, 6 M. 844.

Where there is no want of jurisdiction over the subject-matter of the action, but leave under cl. 12 of the Letters Patent is required before the Court can entertain the suit, the objection that such leave has not been properly obtained may be waived, and will be considered to have been waived if the defendant files his written statement and applies for a commission to examine witnesses.—*King v. Secretary of State*, 85 C. 894: 12 C. W. N. 705.

**Objection to Jurisdiction—Want of Jurisdiction—Proper Course to be Adopted.**—On this point see the cases noted under Or. VII, r. 10.

**Consent of Parties and Waiver of Jurisdiction.**—All the cases on this point have been noted under s. 15 under the heading "*Jurisdiction cannot be conferred by consent of parties or by their waiver.*"

**Whether Judgment-debtor can Challenge the Validity of the Decree in a Separate Suit.**—The Madras High Court has answered this question in the negative in *Chokkalinga v. Velayudha*, 47 M. L. J. 448: A. I. R. 1925 Mad. 117: 87 I. C. 152. But the Calcutta High Court in *Krishna v. Amarnath*, 47 C. 770: 56 I. C. 532 has held that a purchaser of mortgaged property at a Court Sale is competent to sue for a declaration that the decree was a nullity. The same High Court in *Kunja v. Manindra*, 27 C. W. N. 542; 77 I. C. 253 has also held that a judgment-debtor can take the plea that the decree is a nullity in a suit brought against him for possession by the auction purchaser.

**Whether s. 21 is Applicable to Execution Proceedings.**—The provisions of this section are applicable to execution proceedings; *Manavikraman v. Ananthanarayana*, 46 M. L. J. 250; A. I. R. 1924 Mad. 457; *Zemindar of Ethiapuram v. Chidambaran*, 43 M. 675; 58 I. C. 871. In *Gorachand v. Prafulla*, 53 C. 166: A. I. R. 1925 Cal. 907: 89 I. C. 685. The Calcutta High Court has held that where a decree presented for execution has been made by a Court which apparently has no jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction.

**Principle of s. 21 applicable to execution proceedings. Estoppel by acquiescence.**—See *Velayutha Muppan v. Subramanian*, 24 M. L. J. 70: 13 M. L. T. 207: 18 I. C. 499; *Veerapa Chetti v. Ramasami Chetti*, 43 M. 135: 37 M. L. J. 442: 26 M. L. T. 271: 53 I. C. 579.

**Jurisdiction to Try Case remanded by Appellate Court.**—The jurisdiction of the Court trying a remanded case depends entirely on the order of remand. Neither s. 21 C. P. Code in terms nor any principle underlying it is applicable to the case; *Uthuman Ammal v. Naina Mahomed Rowther*, 44 M. L. J. 238: 72 I. C. 314.

**22. Where a suit may be instituted in any one of two or**

Power to transfer suits which may be instituted in more than one Court.

more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit

under s. 30 and has no application to the case of a party who fails to produce documents which he has been ordered to produce; *Kumar Rameswar v. Rani Rik Nath*, 5 Pat. L. J. 550: 58 I. C. 281: 1 P. L. T. 668.

See notes under Order XVI, Rules 10 to 13, 17, 18.

### JUDGMENT AND DECREE.

**33.** The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow. [Part of S. 198.]

### COMMENTARY.

**"A decree shall follow."**—Under s. 33 of the C. P. Code, it is imperative that a decree shall follow the judgment and it is the duty of the Court to comply with the provisions of the law and failure to prepare a decree cannot therefore deprive the parties of their right to appeal; *Manohar Lal v. Nanak Chand*, 66 P. R. 1919: 52 I. C. 503: 72 P. W. R. 1919.

**"Shall pronounce judgment."**—Plaintiff sued without the production of a succession certificate to recover a debt due to the estate of her late husband. The Court passed judgment in her favour but postponed the issue of a decree till a certificate was produced. *Held*, the course adopted by the Court was neither desirable nor convenient, but it was, nevertheless legal. S. 33 of the C. P. Code must be qualified by the terms of s. 4 of the Succession Certificate Act and a decree cannot be passed till a certificate is produced; *Rajaram v. Malan*, 57 I. C. 650.

A decree is something different from a judgment. The decree has to agree with the judgment. Rules 6 and 7 of Or. XX prescribe what the decree shall contain. Section 33 also leads to the same conclusion, for it provides that the Court after the case has been heard shall pronounce judgment and on such judgment a decree shall follow; that judgment may be either preliminary or final; *Bai Divali v. Shah Vishnav*, 34 B. 182, p. 188.

See notes under Order XX, Rule 1.

### INTEREST.

**34.** (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment or to such earlier date as the Court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from

herent jurisdiction to stay the suit on the ground that the process of the Court is being abused, if it finds that the suit is instituted not *bona fide* but for the purpose of harassing or annoying the defendant.—*Hindustan Assurance Co. v. Rail Mulraj*, 27 M. L. J. 645: 27 I. C. 455.

A transfer of a case ought generally to be made only on strong grounds. Where it was established that almost all the evidence would be available only at the place to which a transfer is applied for, the convenience and interest of both parties would be secured by ordering a transfer; *Ramjidas v. The Firm of Brij Lal Jagannath*, 60 I. C. 230.

A defendant in a suit who takes objection to the jurisdiction of the Court in which it has been instituted, to try that suit, cannot maintain an application for its transfer to another Court under s. 22 C. P. Code. A plaintiff's right to choose his own *forum* cannot be taken away from him except for very cogent reasons (13 B. 178, *resd. to*). *Held* that the fact that the defendant's witnesses would be very much inconvenienced if the suit continued in the Court chosen by the plaintiff as his *forum* is not a sufficient ground for taking action under s. 22 C. P. Code; *Askaram Boid v. Bholanath*, 21 O. C. 217: 48 I. C. 105 (followed in 56 I. C. 920).

There must be strong reasons for depriving a plaintiff of the right to bring his suit in any Court in which the law allows and the fact that the defendant's evidence in regard to one of the issues is mainly in another place is not a sufficient ground for transferring the case to that place: *Shib Parshad v. Kanhaiya Sha*, 167 P. R. 1919: 54 I. C. 935 (8 I. C. 449, 23 I. C. 345, 24 I. C. 707, 25 I. C. 874, 34 I. C. 686, *referred to*).

The mere fact that the defendant resides outside and that all his evidence is available outside the jurisdiction of a Court is no ground for transferring a suit from the Court where it has been originally instituted; *Sham-suddin v. Ali Mahomed*, 8 S. L. R. 43: 25 I. C. 874.

The plaintiff has a right to bring a suit in any Court which the law allows, and a strong case based either on some ground of expense or convenience must be made out in order to overrule the right of the plaintiff to select the *forum* of his suit; *Syed Husain v. Sajjadi Begam*, 3 O. L. J. 200: 34 I. C. 686.

A suit can be transferred only upon two grounds, *viz.*, (a) that there will not be an impartial trial by the trying Court, or (b) that there is a manifest preponderance of convenience of the petitioner if the suit is transferred to the other Court. The convenience of the plaintiffs and their witnesses have also to be considered particularly as they have in the first instance the right to choose the venue in which they would prosecute their suit; *Ram Kumar Sheo Chand v. Tularam Nathuram*, 1 Pat. L. T. 277: 56 I. C. 920.

A High Court by directing under s. 22 that a suit shall proceed in another jurisdiction, and not in the Court in its own jurisdiction, in which it has been instituted, in effect, stays further proceedings in the latter Court and makes that Court incompetent to proceed with the case. The only course open to it, is then to return the plaint to the plaintiff for presentation to the proper Court, *i. e.*, the Court in the other jurisdiction, in which the High Court has determined that it shall proceed, *Milon Magyi v. Naga Ba*, U. B. R. (1909), C. P. 25.

Whether Question as to want of Jurisdiction of Trying Court can be Raised in Application for Transfer under this Section.—In an application

Promissory Note or Bill of Exchange. Similarly, under the Interest Act XXXII of 1839, the Court may award interest to the plaintiff if the amount claimed is a sum certain (as distinguished from unascertained damages) and is payable at a certain time by virtue of some written instrument.

**Interest from Date of Suit to Date of Decree.**—Section 34 leaves it to the discretion of the Court to allow or disallow interest on the amount decreed from the date of the suit to the date of the decree. *Panna Lal v. Nihal Chand*, 26 C. W. N. 737; 67 I. C. 423; A. I. R. 1922 P. C. 46; *Raja Peary Mohan v. Norendra*, 9 C. W. N. 421. See also *Hira Lal v. Narsi Lal*, 37 B. 326 P. C.; 17 C. L. J. 474; 17 C. W. N. 573; 11 A. L. J. 432; 25 M. L. J. 101; this discretion is not excluded notwithstanding that a fixed rate of interest is mentioned in the contract as payable up to realisation.—*Magniram v. Dowlat Roy*, 12 C. 569; *Carathio v. Nurbibi*, 3 B. 202; *Umes v. Fatima*, 18 C. 180. The Court should, in the exercise of its discretion, award interest, from date of suit till realisation, at the contract rate. *Orde v. Skinner*, 3 A. 91; 7 I. A. 196. But such discretion should be exercised on sound judicial principles; *Sarajubala v. Sarada*, 23 C. W. N. 337.

Interest even on damages may be awarded, but when such damages are awarded, the Court should state its reasons; *Panna Lal v. Mukhram*, 89 C. L. J. 77; A. I. R. 1924 C. 637; 80 I. C. 87; but no interest on damages for any period prior to suit can be awarded; *Framji v. Commr. of Custom*, 7 Bom. H. C. A. C. 89; *Rutnessur v. Hurrish*, 11 C. 225.

A plaintiff is not entitled as of right to interest from date of suit to date of decree at the contract rate. The question is one for the discretion of the Court but some reason must be assigned in every case for not allowing any interest; *Rajagopala Chetty v. Kandappa Chetty*, 28 I. C. 429.

Under s. 34, the Court is empowered to award interest at such a rate as it deems reasonable from the date of decree till the date of payment. There is no limitation placed on the discretion of the Court in this respect, as in the case of costs in s. 35.—*Allahabad Bank, Ltd. v. Suraj Kuar*, 26 I. C. 177; See also *Managi Singh v. Sahebram*, 10 C. L. J. 203.

Having regard to the provisions of Or. VII, r. 7 of the C. P. Code, the Court has discretionary power to grant interest under s. 34 of the Code in a suit for money although interest was not specifically asked for in the plaint; *Dup Ram v. Harphal*, 2 Lah. 256; 64 I. C. 846.

**Interest from Date of Decree to Date of Payment.**—The awarding of interest from the date of decree to the date of payment is also in the discretion of the Court. The plaintiff getting the security of a decree, has his interest reduced in the generality of cases; *Umes v. Zahur Fatima*, 18 C. 164. Where the Court awards interest from the date of the decree but no rate is maintained, the decreeholder should get interest at the Court rate, i.e., 6 per cent. But where the decree awards no such interest, it will be deemed to have been refused; s. 34, Cl. 2 and *Ambi v. Sri Debi*, 45 M. L. J. 687; 75 I. C. 566; A. I. R. 1924 M. 102.

**Interest in Suits for Enforcement of Mortgage.**—Section 34 does not apply to mortgage decrees.—*Giriya Chettiar v. Sabapathy*, 29 M. 65; *Rajwant Kunwar v. Shiam Narain*, 36 A. 220; 12 A. L. J. 283.

it to transfer such suit to any Court beyond the local limits of its own jurisdiction; *Abu Bakar Abdul Rahiman & Co. v. Rambur*, 13 N. L. R. 81: 40 I. C. 303.

Where the question was whether a suit was entertainable by the Civil Court at Benares or at Bhagulpore, *held that application under ss. 22 and 23 could not be entertained*; *Purna Chandra v. Dhon Kristo*, 12 A. L. J. 896: 24 I. C. 318.

**Transfer under S. 23 When should be Granted.**—Applications for transfer is an extraordinary procedure and some good cause must be shown why such procedure should be exercised; *Sachindra Nath v. Md. Habibullah*, 24 I. C. 707.

Very strong reasons must be shown for depriving a plaintiff of the right to bring his suit in any Court allowed by law; *Muthia Chetty v. Arunachalam* 7 Bur. L. T. 1; 23 I. C. 345; *see also Umatul v. Kulsoom*, 10 C. L. J. 208, *Gilmour v. Ram Lal*, 77 P. L. R. (1009).

The plaintiff has the right to choose the *forum* of trial, and a case can be transferred from one Court to another, only when the Court is satisfied that the proceedings in the trying Court constitute an abuse of the process of the Court; *Jawahir Kumari v. Naresch Chandra*, 1 P. L. T. 389: 54 I. C. 649.

The right of a plaintiff to institute a suit in a Court in which the law permits him to sue should not be interfered with by the High Court in the exercise of its extraordinary jurisdiction unless the suit is brought in bad faith for the purpose of working injustice to which the defendant would not be subjected if the suit were brought in another competent Court. The mere fact that it would be more convenient to the defendant to have the suit tried in another *forum* is no ground for the transfer; *Pragji Soorji & Co., Bombay v. Kalu Mal Shori Mal & Co.* 69 I. C. 772; *Pandit Roop Chand v. Gokal Chand*, 73 I. C. 860.

**24.** (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage—

General power of transfer and withdrawal.

- (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or to dispose of the same, or
- (b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and
  - (i) try or dispose of the same; or
  - (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or
  - (iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.



are framed by the High Court under s. 104 of the T. P. Act, fixing Court rate, the case is governed by section 34 of the C. P. Code; *Allahabad Bank Ltd. v. Suraj Kuar*, 26 I. C. 177: 1 O. L. J. 544.

**Interest on Unpaid Arrears of Interest.**—If the liability under a general undertaking to pay interest is further extended by what may be styled an appurtenant undertaking to pay interest upon arrears of interest and such further undertaking is found on the same document following provisions for payment of interest, it might be assumed that the parties intended that both the principal and the appurtenant undertaking should govern the liability of the debtor for post diem interest; *Narasimhaya Srinivasayya*, 36 M. L. J. 118: 52 I. C. 313 (19 A. 32, 20 A. 171: 23 A. 453: 11 M. L. J. 188: *folld.*).

**Hard and Unconscionable Bargain, and Power of Court to Reduce Contract Rate.**—Hard and unconscionable bargain explained. A transaction may fall within the description of hard and unconscionable bargain in many ways.—*Kali Prosonna v. Pratap*, 17 C. L. J. 221: (34 C. 150 P. *followed.*)

There is nothing inherently wrong or oppressive in a lender's security for himself compound interest after the borrower has for a considerable time neglected to pay the debt he owes or the interest accrued due upon it which he has contracted to pay. In their Lordships' opinion neither the rate of interest reserved, 30 per cent. per annum, nor the capitalisation of overdu interest at intervals so lengthy as those proved by the dates of the security themselves, nor the two combined are sufficient to lead to the conclusion that the transactions were on the face of them unconscionable contracts within the meaning of s. 16 (3) of the Indian Contract Act; *Lala Bala Mal v. Ahad Shah*, 23 C. W. N. 233 P. C. (23 C. W. N. 130 P. C. *referred to*). The Court has no option but to allow the defendants, the rate of interest stipulated in the bond which was 30 per cent. per annum; *Ektar Sikdar v. Wajuddi*, 23 C. W. N. 980 (23 C. W. N. 180, P. C. 23 C. W. N. 233, P. C., *followed*).

In the absence of undue pressure or influence on the part of the lender the plaintiff is entitled to get interest at the rate agreed, although it is a hard bargain.—*Krishna Kumar v. Brojonath*, 7 C. W. N. 876; *Pratap v. Shyama Lal*, 31 I. C. 188; *Umesh v. Gopal*, 31 C. 233; *Satish Chandra v. Hem Chandra*, 29 C. 823 and *Sankaranarayana v. Sankaranarayana*, M. 343. But where the bargain is hard and unconscionable the Court should not enforce it.—*Kriparam v. Samiuddin*, 25 A. 284; *Kamini Sarda v. Kali Prosonna*, 12 C. 225, P. C. and *Hari v. Ramji*, 28 B. 371.

Although the execution of the bond is not procured by undue influence and although the rate of interest is not penal, nevertheless the Court can grant relief against a bargain which is hard and unconscionable.—*Krishna v. Madan Lal*, 29 A. 303: 4 A. L. J. 222: A. W. N. (1907). See also *Poma Dongra v. Gillespie*, 31 B. 348: 9 Bom. L. R. 143.

Where a lower Court awarded interest at a rate lower than the contract rate. *Held*, that, although the stipulated rate was properly awarded, yet the award of the lower rate was neither illegal nor beyond the competency of the Court below with whose discretion the High Court refused to interfere.—*Carvalho v. Nurhibi*, 3 B. 202, and *Gossain Luckman Narain v. Tekait Het Narain*, 16 W. R. 322.

Where the transfer is at the instance of a party, the transfer without notice to all parties is a material irregularity. But as the irregularity is a mere defect of form, the High Court did not interfere in the case, as the District Court could have transferred the case *suo motu* without notice; *Mathura Das v. Venkat Rao*, 21 M. L. J. 829.—*Karim Baksh v. Abdul Huq*, 26 O. C. 62; 74 I. C. 249.

Order of transfer without notice to the opposite party is not illegal.—*Sankumani v. Ikoran*, 13 M. 211. Nor it is a material error; *Bishen Kaur v. Amarnath*, 143 P. W. R. 1912: 14 I. C. 561.

It is always usual to issue notices to the parties informing them that a case has been transferred from one Court to another and in the absence of such a notice, a party may well plead that he did not know in what Court he had to appear; *Gangaram v. Girjarmal*, A. I. R. 1923 Lah. 444.

"After hearing such of them as desire to be heard."—Held that an order of transfer under s. 24 of the C. P. Code passed on the application of any of the parties without giving the others notice and hearing such of them as desire to be heard is illegal and liable to be set aside on revision; *Alinaki v. Domadar Das*, 83 P. W. R. 1917: 40 I. C. 111. But where a Court proceeds of its own motion no notice is necessary; *Bisandayal Sitaram v. Babu Lal*, 13 N. L. R. 203: 42 I. C. 706; *Fatema Begam v. Imdad Ali*, A. L. J. 851: 8 I. C. 560.

"At any stage of the suit."—Under the Old Code of 1882, there was a conflict of decisions on the question whether a transfer can take place after the commencement of hearing of a case. It was held in some cases that a suit could be transferred or withdrawn at any stage though it might be part heard and even in the course of execution proceedings; *In re Balaji*, 5 B. 680; *Nasarvanji v. Kharsedji*, 22 B. 778; *Muttulagiri v. Muttayyar*, 6 M. 357; *Palanisami v. Thandama*, 26 M. 595; *Bandhu v. Lakhi*, 7 A. 342, *Mahadeo v. Gajadhar*, 10 C. W. N. 12. On the other hand it was held in some cases that no order of transfer could be made after the hearing had once commenced, and that the court had no power to make an order for transfer in execution proceedings; *Kishori v. Gul Mohamad*, 15 C. 177; *Kumarsami v. Subbarayaya*, 23 M. 314; *Bidya v. Surja*, 32 C. 875. The words "at any stage" have been added to set at rest the above conflicting decisions and to make it clear that a suit can be transferred at any stage even after the hearing has commenced.

"Pending before it."—Under the corresponding section of the old code of 1882, the District Court had no power to transfer a suit pending before it to a subordinate Court; *Sakharam v. Gangaram*, 13 B. 654; under the present section, both the High Court and the District Court have been invested with the power to transfer any suit or appeal pending before them.

"Any Court subordinate to it."—The Court of the Divisional Judge is not a subordinate Court in the sense in which that expression is used in s. 24 (a) of the Code, so as to enable the High Court to transfer divorce proceedings to the Divisional Court for disposal; *Wallace v. Wallace*, 40 B. 109: 17 Bom. L. R. 948. A senior Subordinate Judge cannot transfer a case from his own Court to that of the junior Subordinate Judge as the Court of the latter is not subordinate to him; *Kishen Lal v. Jailal*, 52 I. C. 852.

**Where Decree is Silent as to the Payment of Further Interest.**—Where a sale was postponed by consent of the parties on condition of judgment-debtors undertaking to pay interest not awarded by the decree—held that the condition should be enforced in execution.—*Lakshmana v. Sulia Bai* 7 M. 400. Followed in *Narayana Vithal v. Raoji Bin*, 28 B. 393.

When a decree gives interest upon the principal sum recovered only, and no mention is made as to interest on costs, the successful party is not entitled to such interest.—*Mahtab Chunder v. Ram Lal*, 3 C. 251; 1 C. L. R. 58; *Amceroonissa v. Mozuffer*, 18 W. R. 103; *Gurudas v. Stephens*, 13 B. L. R. Ap. 44; 21 W. R. 195. See also *Ulfuaunnissa v. Mohen Lal*, 6 B. L. R. Ap. 33 and *Brojo Soonduree v. Anund Moyee*, 16 W. R. 302. But see *Bharut Chunder v. Gaurce Parshad*, 18 W. R. 34 and *Haradhun v. Rashmonee*, 2 W. R. Mis. 21.

Interest not provided for in the order of the Privy Council may, however, be allowed in execution where the parties have agreed to submit the matter to the decision of the Court executing the decree.—*Forester v. Secretary of State*, 3 C. 161 P. C.; and *Lakraj v. Mahatab Chund*, 21 W. R. 147. Where interest on costs is not given in the decree of the Privy Council such interest cannot be given by any Court in this country.—*Dakhina Mohan v. Saroda Mohan*, 23 C. 357 (3 C. 161, P. C., referred to.) See also *Tokhan Singh v. Girwar Singh*, 1 C. L. J. 118; 9 C. W. N. 372; 32 C. 494.

Where a decree is silent as to future interest, interest cannot be recovered by proceedings in execution of the decree, but it may be recovered as damages by a separate suit.—*Seth Gopal Das v. Murli*, 3 C. 602, P. C.; 2 C. L. R. 156, P. C.; and *Nilambar v. Pitambur*, 5 W. R. Mis. 28.

A Court of execution cannot award interest when the decree is silent.—*Vabaj Lal v. Kastur*, 22 B. 42; *Mosoondun Lal v. Bekaree*, B. L. R. Sup. Vol. 602: 6 W. R. Mis. 109; *Abdul Ali v. Ashraffan*, 7 B. L. R. Ap. 30 (n): 14 W. R. 62; *Jardine Skinner v. Sama Soonduree*, 10 W. R. 60, *Becharam v. Brojo Nath*, 9 W. R. 369; *Leelanand v. Joy Mungal*, 15 W. R. 335; *Leelanand v. Ram Narain*, 15 W. R. 415; *Nubo Kishore v. Anund Mohun*, 17 W. R. 19; *Jewan Lall v. Doorga Dutt*, 20 W. R. 477; *Mohamed Yakoob v. Mahomed Zahoorul* 22 W. R. 533; *Enayet Ali v. Mohamed Zahoorul* 22 W. R. 534.

Where a decree is silent with respect to interest, the Court should be deemed to have refused it; *Ambi v. Pudia Kovilagath*, 45 M. L. J. 687: (1923) M. W. N. 753.

Where the decree did not specify the rate of interest, held that the Court ought not to have allowed higher than the usual Court rate—namely, 12 per cent.—*Soobudra Bibes v. Sheo Churn*, 7 W. R. 375; *Abdoolah v. Reasut Hossein*, 17 W. R. 414; and *Lalun Mani v. Behari Lal*, 7 B. L. R. Ap. 30.

Where a decree was given for a certain amount, the rate not being specified, the order of the executing Court allowing interest at the usual Court rate was affirmed.—*Madhub Lal v. Nayan Ghose*, 6 C. L. R. 231.

Interest which was not awarded by the judgment cannot subsequently be given by amending the decree under s. 206, C. P. Code, 1882 (s. 152).—*Sasan Shah v. Sheo Prasad*, 15 A. 121.

A District Judge has power to transfer a suit from the file of the District Munsif to that of a Sub-Judge though the consequence is that the suit will have to be tried as a Small Cause Suit by the Sub-Judge and the plaintiff will have no right of appeal from the decision; *Umacharan v. Chintia Roy*, 36 I. C. 881.

Where a suit which was deliberately undervalued by the plaintiff and filed in the Court of the Munsif and was then transferred by the District Judge for trial to the Court of the Subordinate Judge, held that the District Judge had no jurisdiction to transfer the case under s. 24 so as to confer jurisdiction upon the Munsif's successor or substitute (L. R. 15 I. A. 434, *refd. to*); *Bibi Sairah v. Mussi. Gulab Kuar*, (1910) Pat 409: 53 I. C. 892.

**Whether Power of Transfer can be Delegated.**—The power to transfer cases under s. 24 of the C. P. Code can be delegated by the District Judge to the Subordinate Judge; when so delegated, it must be exercised in accordance with law. It can only be exercised in cases pending in a Court subordinate to the Court exercising the power; *Kishan Lal v. Jailal*, 52 I. C. 352: 1 Lah. 158.

**Cl. 4.—Suit Withdrawn or Transferred from a Court of Small Causes.**—The expression "Court of Small Causes" in cl. (4) includes a Court vested with the powers of a Court of Small Causes as well as Courts constituted under the Provincial Small Cause Courts Act IX of 1887; *Mangal v. Rupchand*, 13 A. 324; *Sukha v. Raghunath*, 39 A. 214: 37 I. C. 809; *Chaturisingh v. Mt. Ramia*, 40 A. 525: 46 I. C. 893; *Megimal v. Hiralal*, 22 A. L. J. 880: A. I. R. 1924 All. 761; *Sankararama v. Padmanava*, 38 M. 25: 17 I. C. 425; *Bhagwan v. Keshwar*, 1 Pat. 606. A. I. R. 1923 Pat. 49: 69 I. C. 681; *Narayan v. Bhagubin*, 31 B. 314 (F. B.); *Madhusudan v. Behari*, 27 C. L. J. 461: 44 I. C. 881. The decisions of the Calcutta and Bombay High Courts (in 23 B. 382 and 31 C. 1057) that "Court of Small Causes" means only a Court constituted under the Provincial Small Cause Court Act, 1887, have now been overruled by the above decisions. The procedure of the Court to which a suit is transferred from a Court of Small Causes under cl. (4) is governed by the provisions of the Provincial Small Cause Courts Act, *Chhotey Lal v. Lakhmi Chand*, 38 A. 425: 34 I. C. 113; *Ugrasung v. Motihari Co Ltd*, 4 Pat L. J. 13: 49 I. C. 208.

The term "suit" in s. 24 includes execution proceedings and therefore a Court to which execution proceedings are transferred under s. 24 from a Court of Small Causes is a Court of Small Causes for the purposes of such proceedings; *Fielding v. Firm Janki Das*, A. I. R. 1926 Lah. 465: 95 I. C. 248.

**Power to Transfer a Case Remanded.**—An order by the District Judge after remand by the High Court for transfer of a suit under s. 24 is legal and it is immaterial that the suit is to be tried by a Sub-Judge on the evidence recorded by the District Judge who heard the case in the first instance. The terms of s. 24 are comprehensive enough to cover a case of this description; *Protap Chandra v. Judhistir*, 10 C. L. J. 408: 10 O. W. N. 143. A case remanded to a District Judge for disposal can be transferred by him to Sub-Judge—powers of transfer under the new Code are wider than under the old Code *Pandoh v. Sheo Bharat*, 12 A. L. J. 1094: 25 I. C. 141; *Rajkali v. Gopinath*, 41 A. 211: 20 A. L. J. 41. See also *Raza Hussain v. Sheosahai*, 10 I. C. 552: 8 N. L. R. 40, where it

from the time when rent became due.—*Ahsanoolah v. Kajee Aftabood-deen*, 4 C. 594: 3 C. L. R. 382. But see *Rajmohan v. Anund Chunder*, 10 W. R. 166.

**Stipulations Amounting to Penalties.**—Stipulation for the payment of compound interest at a rate higher than that of simple interest is a penalty. *Rameswar Prosad v. Rai Sham Kishan*, 29 C. 43 (22 C. 143, followed). See also *Abdul Majid v. Khirode Chandra*, 19 C. W. N. 809.

Stipulation for the payment of increased interest upon default, from the date of the bond and not merely from the date of default, is a penalty. The Court may, however, direct payment of reasonable compensation in lieu of interest.—*Rani Sunder Koer v. Rai Sham Kishan*, 34 C. 150, P. C.: 11 C. W. N. 249: 5 C. L. J. 106; 4 A. L. J. 109: 17 M. L. J. 43: 9 B. L. R. 304 P. C.

A provision in a bond, to the effect that the principal should be repaid with the interest on the due date, and that, on failure thereof, interest should be paid at an increased rate from the date of the bond up to the date of realization, amounts to a provision for a penalty, and section 74 of the Contract Act applies to the money claimed at the increased rate of interest from the date of the bond until realization.—*Kala Chand v. Shub Chunder*, 19 C. 392, F. B. (14 C. 248, overruled so far as it dissents from *Mackintosh v. Crow*, 9 C. 689: 10 C. 305, distinguished). Followed in *Rameswar Prosad v. Rai Sham Kishan*, 29 C. 43. See also *Abdul Gani v. Nand Lal*, 30 C. 15: 7 C. W. N. 152; *Trimbak v. Bhagchand*, 27 B. 21 and *Sheo Prasad v. Muhammad*, 25 A. 169; *Mackintosh v. Crow*, 9 C. 689; *Nanjappa v. Nanjappa*, 12 M. 161; *Sajaji Panhaji v. Naruti*, 14 B. 274; *Baidnath v. Shamanand Das*, 22 C. 143; *Gopaludu v. Venkataratnam*, 18 M. 175; and *Ramendra Ray v. Serajuddin*, 2 C. W. N. 234.

In a mortgage bond there was a stipulation that on default of payment on the due date, interest at a higher rate should run from the date of default. In a suit upon the bond, interest was claimed at a higher rate from the date of default. Held, that, notwithstanding the provisions of section 2, Act XXVIII of 1855, it is open to the Court to decide whether the stipulation as to enhanced rate of interest was penalty or not, and whether the debtor was entitled to equitable relief.—*Pardhan Bukhan v. Narsing Dyal*, 26 C. 300: 3 C. W. N. 175 (2 C. W. N. 234: 17 B. 106, referred to; 9 C. 689, and 19 C. 392, referred to by Ghose, J., and 2 C. W. N. 234, distinguished; 17 B. 106: 11 B. L. R. 135: 20 C. 360 and 366, referred to by Rampini, J.). See *Mia Jan v. Abdul Judehar*, 10 C. W. N. 1020 and *Abbakke Heggadithi v. Kinhiamma Shetty*, 29 M. 491.

A proviso for retrospective enhancement of interest in default of payment of interest at a due date is generally a penalty which should be relieved against; but a proviso for enhanced interest in the future cannot be considered a penalty unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be a part of the primary contract between the parties.—*Umarkhan Mahammad Khan v. Salekhan*, 17 B. 106, F. B.

Even when no interest is payable until default but interest at an exorbitant rate is payable as from the date of default, the Court has power to treat the latter stipulation as a penalty and award reasonable compensation in lieu of such excessive interest.—The word "penalty" explained—History and scope of s. 74 of the Contract Act considered;

Where a suit has been instituted in the wrong Court, the defect of jurisdiction is not cured by its transfer to the Court in which it ought to have been brought.—*Panchooni Awashti v. Illahi Baksh*, 4 A. 478.

A case was instituted in the Court of one Subordinate Judge, but was disposed of by another. No order transferring the case to the latter was on the record, nor was it otherwise shown how he obtained jurisdiction to deal with it. Held that the High Court should not interfere in revision.—*Sheo Prasad v. Kastura Kuar*, 10 A. 110.

The proceedings which were without jurisdiction are not proceedings that can be transferred under this section; *Sham Sundar v. Anath Bandhu*, 37 C. 574; 14 C. W. N. 602.

**Grounds for Transfer.**—*Difficult and Intricate questions of Law.*—Difficult and intricate questions of law are not sufficient grounds for transferring a case from the mofussil.—*Courjon v. Courjon*, 9 B. L. R. 10. See, however, *Doucet v. Wise*, 1 Ind. Jur., N. S. 94, 227, and *Harendra Lal v. Sarvamangala Dabee*, 24 C. 183; 1 C. W. N. 109.

Conduct of Judge and nature of questions for disposal are good grounds for transfer.—*Payne v. Administrator-General of Bengal*, 6 C. 766; 6 C. L. R. 221; *Jotindro Nath v. Rajkristo*, 16 C. 771; *Thakur Kapil v. Govt.* 10 B. L. R. 168; see also *Harendra v. Sarvamangala*, 24 C. 183; 1 C. W. N. 109. See, however, *Ojooderam Khan v. Nobinmoney*, 1 Ind. Jur. N. S. 396.

**Convenience of Parties and Witnesses**—S. 24 of the C. P. Code dealing with the transfer of a suit does not mention the words "Convenience of the parties" anywhere as a test for such transfer. It is a well-known maxim of the law that the plaintiff is the person to choose where his suit shall be brought provided that he chooses a *forum* which the law allows him to choose. The transfer of a suit is an extraordinary matter and in order to justify the removal of a case against the plaintiff's will from the Court where he lodged it there must exist some good cause. Mere convenience of the parties is not a good test; *Madho Prasad v. Moti Chand*, 41 A 381; 17 A. L. J. 371; 50 I. C. 368. But see *Mohabor Rahman v. Hazi Abdur Rahim*, 48 C. 53; 62 I. C. 115, where the suit was transferred on the ground of convenience, the opposite party being compensated by payment of his costs.

This section is intended to provide for those cases, where on the ground of expense, or convenience or some other good reason, the Court thinks that the place of trial ought to be changed; *Khatija v. Tarak*, 9 C. 980. Convenience of parties and witnesses is a good ground for transfer, *Gobinda Mohan v. Kunja Behari*, 10 C. L. J. 414; 14 C. W. N. 153. *Thakur Narindra Bikram v. Sheo Ratan*, 69 I. C. 717; 1023 Oudh 30. The jurisdiction of a superior Court to transfer a suit from one subordinate Court to another, ought to be exercised with extreme caution. The choice of forum given to a plaintiff by the Legislature ought not to be lightly interfered with, and the Court will not transfer a suit properly laid, except upon proof of special circumstances, *Umafool v. Kulsoom*, 10 C. L. J. 208. *Subba Bibi v. Maqbul Hussain*, 14 A. L. J. 242; 32 I. C. 613 (Relied on in *Inayatullah Khan v. Nisar Ahmed*, 44 A. 278; 20 A. L. J. 118). The mere fact that the defendant resides outside and that all his evidence is available outside the jurisdiction of a court is no ground for transfer: *Shamsuddin v. Ali Mahomed*, 8 S. L. R. 43.

92: 24 W. R. 106; *Het Narain v. Ram Dein*, 9 C. 871: 12 C. L. R. 590; *Suriya Narain v. Sirdhary Lall*, 9 C. 825: 12 C. L. R. 400; *Annaji Rau v. Raghubai*, 6 M. 400; *Nobin Chunder v. Romesh Chunder*, 14 C. 781; *Ram Kanye v. Cally Churn*, 21 C. 840; and *Lal Behary v. Thacomonee*, 23 C. 899; *Kanja Lal v. Narsamba Debi*, 42 C. 826: 20 C. W. N. 110. But an agreement between the debtor and the creditor to capitalize interest at a stage when it does not exceed principal is not illegal; *Khimji v. Chunilal*, 21 B. L. R. 419: 51 I. C. 353.

The rule of *damdupat* exists only so long as the contractual relation of debtor and creditor exists, but not when the contractual relation has come to an end by reason of a decree.—*In the matter of Hari Lal Mallick*, 83 C. 1269: 10 C. W. N. 884. Followed in *Nanda Lal v. Dharendra*, 40 C. 710.

The rule of *damdupat* is inapplicable to cases of mortgage governed by the Transfer of Property Act.—*Madhawa Sidhanta v. Venkata Ramanujulu*, 26 M. 662. See also *Gopal Ram Chandra v. Gangaram Anand*, 20 B. 721, F. B. (15 B. 625, overruled). *Jeevanbai v. Manoras Lachmandas*, 35 B. 199. But see *Kunja Lal v. Narsamba Debi*, 42 C. 826: 20 C. W. N. 110.

The *damdupat* rule applies in all cases as between Hindu debtors and creditors both in respect of simple as also of mortgage-debts.—*Sundarabai v. Jayavant*, 24 B. 114 (20 B. 721, distinguished).

In the case of a bond purporting to be executed in adjustment of a past debt, the principal for the purpose of the rule of *damdupat* is the amount of such bond, and not the balance of the unpaid principal actually advanced on an earlier bond.—*Suka Lal v. Bapu Sakharam*, 24 B. 905.

The rule of *damdupat* limits the arrears of interest recoverable at any one time by the amount of principal remaining due at that time.—*Dagdusa Shevakdas v. Ram Chandra*, 20 B. 611.

A suit against a Hindu debtor for interest actually and legally accrued is not barred merely because the principal sum lent has been paid off.—*Nusserwanji v. Lazman*, 30 B. 452: 8 B. L. R. 82: 1 M. L. T. 49.

According to Hindu Law, arrears of interest more than sufficient to double the debt are not recoverable, and the law upon the subject was not affected by the Act (XXVIII of 1855) for the repeal of the usury laws, not by section 10 of the Contract Act.—*Ram Connoy v. Johur Lal*, 5 C. 867: 7 C. L. R. 204; *Ganpat Pandurang v. Adanji*, 3 B. 312; *Hari Mahadaji v. Balambhat*, 9 B. 233. See *Hira Lal v. Narsi Lal*, 37 B. 326 P. C. : 17 C. L. J. 474.

**Cases Under the Interest Act (XXXII of 1839).**—In an action brought to recover principal and interest on a bond in which no provision is made for allowance of interest, the Court is authorized, under the provisions of Act XXXII of 1839, to allow interest at a rate not exceeding the current rate of interest.—*Bommarouze Bahadur v. Rangasamy*, 6 M. I. A. 232; *Murli Dhar v. Mul Chand*, 52 I. C. 953. See also *Saunadanappa v. Shivbasawa*, 31 B. 354: 9 B. L. R. 439. The creditor can claim damages in lieu of interest where money has been advanced without an express agreement to pay interest; *Remjiban v. Dikhu Singh*, 16 C. L. J. 264.

(2) The law applicable to any suit, appeal or proceeding so transferred shall be the law which the Court in which the suit appeal or proceeding was originally instituted ought to have applied to such case. [New.]

### COMMENTARY.

This section is new. There was no similar provision in the Old Code. "We think that the exercise of such a power may sometimes be necessary and it has been brought to our notice that the absence of any provision on the point in the existing Code, has given rise to difficulty. The new section proceeds on the analogy of s. 527, Cr. P. Code, 1898."—*See the Report of the Select Committee.*

### INSTITUTION OF SUITS.

26. Every suit shall be instituted by the presentation of a  
Institution of suits. plaint or in such other manner as may be prescribed. [S. 48.]

### COMMENTARY.

The mode of institution of suits has been prescribed in Order IV, Rule 1, which exactly corresponds with s. 48 of the C. P. Code, of 1882. *See notes under Order IV, r. 1.*

"**Plaint.**"—A "plaint" in law means a private memorial tendered to a Court in which the person sets forth his cause of action; the exhibition of an action in writing"; *Assan v. Pathumma*, 22 M. 494.

"**Presentation.**"—"Presentation" means "delivery to the Court or its officer either personally or by a pleader."—*Queen-Empress v. Ariappa*, 15 M. 137. A petition sent by post is not a substitute for the presentation of a plaint.—*Moparte v. Puppalla*, 6 M. H. C. R. 186; *Queen-Empress v. Ariappa*, 15 M. 137. The placing of a petition on a table when the officer is not present is not a presentation to him, *Tajuddin v. Ghafoorulnissa*, 3 N. W. P. H. C. R. 341.

**Delivery of Plaint at Private Residence of Judge, if Valid.**—The presentation of a plaint after the usual Court hours at the private residence of the Judge is valid. A Judge has jurisdiction to receive the plaint at his residence and after the Court hours, though he is not obliged to do so; *Madhorao v. Manohar Lal*, A. I. R. 1922 Nag 167; 65 I. C. 674 (34 A. 482, *relied on*).

### SUMMONS AND DISCOVERY.

27. Where a suit has been duly instituted, a summons may  
Summons to de- be issued to the defendant to appear and answer the claim and may be served in manner prescribed. [S. 64.]  
fendants.

### COMMENTARY.

This section is new. Order V, Rule 1 corresponds to section 64 of the C. P. Code, 1882. *See notes under Order V, r. 1.*



**Interest in Suit for Unliquidated Damages.**—In a suit for the recovery of money representing the depreciation in the value of goods supplied interest cannot be claimed during the pendency of the suit as the amount claimed is not a "debt" nor a "sum certain" but is unliquidated damage. Interest does not run on such damages; *J. W. Crewdson v. Ganesh Das Hari Bux*, 32 C. L. J. 239: 60 I. C. 288; *Boddu Sanyasi Raja v. Kotta Ramamurthi*, (1913) M. W. N. 874: 21 I. C. 543.

**Right to Interest in Cases not Covered by the Interest Act.**—The interest Act is not exhaustive of all claims to interest and it is open to the Courts in India to award interest, in a proper case, independently of the provisions of that Act, *Authorities on the subject reviewed*; *Abdul Gafur v. Hamida Beebi Ammal*, 42 M. 661: 52 I. C. 505.

**Interest in Contribution Suits.**—Interest may be allowed in a suit for contribution, although no demand for interest may have been made before suit.—*Nullit Biswas v. Prasanna Moyee*, 17 W. R. 179.

In contribution suits interest should be allowed at 12 per cent; *Lalteshuwar v. Maharaja Rameshwar Singh*, 13 C. W. N. 118, p. 121.

**Interest in Account Suits.**—In a suit for accounts the defendant is liable to pay interest on sums collected by him and not accounted for; *Gorinda Chundra v. Nirod Kumar*, 50 I. C. 747.

**Interest on Demonstrative Legacies.**—Interest is payable on demonstrative legacies though the will is silent as regards interest. A legacy payable on a future day carries interest only from the date fixed for payment. The usual rate of interest generally is 4 p. c.; *Administrator-General of Bengal v. A. D. Christiana*, 43 C. 201.

## COSTS.

**35.** (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers. [S. 220.]

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing. [New.]

(3) The Court may give interest on costs at any rate not exceeding six per cent. per annum, and such interest shall be added to the costs and shall be recoverable as such. [S. 222.]

## COMMENTARY.

The provisions of sections 220 and 222 of the C. P. Code of 1882, have been summarized in this section with some additions and alterations.

**30.** Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party—

Power to order discovery and the like.

- (a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;
- (b) issue summonses to persons whose attendance is required either to give evidence, to produce documents or such other objects as aforesaid;
- (c) order any fact to be proved by affidavit. [New.]

### COMMENTARY.

This section is new. The conditions and limitations referred to in this section are to be found in Orders XI, XII, XIII, XVI and XIX.

Or. XI contains Rules as to Discovery and Inspection.

Or. XII contains Rules as to Admissions.

Or. XIII contains Rules as to production, impounding, and return of documents.

Or. XVI contains Rules as to summoning and attendance of witnesses.

Or. XIX contains Rules of proving certain facts by affidavits.

**31.** The provisions in Sections 27, 28 and 29 shall apply to summonses to give evidence or to produce documents or other material objects. [New.]

Summons to witness.

**32.** The Court may compel the attendance of any person to whom a summons has been issued under section 30 and for that purpose may—

Penalty for default.

- (a) issue a warrant for his arrest;
- (b) attach and sell his property;
- (c) impose a fine upon him not exceeding five hundred rupees;
- (d) order him to furnish security for his appearance and in default commit him to the civil prison. [New.]

### COMMENTARY.

**Scope of Section.**—S. 32 of the C. P. Code applies only to the case of a person who has failed to comply with a summons to attend a Court issued

Lord Mansfield in *Wilkes' Case* cited in *Narayana v. Surappa*, 3 M. H. C. R. 114; *Harbans v. Bhairo*, 6 C. 259; *Gopal v. Solomon*, 11 C. 767.

The Court can exercise its discretion as to the awarding of costs by disallowing costs to the successful party where the suit was based on a state of law which since has been overruled either by an enactment of the legislature or by the superior tribunals; *Ramaswami v. Venkataswami*, 43 M. 61: 87 M. L. J. 271.

The discretion given under this section is one which is to be exercised with reference to general principles. The direction contained in clause (2) of the section is a clear confirmation of the said view. Where a plaintiff comes to enforce a legal right and there has been no misconduct on his part, no omission or neglect which would induce the Court to deprive him of his costs, the Court has no discretion and cannot take away the plaintiff's right to costs. Misconduct of many sorts explained.—*Kuppuswami Chetty v. Zemindar of Kalahasti*, 27 M. 341.

The discretion of the Court in awarding costs under this section is not absolute; *Indoar v. Nelatur*, 18 M. L. T. 460: (1915) M. W. N. 1021.

Award of costs by a court without jurisdiction is not a nullity and such amount is recoverable.—*Sri Reja Simhadri Appa Rao v. Chelsane Bhadrappa*, 80 M. 41: 1 M. L. T. 414.

**Costs to Follow the Event.**—The ordinary rule as to award of costs in a suit is, that they should follow the event. In other words, if a plaintiff substantially succeeds he is entitled to his costs (*Ghanasham Nilkant v. Moroba Ram Chandra*, 18 B. 474); unless he is guilty of misconduct or there is some other good cause for not awarding costs to him; *Kuppuswami v. Zemindar of Kalahasti*, 27 M. 341; *Rodeshwar v. Manrup*, 13 I. A. 20, 31; *Bhubaneswari v. Nilcomul*, 12 C. 18; 12 I. A. 137. The Court may not only consider the conduct of the party in the actual litigation, but the matters which led up to the litigation; *Sukumari v. Gopi Mohan*, 43 C. 190: 31 I. C. 662. Similarly, if a defendant succeeds, he is ordinarily entitled to his costs of the suit. But where the Court considering the circumstances of any particular case, comes to the conclusion that costs should not follow the event, then it should state its reasons in writing for departing from this ordinary rule. The ordinary rule is departed from according to the nature of interest and conduct of the parties. As to the meaning of "costs following the event," see 26 M. L. J. 356: 22 I. C. 919. Where the order of lower Court refusing costs to a successful party is unsatisfactory, the High Court will interfere.—*Narayana v. Venkatama*, (1912) M. W. N. 366: 15 I. C. 202.

The ordinary rule is that costs do follow the events. The Court may however direct otherwise, but if it does so it must state its reasons in writing (s. 35, cl. 2). This provision was enacted both to secure a proper exercise of discretion and in order that the Court of appeal may be in a position to control the order and see whether there is a good cause for departing from the general rule. It is not sufficient answer to say in such case in an appeal from the judgment that the costs are in the discretion of the Court. The Appellate Court must itself decide whether the order should be sustained, that is, whether the reasons required to be stated are good reasons founded on the facts of the case. There are certain well-known principles on which a successful party may be deprived

the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie. [S. 209.]

## COMMENTARY.

No material changes have been made in this section. It is almost similar to s. 209 of Act XIV of 1882.

**Object and Scope.**—This section deals with interest after the institution of suit. It contemplates two classes of interests; (1) interest on the principal sum adjudged from the date of suit to date of decree; (2) further interest on the aggregate sum adjudged, that is, the principal sum plus interest from the date of the decree to date of payment or realization, or to such earlier date as the Court thinks fit at such rate as the Court deems reasonable. S. 34, C. P. Code, does not provide for payment of interest for period antecedent to suit but it empowers the Court, when the decree is for the payment of money, to allow interest *pendente lite* as also interest subsequent to decree; *Crowdson v. Ganesh Das*, 32 C. L. J. 239.

**"Payment of money."**—A decree for payment of money does not include a decree for sale in enforcement of a mortgage or charge. See the *Report of the Select Committee*.

This section applies to decrees for the payment of money. It does not in any way permit the Court to reduce the interest below the contractual rate, where the decree is for the enforcement of a mortgage or charge; *Rajwant v. Sham Narain*, 36 A. 220.

The word "money" in s. 34 is not confined to an ascertained sum. The expression "decree for payment of money" must be construed as including a claim to unliquidated damages. The Court can allow interest on unliquidated damages *Ramalingam v. Gokuldas Madavji*, 51 M. L. J. 243; A. I. R. 1923 M. 1021.

**Claim for Interest Depends on Contract or Statute.**—The right to interest depends on contract, express or implied, or on some rule of law allowing it. *Lala Kalyan Das v. Sheikh Magbul Ahmad*, 40 A. 497; 22 C. W. N. 886; 35 M. L. J. 169; 18 A. L. J. 693; 46 I. C. 548 (P. C.).

**Interest Prior to Date of Suit.**—Interest prior to date of suit does not come within the purview of this section. *Where there is a stipulation for the payment of interest at a fixed rate*, the Court, under s. 2 of Act XXVIII of 1855 (Usury Laws Repeal Act), must allow interest at that rate, however high it may be. If the rate stipulated for is penal, the Court may, under section 74 of the Indian Contract Act, award such rate as it considers reasonable. If the rate of interest is excessive and the transaction between the parties seems to be unfair, the Court has the power to reduce the rate under s. 3 of Act X of 1918. *Where there is no stipulation at all for the payment of interest*, interest may be awarded (a) if it is allowed by mercantile usage; *Doolab Das v. Ram Lal*, 5 M. I. A. 109; *Juggomohom v. Manickchand*, 7 M. I. A. 263; *Juggomohom v. Kaisruchand*, 9 M. I. A. 260; (b) if, under the provisions of any substantive law, the plaintiff is entitled to get interest. As for instance, under the provisions of s. 80 of the Negotiable Instruments Act, 1881, the Court may award interest at the rate of 6 per cent. per annum when no rate of interest is specified in the

Where it is difficult to apportion costs between the parties in view of the peculiar nature of the disputes between the parties and the necessarily arbitrary manner in which most of the items had to be valued. *Held* that equity will be equally well served by each party being ordered to bear his own costs; *Pedda Jiyangar v. Mahant of Tirupati*, 21 M. L. J. 730.

The fact that the delay in the final disposal of the suit took place owing to the laches of the plaintiff could be taken into consideration in dealing with the question of costs; *Siba Prasad v. Kazimuddin*, 65 I. C. 709.

An unsuccessful plaintiff is only liable for costs necessarily incurred by the successful party in the defence of the suit. Costs cannot be deemed necessary if by reasonable diligence on the part of the defendant or his pleader the expenditure of them could have been avoided.—*Seeta Patta Mahadevi v. Suryudamma*, 18 M. 128.

Where the defendant proved a set-off against the plaintiff, and thus reduced the amount which the plaintiff was entitled to recover from him, *held* that, notwithstanding the provisions of s. 9, Act XXVI of 1864, the plaintiff was entitled to his costs.—*Kishor Chand v. Madhowji*, 4 B. 407.

A person wrongfully made a party should get his costs; *Bishu Dayal v. Bank of Upper India*, 13 A. 290, 295.

In a suit for damages for breach of contract, and for refund of earnest-money paid to the plaintiff by the defendant, in which the plaintiff obtained a decree, *held* that, as the defendant had not paid the earnest-money into Court, nor formally tendered it, he must pay the costs of the suit.—*Pitambar v. Cassibai*, 11 B. 272.

The costs of the appeal, though successful, were refused, because the defendant (appellant) had set up as his defence an exclusive title which he had failed to prove.—*Lachmeswar Singh v. Manwar Hossein*, 19 C. 253, P. C. *See also The Englishman v. Lajpat Rai*, 14 C. W. N. 713.

**Separate Costs.**—Where the defence is common and not separate, one set of costs should be awarded to all the defendants, even if they appear by separate vakils.—*Francisco v. Dos Argos*, 17 W. R. 188; *Ram Chunder v. Doorganath*, 2 C. L. R. 152; *Bhup Singh v. Zainul-Abdin*, 9 A. 205; and *Brindaban Chunder v. Ram Coomar*, 1 W. R. 189. But defendants whose interests are not identical, and whose defences are separate, are entitled to separate costs.—*Ram Chandra v. Moti Lal*, 2 B. L. R. A. C. 169; 11 W. R. 19; *Gobind Nath v. Lachmee Kumaree*, 11 W. R. 36; *Nilkant v. Soosila*, 6 W. R. 324; *Raghunundan v. Rajendra*, 11 C. L. J. 207; 14 C. W. N. 555, *Rudra Narain v. Coomar Narain*, 13 W. R. 320.

**Proportionate Costs on Partial Decree.**—Where a plaintiff is entitled to some part of his claim he ought not to be deprived of the benefit of the decree by such an order as to costs as would make him liable to the defendant for more than he would himself recover.—*Ram Chunder v. Mariott*, 15 W. R. 495.

Where a suit for damages was partially decreed on a finding of nominal damages, and costs on the amount disallowed were awarded to the defendant, *held*, that there was no ground of justice for saddling the plaintiff with defendant's costs.—*Moseehun v. Munoorun*, 24 W. R. 69.

Where a decree for foreclosure of a mortgage or for the sale of mortgaged property is passed under rules 2 and 4 of Or. XXXIV, C. P. Code, the Court is bound to award to the mortgagee, (a) interest on the principal sum prior to the date of the suit, at the rate provided by the mortgage unless the rate is penal, in which case the Court may award such interest as it thinks proper; *Khaga Ram v. Ramsankar*, 42 C. 652: 27 I. C. 815; (b) interest on the principal sum from the date of the suit to the date fixed by the Court for payment of the mortgage debt also at the rate provided by the mortgage unless the rate is penal, in which case the Court may award such interest as it thinks proper; *Rameswar v. Mehdi Hossein*, 26 C. 39: 25 I. A. 179 explained in *Sundar Koer v. Sham Kishen*, 84 C. 150; *Surya v. Jogendra*, 20 C. 360; *Chaturbhuj v. Harbhamji*, 20 B. 744; *Sabbaraya v. Ponnusami*, 21 M. 364; *Tara Chand v. Brojo Gopal*, 7 C. W. N. 457; (c) Interest on the aggregate amount of principal, interest and costs decreed, from the date fixed for the payment of the mortgage debt up to the date of realisation or actual payment as the Court thinks proper. Such interest may be allowed either at Court-rate i.e., 6 per cent.; *Sundar Koer v. Sham Kishen*, 34 C. 150: 34 I. A. 9, *Venkata Chalapathy v. Thavasi*, 24 M. 465: 51 I. C. 67; *Saminathan v. Swamiappa*, 29 M. 170; or at any other rate; *Lachmi Narain v. Uman Dat*, 29 A. 322; *Bhaqat Singh v. Jai Ram*, 26 I. C. 402; Or. XXXIV, r. 4 of the C. P. Code, which is mainly a reproduction of s. 88 of the T. P. Act now contains an express provision for the payment of such "subsequent interest"

In a suit by a mortgagee to recover the money due on his mortgage, the plaintiff is entitled to interest at the rate specified in the mortgage-deed up to date of decree, and a Court has no discretion to refuse to award such interest.—*Chaturbhaj Karsan v. Harbhanji*, 20 B. 744.

The discretionary power as to awarding interest conferred on the Courts by this section may be exercised without reference to the law of *damdupat*.—22 B. 86, (20 B. 721, referred to).

Where there is an express covenant to pay interest at a certain rate after the stipulated date of payment, the Court is bound to allow interest at that rate up to the date of decree.—*Chhab Nath v. Ramta Prasad*, 7 A. 333.

A puisne mortgagee seeking to redeem prior incumbrances must pay the interest at the rate agreed upon in the mortgage; there being no authority under section 209, C. P. Code, 1882 (s. 34) to reduce it to the Court rate.—*Umes Chunder v. Zahur Fatiam*, 18 C. 164 P. C.

A mortgagee, who has obtained a decree for sale awarding interest up to the date of realization, is entitled to interest up to the date of the confirmation of the sale. Meaning of the words "up to the date of realization" in the decree, explained.—*Megraj Marwari v. Narsingh Mohan*, 33 C. 846 (28 B. 264, referred).

Section 34 (1) does not control and negative the effect of Rules 2 and 4 of Or. XXXIV, of the C. P. Code. The Court in a mortgage suit is bound to award interest on the principal sum prior to the date of the suit as well as from the date of the suit to the date fixed for redemption at the rate mentioned in the mortgage, unless the rate is penal; *Kali Prosonna v. Pratap*, 17 C. L. J. 221.

Decrees in mortgage suits being governed by Or. XXXIV, of the C. P. Code are subject to section 34 which provides for interest. Where no rules

As a general rule, when the amount of tender is not accepted and is to be paid into Court in order to entitle the defendant to his costs, when the tender amounts to payment, the defendant is entitled to the suit dismissed with costs.—*Brij Chaml v. Mardul*, 4 C. 52.

As to the validity and effect of tender, see notes to Order III, §§ 1 to 4 post, and also section 28 of the Contract Act (II) of 1872.

(1, (3)—Interest on Costs.—All the Indian High Courts have recognised it to be settled law that, where the decree is silent with respect to interest, the Court executing decree cannot give execution in suit.—*Badasira Pullai v. Ramalinga Pillai*, 17 B. L. R. 393 P. C. 189, 190, P. C. The Court, in executing a decree, has no power to allow interest on costs when not mentioned in the decree. The proper course for obtaining such interest is to apply to the Court which passed the decree to amend it.—*Mufutunniss v. Mohan Lal*, 6 B. L. R. 4; 5; see also *Bhoja Bhoonduree v. Anund Moyee*, 18 W. R. 372.

Interest should not be allowed to run on costs until such costs have been actually incurred, *Uttam Chand v. Ballu Mal*, 60 I. C. 245.

Where on appeal to the Privy Council it was ordered that the decree of the High Court be reversed with costs and the decree of the Zilla Court be affirmed with costs in the Court below, held, that the decree was entitled to interest upon the costs of the Zilla Court.—*Maharajah v. Loper*, 9 B. L. R. Ap. 22; 18 W. R. 253. See also *Guru Das Pat v. Stephens*, 13 B. L. R. Ap. 44; 21 W. R. 195; and *Bhona Rajah v. Bhujia Raj*, 11 B. L. R. P. 319.

Costs paid in compliance with a decree subsequently reversed are to be ordered to be refunded by the Court which made the original decree, and interest is awardable on such costs.—*Kedar Nath v. Dey*, 20 W. R. 49 and *Ram Bahai v. Bank of Bengal*, 8 A. 262. See also *Darab Ally v. Abdul Aziz*, 4 C. 229; 3 C. L. R. 358; *Indar Bikram Singh v. Chundrika*, 20 C. O. 327; 43 I. C. 837.

Where a decree gives interest upon the principal sum only, and no mention is made as to interest on costs, the successful party is not entitled to such interest.—*Mahatab Chand v. Ramlal*, 3 C. 351; 1 C. L. R. 133.

Held that the principle of the Full Bench ruling, *Masoodun Lal v. Bhakarr Singh*, 11 B. L. R. Sup. Vol. 602; 6 W. R. Mis. 109, is as much applicable to interest upon costs as it is to interest upon mesne profits not awarded by the decree.—*Leelanand Singh v. Ram Narain Singh*, 15 W. R. 416.

A Court inserting interest on costs for the first time in the decree though not provided for in the judgment is within its jurisdiction. The power to award interest on costs is discretionary and may be exercised when framing the decree; *Rishori Lal v. Badri Das*, 35 I. C. 218.

Where a plaintiff obtains a decree with costs and interest upon such costs, the defendant being declared entitled to set-off on account of costs, the interest should be calculated on the amount due to the plaintiff after deduction of the set-off.—*Amanut v. Bindhoo*, 13 W. R. 138.

Where the property of the judgment-debtor had been attached in execution for a sum claimed to be due under a decree, but which sum in

When the agreed rate of interest is excessive and extraordinary, the Court may reduce the rate to a reasonable amount.—*Nanchand Hunsraj v. Bapu Rastumbhai*, 3 B. 131. See also *Manoo Bepari v. Durga Churn*, 2 C. W. N. 333. (2 C. W. N. 234 and 17 B. 106, *followed*). See *Poma Dongra v. Gillespie*, 31 B. 348; 9 Bom. L. R. 143 and *Abhiram Pal v. Mukunda Lal*, 5 C. L. J. 342; *Dargahi v. Chaudhuri Rajeshwari*, 21 O. C. 265; 48 I. C. 753; *Gopeswar v. Jadab*, 43 C. 632; 20 C. W. N. 689.

**Interest Post Diem.**—Where there is no agreement fixing the rate of interest after due date the question as to the amount of interest to be allowed after that date should be treated as one of damages.—*Jaula Prasad v. Khaman Singh*, 2 A. 617. See also *Bishen Doyal v. Udit Narain*, 8 A. 486; *Mansab Ali v. Gulab Chand*, 10 A. 85; *Bhagat Singh v. Daryao Singh*, 11 A. 416; and *Srinivas v. Udit Narain*, 13 A. 830; *Gita Prasad Singh v. Ragho Singh*, 1 Pat. L. W. 777; 40 I. C. 809.

*Post diem* interest is recoverable on the general promise by the debtor to be liable for interest though a definite term is fixed in the bond for repayment of the principal and interest; *Narasimhayya v. Srinivasayya*, 86 M. L. J. 118; 52 I. C. 813.

When a mortgage-bond contains no stipulation for the payment of interest after due date, interest is payable by virtue of the Interest Act (XXXII of 1839)—*Mati Singh v. Ramo Hari* 24 C. 699, F. B. Considered in *Ghanlayya v. Papayya*, 23 M. 534.

Where a mortgage-bond does not provide for interest *post diem*, a mortgagee is entitled to receive such interest by way of damages.—*Chajmal Das v. Brij Bhukhan*, 17 A. 511, P. C.; *Ghusnavi v. National Bank of India*, 20 C. W. N. 562; 23 C. L. J. 256 (17 A. 511 P. C. *referred to*). The measure of damages would *prima facie* be the same as the rate of interest stipulated for by the parties; *Budhu Ram v. Niamat Ali*, 75 I. C. 855; 1923 Lah. 632 (17 A. 511 P. C., *referred to*). See also *Badi Bibi v. Sami Pillai*, 18 M. 257; *Thayar Ammal v. Lakshmi Ammal*, 18 M. 331; *Nityananda v. Radha Charan*, 20 M. 371; *Pedda Subbaraya v. Ganga*, 20 M. 149; *Mahadeo v. Tikni*, 3 O. L. J. 890; *Malayappier v. Pitchai Asari*, (1915) M. W. N. 208. But whether such *post diem* interest would constitute a charge on the mortgaged property or not, there is a difference of opinion. In *Bikramjit Tewary v. Durga Dyal*, 21 C. 274; in *Rama Reddi v. Appaji Reddi*, 18 M. 248; in *Kristna Reddi v. Varadarajulu Reddi*, 18 M. 338-note, it has been held that such *post diem* interest would constitute a charge on the mortgaged property. But in *Narindra Bahadur v. Kadim Hussain*, 17 A. 581; in *Gudre Koer v. Bhubaneswar Coomar Singh*, 19 C. 19; and in *Rikki Ram v. Sheo Prashan*, 18 A. 316, it has been held that such *post diem* interest does not constitute a charge on the mortgaged property. (See also *Balwant Singh v. Gayan Singh*, 35 A. 534; 11 A. L. J. 829). These latter cases seem to have been disapproved by the Judicial Committee in *Mathura Das v. Narindra Bahadur*, 19 A. 39 P. C. followed in *Sarala Dasi v. Jogendra Narain*, 25 C. 246. See also *Bindesri Naik v. Ganga Saran*, 20 A. 171, P. C.

Where in a decree for foreclosure, interest subsequent to the decree was included in the amount made payable to the plaintiff—*held*, that such future interest, supposing it could be properly payable, could not be treated as a charge upon the land.—*Bhawani Prasad v. Birji Lal*, 16 A. 269. See also *Rajkumar v. Bisheshar*, 16 A. 270.



appellate Court to disturb the order of the first Court as regards costs, when it affirms in substance the first Court's decree; *Sreemati Kali Dasi v. Sreemati Nobo Kumari*; 22 C. W. N. 929.

A second appeal will lie in respect of costs when the Court has exercised its discretion arbitrarily and not according to general principles.—*Daulat Ram v. Durga Prasad*, 15 A. 333. See also *Bhugobati Pal v. Mohamed Ali*, 7 C. W. N. 647; *Karam Kuar v. Kirpa Singh*, 2 Lah. L. J. 310; *Ram Kishan v. Jagannath*, 25 O. C. 285; 73 I. C. 222; *Hakim Zahur Ahmad v. Fatihullah*, 64 I. C. 962.

If an order is itself appealable as affecting the jurisdiction of the Court or the merits of the case, an appeal will lie from that part of the order which relates to costs.—*Balkissen v. Luchmiput*, 8 C. 91; *Kamat v. Kamat*, 8 B. 368; *Barudev v. Bhavan*, 16 B. 241; *Shib Kumar v. Sheo*, 44 A. 209; A. I. R. 1922 A. 90; 64 I. C. 932. No appeal lies from a direction as to costs contained in a non-appealable order because no appeal lies from a non-appealable order.

An order of a single Judge of the High Court as to costs is not a judgment and is not appealable.—*Aliar v. Raj Gopala*, 17 M. L. J. 569, F. B. 100; *Aliar v. Krishnajeet*, 26 M. L. J. 356; 22 I. C. 101. An order of the appellate court not to interfere with the order for costs unless the order offends against some well recognised principle, or unless the appellate Court feels that it would be unjust to the party against whom it is made if the order be allowed to stand; *Ahmedbhai v. Dinshaw Manekji*, 13 Bom. L. R. 1061.

If the Court is divided in opinion as regards the question of costs, an appeal may be preferred under the Letters Patent; *Mohendra v. Ashutosh*, 20 C. 762. In such a case the opinion of the Senior Judge prevails under s. 36 of the Letters Patent; *Ramdas v. Secretary of State*, 18 C. W. N. 106.

### COSTS IN SPECIAL CASES.

(a) **Account, Suit For.**—Where in a suit for account by a principal against his agent, the defendant falsely denied his fiduciary position, he was ordered to pay the whole costs of the suit up to and including the costs of an appeal to the Privy Council without regard to the result of the account.—*Hurri Nath v. Krishna Kumar*, 14 C. 147, P. C.; *Debendra Narain v. Narendra Narain*, 24 C. W. N. 110; *Sukumari v. Gopi Mohan*, 43 C. 190; 19 C. W. N. 880.

(b) **Admiralty or Vice-Admiralty.**—In an action of salvage, in which a ship was arrested, and the bail asked for was found to be excessive, the Court held that the *promovents* must pay the *impugnants*, the costs required by the bail being excessive.—*In the matter of the Ship "Champion"*, 17 C. 84.

(c) **Attorney and Client.**—An attorney is bound to prosecute his client's case with due diligence, whether the client supplies him with funds or not. Where a client discharges his attorney, the latter is entitled to his costs; but where the attorney discharges himself, he has no such right.—*Atul Chunder v. Soshi Bhusan*, 29 C. 63; 6 C. W. N. 215.

It is not the practice to make an order directing a client to pay his attorney the costs of the suit when taxed. Such an order can only be made

Where interest is not mentioned in the decree, no oral agreement as to interest can be proved; *Ram Gopal v. Sitarma*, 269 P. L. R. 1918: 20 I. C. 319.

**Separate Suit for Interest.**—A suit for interest on money for the period defendant obstructed plaintiff in his attempts to obtain it, was held maintainable.—*Parbutty Churn v. Promotho Nath*, W. R. (1864) 174.

When a decree is silent as to future interest, it cannot be recovered in execution; but it may be recovered as damages by a separate suit.—*Seth Gokul Dass v. Murali and Alim*, 3 C. 602 (P. C.). But no separate suit will lie unless the silence was due to oversight or mistake. *Yaggappa Chetty v. Mahomed*, 11 Bur. L. T. 132: 9 L. B. R. 78: 40 I. C. 758.

A suit will not lie for interest in respect of money deposited under a decree subsequently reversed on appeal.—*Ashruffunnessa v. Khonum Jaun*, 6 W. R. 285.

A suit for interest only is not barred because the principal has been paid off.—*Nussermanjil v. Lakman*, 80 B. 452: 8 B. L. R. 82.

**Interest on Arrears of Rent.**—Every arrear of rent, unless it is otherwise provided by any written agreement, is liable to bear interest at 12 per cent. from the date when it, or each instalment of it, becomes due. The mere non-enforcement by a landlord, even for a series of years, of his right to interest upon arrears of rent does not amount to a waiver of such right.—*Johoory Lall v. Bullab Lall*, 5 C. 102: 4 C. L. R. 359.

Where rents are collected in kind instead of in money, interest should be allowed at the same rate as is usually allowed on rents paid in money. No difference in that respect should be made between rents paid in kind and those paid in money.—*Raikishore Dasi v. Bonomali Churn*, 1 B. L. R. (S. N.) 14: 10 W. R. 209.

The purchaser of a tenure in a sale for arrears of rent is not liable to pay interest at the rate specified in the *kabuliyat* of the former tenant, but is liable for interest at the rate specified in section 67, Bengal Tenancy Act (VIII of 1885)—*Alim v. Satischandra*, 24 C. 37; *Ali Mamud v. Bhagabati Debya*, 2 C. W. N. 525, *Kalinath v. Trailokhyanath*, 3 C. W. N. 194; 26 C. 315; and *Administrator-General of Bengal v. Asraf Ali*, 28 C. 227. But see *Raj Narain v. Panna Chand*, 30 C. 213: 7 C. W. N. 203, where it has been held that the auction-purchaser of a *dur-putni* tenure is bound by the stipulation in *dur-putni* lease as to payment of interest on arrears of rent: See also *Lalgopal v. Manmatha*, 32 C. 258, F. B.: 9 C. W. N. 175, F. B.

A contract by a tenant holding under a permanent *mokarrari* lease to pay interest on the arrears of rent at a higher rate than 12 per cent. per annum is enforceable in law.—*Matangini Debi v. Mukrura Bibi*, 5 C. W. N. 438 F. B.; 29 C. 674, F. B. (*Atulya Churn v. Tulsidas* 2 C. W. N. 543, approved: 26 C. 130; 3 C. W. N. 36, *overruled*).

A *thikadar* who makes default in payment of his rent is liable to be charged with interest on the sums due up to the date of payment.—*Ghansham Singh v. Daulat Singh*, 18 A. 240; *Raj Kumar Lal v. Canaiyan Singh*, 52 I. C. 835: 22 O. C. 287.

In a suit in which decree is given for arrears of rent at an enhanced rate, interest is to be allowed not only from the date of the decree, but

the cause of action not surviving the death of the plaintiff; *Dontu Pedda v. Mallam Ballaya*, 43 M. 284: 37 M. L. J. 506.

Persons who are in the position of trustees ought to have their costs out of the trust estate when a question of legal proceedings is concerned unless they have unreasonably carried on or resisted such proceedings; *Aga Mahomed v. Syed Md. Shoostry*, 21 C. W. N. 339.

In a suit for the construction of a will where the construction was not so difficult as to have required the assistance of the Court, *held*, that the estate should not bear the cost.—*Narayani Dasi v. Administrator-General of Bengal*, 21 C. 483.

Costs of executors for taking out probate were, under the circumstances of the case, ordered to be paid out of the estate.—*In the goods of Tara-moni*, 25 C. 553. See *Bechar Akha v. De Cruz*, 19 B. 770 (varying the decree in 19 B. 221).

Costs of contentious probate proceedings, when to come out of the estate; *Baroda Prosad v. Gajendra Nath*, 9 C. L. J. 383: 13 C. W. N. 557.

(g) **Guardian and Minor.**—Where a guardian *ad litem* of an infant had been guilty of gross misconduct in putting executors to proof of a will which he wished to upset for his own private purposes, *held*, that he was liable for the costs of the suit.—*Goolam Hossein v. Fatmabai*, 8 B. 391.

The Civil Procedure Code does not authorize a Court to decree costs against the guardian of a defendant except in the case referred to in s. 458, C. P. Code, 1882 (Or. XXXII, r. 11).—*Narasimha v. Lakshmi-pati*, 3 M. 263.

A legatee cannot sue on behalf of himself and other legatees without an order of the Court under s. 30, C. P. Code, 1882 [Or. I, r. 8 (1)]. Where a legatee, a minor, sued in that form by her next friend without such an order, the next friend was held liable for costs on his adducing no evidence to show that the suit was for the benefit of the minor.—*Geeteeballa v. Chandrakant*, 11 C. 213.

Where a suit was brought against a minor, the effect of which, if successful, would be to deprive the minor of his property, the cost of successfully defending that suit on his behalf may be recovered from the minor as necessities in an action brought against him by his attorney.—*Watkins v. Dhunnoo Baboo*, 7 C. 140: 8 C. L. R. 433. See however, *Branson v. Appasami*, 17 M. 257.

Costs of guardian *ad litem*.—Advance by plaintiff for costs of minor defendants—Rights to recover amount advanced. *Held* that the disbursements properly made in defence of the suit by the guardian *ad litem* out of the plaintiff's advances might be allowable, if it be alleged and proved that there were reasonable grounds for the defence put forward, though it proved unsuccessful.—*Venkata Vijaya v. Timmayya Pentulu*, 22 M. 314.

In a suit on behalf of a minor, where the plaint was not framed in accordance with the provisions of s. 440, C. P. Code, 1882 (Or. XXXII, r. 1, 4) the pleaders of the Original and of the Appellate Courts were called upon to show cause why they should not be ordered, under s. 444, C. P. Code, 1882 (Or. XXXII, r. 5) to pay the costs of the suit and of the appeal.—*Bhonai Bewa v. Monoram Mundul*, 11 C. L. R. 15.

*Muthukrishna v. Sankaralingam*, 36 M. 229 F. B.: 24 M. L. J. 185; 18 I. C. 417. See also *Khagaram v. Ram Sankar*, 10 C. W. N. 775; 21 C. L. J. 79; 42 C. 652. These are very important cases where all the Indian and English cases have been referred to and considered. The cases are very instructive on the question of penalty and every reader should carefully study the cases.

**Stipulations Not Amounting to Penalties.**—Where, in a contract under which interest is payable, it is agreed between the parties that if such interest be not paid punctually the defaulter shall be liable to pay interest at an enhanced rate, such contract does not come within section 74 of the Contract Act, and is not a stipulation for a penalty.—*Banke Behari v. Sunder Lal*, 15 A. 232, F. B. (10 C. 305, considered). See also *Narayanasami Naidu v. Narayana Rau*, 17 M. 62 and *Chunder v. Atkinson*, 10 C. W. N. 640.

A mortgage-bond provided that interest for the loan should be paid at a certain rate, and in default, future interest should be paid at an enhanced rate from the date of default. Held that the higher rate of interest was not a penalty, and might be enforced.—*Lakshman Das v. Swarup Chand*, 14 B. 200. A stipulation to pay compound interest on failure to pay simple interest on the same amount is not penalty.—*Ganga Dayal v. Bachchu Lal*, 25 A. 26. Followed in *Janki Das v. Ahmed Hussain*, 25 A. 159. See also *Kutubuddin v. Bashiruddin*, 32 A. 448.

A usufructuary mortgage-bond contained a provision that, on failure to pay on due date, enhanced rate of interest from date of bond till date of realization would be payable. Held, that the provision as regards the additional payment of interest did not operate as a penalty, and that section 74 of the Contract Act did not apply to such case.—*Denonath v. Nibaran Chandra*, 27 C. 421; 4 C. W. N. 122. A stipulation that interest shall be chargeable if instalments in repayment of principal be not paid at due dates is not a penalty.—*Chinna Venkatasami v. Pedda Khondiah*, 26 M. 445, followed in *Khaga Ram v. Ramsankar*, 42 C. 652; 21 C. L. J. 79; 19 C. W. N. 775. See also *Abdul Majeed v. Kherode Chandra*, 42 C. 690; (36 M. 229 and 533 referred to).

The doctrine of penalties is not applicable to stipulations contained in decrees.—*Shirekuli Timapa v. Mahallaya*, 10 B. 435. Dissented from in *Krishnabai v. Hari Gobind*, 31 B. 15 F. B.: 8 B. L. R. 818. See also, *Balkishen Das v. Run Bahadur*, 10 C. 305, P. C.: 13 C. L. R. 418, P. C.

An agreement to pay interest at 36 per cent. per annum, is not penal; *Annamalai Chettiar v. Sellappa*, 10 M. L. T. 77; (1911) 2 M. W. N. 367; nor a promise to pay compound interest at 2 per cent. per mensem with six months' rest is penalty; *Venkatachelam v. Veeranan*, (1912) M. W. N. 512; 14 I. C. 283.

**Rule of Damdupat.**—The rule of *damdupat* is a rule of Hindu Law, and it applies to those cases only in which the parties are Hindus; and specially when a debtor is a Hindu—*Ali Saheb v. Shabji*, 21 B. 85; see *Damood Darvesh v. Vallubhadas*, 18 B. 227, *Hari Lal v. Nagar*, 21 B. 38; *Nanchand v. Bapushaheb*, 3 B. 131.

The rule of Hindu Law that interest exceeding the principal sum is not recoverable is applicable to suits between Hindus in the presidency towns and not in the mofussil.—*Deen Dayal v. Kaylas Chunder*, 1 C.

Where co-sharers are made consenting defendants only in order to plaintiffs' obtaining a complete decree for partition, *held* that the plaintiff ought to pay the co-sharers' costs sufficient to cover the costs of their appearing.—*Ram Putty v. Kaleo Ohurn*, 14 W. R. 94.

(J) **Representatives, Liability for Costs.**—The power conferred by s. 366, C. P. Code, 1882 [Or. XXI, r. 8 (2)] on the Court of Original Jurisdiction, to award costs against the estate of a deceased plaintiff, may, by analogy, be taken to be conferred on the Appellate Court.—*Rajmonee v. Chunder Kant*, 8 C. 440; 10 C. L. R. 437 (4 B. 654, *followed*).

A party improperly brought on the record as the representative of a deceased judgment-debtor is entitled to get his costs, and can appeal on the question of costs alone.—*Bishen Dayal v. Bank of Upper India*, 13 A. 290.

**Land Acquisition Proceedings.**—In land acquisition proceedings, the necessity for coming to court arises from the desire of the public authority to acquire the land and the owner cannot be forced to pay costs merely, because he is compelled to sell his land and endeavours to get the best price possible; *Karachi Municipality v. Khatanmal*, 8 S. L. R. 126; 27 L. C. 326.

**Divorce Suits.**—In all matrimonial causes the solicitor for the wife irrespective of the result of the petition, is entitled to have his costs paid out of the amount deposited by the husband to meet the costs of the wife in defending or conducting the action unless the solicitor had been in any way to be blamed. This applies even as regards the amount deposited by the husband on appeal as security for the costs of the wife; *Nusserwanjee Wadia v. Ellnera Wadia*, 38 B. 125.

Where in a suit by the husband for dissolution of marriage on the ground of adultery of the wife, the adultery is not denied and the Court passes a decree for dissolution and the wife then actually seeks to test the correctness of the decision by way of appeal, the husband cannot be justly called upon by her as a matter of right to provide for her costs; *Beatrice Alia De Sti Cox v. Philip De Sti Cox*, 21 C. W. N. 711; 44 C. 85.

**Divorce—Wife's costs—Dismissal of wife's petition—Liability of husband.**—*Boyle v. Boyle*, 30 C. 631; 7 C. W. N. 565. *See also* 29 C. 619.

The English law which makes the husband in divorce proceedings liable *prima facie* for the wife's costs does not apply to divorce proceedings between Mahomedans.—*A v. B*, 21 B. 77.

Where a husband obtained an order for dissolution of marriage and costs, but no damages were asked for by the petitioner against the co-respondent; it was ordered that the costs granted should include costs as between attorney and client.—*Outhwaite v. Outhwaite*, 28 C. 84.

**Other Cases.**—In an application to file an award, the cost to be awarded should be as in a regular suit.—*Ray Priyanath v. Prasanna Chandra*, 2 B. L. R. 294; 11 W. R. 104.

Where, in an execution proceeding, time was granted to a party to make application to the Court from which the decree was transferred, and he instead of doing so, irregularly preferred an appeal, the High Court,

Interest is given under Act XXXII of 1839 by way of damages, on the ground that a debtor has wrongfully refused to pay; but where there is no hand to receive payment and to give a complete discharge, there can be no wrongful refusal.—*Raj Narain v. Universal Life Assurance Company*, 7 C. 594; 10 C. L. R. 501.

Though no contract to pay interest was proved and the case was not covered by the Interest Act, some interest should be allowed by way of damages for the detention of the money; *Khetra Mohan v. Nishi Kumar*, 22 C. W. N. 488 (15 C. L. J. 684; 20 M. 481; 26 C. 955; 81 B. 854, *refd.* to); *Prosonnomoyi v. Gopal Lal*, 31 C. L. J. 848

The Interest Act (XXXII of 1839) enables the Court to allow interest in certain cases, but does not create a right to interest which could be made the subject of a suit. It is doubtful whether the Act gives power to allow compound interest on a debt.—*Marshall v. The Bengal Spinning and Weaving Co.*, 1 C. W. N. 219.

Act XXXII of 1839 does not affect debts contingent in amount and time of becoming due.—*Jaggomohan Ghosh v. Manick Chund*, 4 W. R. P. C. 8; 7 M. I. A. 208.

A debt expressed to be payable in kind is a debt under the Interest Act and interest is allowable on it under the Act; *Govinda v. Cheral*, 88 M. 464.

In order to justify the allowance of interest under Act XXXII of 1839, it must be shown that there is a debt, or certain sum payable at a certain time by virtue of some written instrument.—*Surja Narain v. Protap Narain* 26 C. 955 See also *Thakur Ganesh v. Thakur Harihar*, 8 C. W. N. 521, P. C.; *Venkata Kumara Surya v. Pallamaraju*, (1920) M. W. N. 717; 40 M. L. J. 18; 60 I. C. 853; *J. W. Grewdaon v. Ganesh Das*, 32 C. L. J. 239; 60 I. C. 288. But in *Kamalammal v. Peeru Meera*, 20 M. 481, it has been held that where a sum of money is payable under an oral contract, interest cannot be awarded prior to suit in the absence of any written demand or notice. See also *Kisara Rupumma v. Cripati*, 1 M. 869; *Abdool Kureem v. Meah Jan*, 6 W. R. 288; *Surendra Kumar v. Kunja Behari*, 4 C. W. N. 818 (p. 820); 27 C. 814; *Arjan Das v. Hakim Rai*, 89 P. R. 1913; 20 I. C. 299.

A certificate of the Administrator-General admitting a debt to be due is not such a "written instrument" as is contemplated by the Interest Act (XXXII of 1839), s. 1.—*Omirta Nath v. Administrator-General*, 25 C. 54.

Interest is not claimable where there is no agreement to pay interest and no demand in writing so as to bring the case within the provisions of the Interest Act; *Suluamania v. Suluamania*, 31 M. 250; *Vinkley v. Wasata Singh*, 55 P. L. R. 1915; 28 I. C. 926; *Purshottam Das v. Bethal Das*, 54 I. C. 431; *Nanu Nair v. Ashta Moorthi*, 29 M. L. J. 772.

**Interest on Unpaid Price of Goods.**—Interest is not allowed upon the unpaid price of goods sold unless demand has been made for the arrears. A printed head line in the tradesman's Bill that interest would be charged on all arrears after a certain period is not such a demand as is contemplated by the Interest Act. *Fillingham v. Dunn*, 8 P. R. 1914; 20 I. C. 194.

**35-A.** (1) If in any suit or other proceeding, not being an appeal, any party objects to the claim or defence on the ground that the claim or defence or any part of it is, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward, and if thereafter, as against the objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court, if the objection has been taken at the earliest opportunity and if it is satisfied of the justice thereof, may, after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the objector, by the party by whom such claim or defence has been put forward, of costs by way of compensation.

(2) No Court shall make any such order for the payment of an amount exceeding one thousand rupees or exceeding the limits of its pecuniary jurisdiction, whichever amount is less :

Provided that where the pecuniary limits of the jurisdiction of any Court exercising the jurisdiction of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887, and not being a Court constituted under that Act, are less than two hundred and fifty rupees, the High Court may empower such Court to award as costs under this section any amount not exceeding two hundred and fifty rupees and not exceeding those limits by more than one hundred rupees.

Provided, further, that the High Court may limit the amount which any Court or class of Courts is empowered to award as costs under this section.

(3) No person against whom an order has been made under this section shall, by reason thereof, be exempted from any criminal liability in respect of any claim or defence made by him.

(4) The amount of any compensation awarded under this section in respect of a false or vexatious claim or defence shall be taken into account in any subsequent suit for damages or compensation in respect of such claim or defence.

### COMMENTARY.

This section has been added by Act IX of 1922.

**Object of the Section.**—The object of introducing this section is to provide more effective means of meeting the great evil arising from the

Subject to such conditions and limitations," etc.—There are several provisions in the Code prescribing certain conditions and limitations with regard to award of costs, and the following are some of them:—Or. XI, r. 3 (costs of interrogatories), Or. XII, r. 2 (non-service of notice to admit documents), Or. XXI, r. 72, cl. 3 (where decree-holder buys without permission), Or. XXIII, r. 1, cl. 3 (where plaintiff withdraws without permission), Or. XXII, r. 5 (liability of minor's pleader to pay costs); Or. XXV, r. 4 (where plaintiff accepts deposit made by defendant); Or. XXXIII, rr. 10 and 16 (costs in pauper suit). Besides these there are several other provisions in the Code regarding award of costs.

"As may be prescribed."—The word "prescribed" means prescribed by the rules contained in or framed under this Act (*see* sec. 2, clauses 16 and 18 and sections 122 and 125). For instance, Rules framed by the High Court regarding costs in contested Probate cases (*see* Rule 42-A of Chapter VI of the General Rules and Circular orders of the High Court, Calcutta, Appellate Side, Vol. 1).

"And to the provisions of any law."—This expression refers to the provisions contained in any special or local enactment regarding award of costs; for instance, in section 27 of the Land Acquisition Act I of 1894 special provision is made regarding award of costs; in section 49 of the Provincial Insolvency Act (III of 1907) provision is also made regarding award of costs. There are several other enactments in which provisions are to be found regarding award of costs.

"Costs of and incident to all suits."—The above expression means not only the costs of the suit, but it also includes the costs of all applications made during the course of the trial of suits. Section 218 of the C. P. Code of 1882, which said that "*when disposing of any application under this Code, the Court may give to either party the costs of such application, or may reserve the consideration of such costs for any future stage of the proceeding*" has been omitted, and all the provisions regarding the award of costs of suits, and all applications in such suits have been incorporated in this section. Therefore the award of costs of applications in suits as well as costs of suits is in the discretion of the Court, and is governed by provisions of the section.

**Costs are in the Discretion of the Court.**—A Court has full discretion as to costs, but that discretion must be exercised on general principles and not arbitrarily.—*Bhugobati Pal v. Mahomed Ali*, 7 C. W. N. 647.

The costs are in the discretion of the judge. Such discretion must of course be a judicial discretion to be exercised on legal principles, not by chance, medley nor by caprice nor in temper, (*Huxley v. West London Ex-Ry. Company*, 17 Q. B. D. 376 *approved*). Principles on which a successful litigant should be deprived of his costs discussed (*Jones v. Curling*, 13 Q. B. D. 268 *approved*). Everything which increases the litigation and the costs and which places on the defendant a burden which he ought not to bear in the litigation is a perfectly good cause for depriving the plaintiff of costs; (*Per Sanderson, C. J.*) *Justain Hall v. A. F. Paul*, 24 C. W. N. 353.

Discretion, when applied to a Court of Justice, means a sound discretion guided by law. "It must be governed by rule, not humour." It must not be arbitrary, vague and fanciful, but legal and regular; *per*



## PART II

### EXECUTION.

#### GENERAL.

36. The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders. [New.]

Application to orders.

#### COMMENTARY.

This section is new. The provisions of the last para. of section 220 and first para. of section 649 of the C. P. Code of 1882 have been embodied in this section in a concise and modified form. The section makes provision for execution of judicial orders. Order XXI of the Code contains detailed procedure for execution of decrees but in that Order there is no express provision for execution of orders and this section has expressly made the provisions of Or. XXI applicable to the execution of orders. In other words the provisions contained in Or. XXI relating to execution of decrees are also applicable to the execution of orders.

**What Decrees may be Executed.**—(1) The decree of the Court of last instance is the only decree capable of execution; *Shohrat Singh v. Bridgman*, 4 A. 376 F. B.

(2) The decree to be executed must be a subsisting decree; *Pasupati v. Nandolal*, 30 C. 718; *Chettiatie v. Kunhi Koru*, 29 M. 175; but a decree which is declared fraudulent and void against one only of several judgment-debtors, remains intact as against the other defendants and is susceptible of execution; *Pasupati v. Nandolal*, 30 C. 718.

(3) The decree to be executed must be a decree the execution of which is not barred by the law of limitation; see, Limitation Act, Arts. 182, 183; *Gopal Sha v. Janki Koer*, 23 C. 217; *Asgar Ali v. Troilokya*, 17 C. 631 F. B.

Where an appeal is dismissed under Or. XLI, r. 11 without serving notice of appeal on the respondent, or for default in appearance of the appellant, or as being out of time, or as coming within the provisions of s. 102, the decree capable of execution is the decree appealed from.—*Kailash v. Girija Sundari*, 39 C. 925; *Abdul Majid v. Jawahir Lal*, 36 A. 350; 23 I. C. 649 P. C.; *Batuk Nath v. Munni Dei*, 36 A. 284; *Shyam Mandal v. Satinath*, 44 C. 954; 38 I. C. 493. But where the decree appealed from is confirmed, varied or reversed under Or. XLI, r. 32 by the Appellate Court, the decree capable of execution is the decree of the Appellate Court.—*Shohrat v. Bridgman*, 4 A. 376 F. B.; *Nauchand v. Vithu*, 19 B. 258. Similarly, when there is an appeal to the Privy Council, the decree which is to be executed is the decree of the Privy Council.—*Bhup Inder v. Bijai*, 23 A. 152; *Nand Kumar v. Bilas Ram*, 8 Pat. L. J. 116.

of his general costs. But where the Court purports to act on these principles it is open to the Appellate Court to enquire whether on the facts these principles have been rightfully applied. The Court can get no nearer to a perfect test than the enquiry whether it would be more fair as between the parties that some exception should be made in the special instance to the rule that costs should follow upon success (Dictum of Bowen, C. J., in *Forster v Farquhar*, 1893, 1 Q. B. 564). The mere fact that the plaintiff claims more than he gets is no ground of depriving him of costs, unless it is shown that the cost of the action has been increased by his claim; (*per* Woodroffe, J.); *Justain Hall v. A. F. Paull*, 21 C. W. N. 353.

Clause (2)—“Any costs shall not follow the event.”—S. 35 (2) does not apply where a suit is disposed of without adjudication upon the merits; *Raghunath v. Ram Ratan*, 52 I. C. 961.

At the hearing of an appeal, the case was remanded to the lower Court. The order further directed the costs of the appeal “to abide and follow the result.” After remand the case was withdrawn. Held, that “event” was nothing but the outcome or result of proceedings and that the withdrawal of the suit was an “event” within the meaning of s. 35, cl. (2) of the C. P. Code and if the Court did not order costs it must assign reasons. Where it did not appear that the Court applied its mind as to costs of the appeal, it was a case for revision by the High Court; *Lakshmi Venkayamma Rao v. Venkataram Appa Rao*, 24 M. L. T. 212: (1918) M. W. N. 561.

**Costs to be Given According to Nature of Interest and Conduct of Parties.**—A defendant who, although he has a good defence, has by his conduct induced the plaintiff to sue for him, may be made liable for the plaintiff's costs, though the suit be dismissed.—*Lallah Bhugwan Doss v. Akbar*, 1 Ind. Jur. N. S. 300.

It is not proper to disallow costs to the successful party on the ground that some evidence adduced by that party is false, though if the time of the Court is wasted by false or unnecessary evidence, the Court would be justified in refusing costs to the successful party; *Lakshminarasaraju v. Venkataraju*, 100 I. C. 224: A. I. R. 1927 Mad. 474.

If a plaintiff substantially succeeds, he is entitled to his costs, though he may not have got the precise form of relief he wanted; *Ghanasham v. Moraba*, 18 B. 474.

If a plaintiff recovers a less amount than what he claimed in his plaint, his costs should be apportioned according to the amount recovered and not to the sum claimed; *Mudun Mohun v. Gokul*, 10 M. I. A. 563; *Velu v. Ghosh*, 17 M. 293, 296.

Everything which increases the litigation and the costs and which places on the defendant a burden which he ought not to bear in the litigation is a perfectly good cause for depriving the plaintiff of costs; *Justain Hall v. A. F. Paull*, 24 C. W. N. 352, 359: 58 I. C. 421.

When both the parties advance pleas far in excess of their legal rights, each party will be made to bear his own costs; *Ram Kumar v. Kali Kumar*, 14 C. 99, 108; *Lachmeswar v. Manowar*, 19 C. 256: 19 I. A. 48.

Heavy costs were awarded against a party who improperly obtained a rule; *Kunja Lal v. Dinabandhu*, 15 C. L. J. 162.

decree. *Udit Narain v. Mathura Prasad*, 35 C. 974: 12 C. W. N. 859. Section 37 provides that the Court of first instance is the proper Court to execute the decree, not only where the decree to be executed is actually passed by that Court, but also where the decree to be executed is a decree passed either by a Court of first appeal or by the High Court in second appeal [s. 37, cl. (a)]. It also provides that where the Court of first instance has ceased to exist, or to have jurisdiction to execute the decree, the only Court which can execute the decree is the Court which, at the time of making the application for execution, would have jurisdiction to try the suit in which the decree sought to be executed was passed.

**"Deemed to include."**—The word "*include*" is intended to be innumerate and not exhaustive. The word has an extending force and does not limit the meaning of the term to the substance of the definition. It does not exclude the Court which originally passed the decree, but only includes another Court. Therefore, in addition to the Court by which the decree was passed, the expression "*Court which passed the decree*" includes the Courts mentioned in clauses (a) and (b) to this section.

**Clause (a).**—This clause means that where the decree to be executed, has been passed by an intermediate appellate Court, and that decree is confirmed, modified or reversed by the High Court, then the final decree of the High Court is to be executed by the Court of the first instance and not by the intermediate appellate Court. So also the decrees of the Privy Council is to be executed by the Court of the first instance which passed the decree; *Krishna Bhoopathi v. Raja of Vizianagram*, 38 M. 832.

**Clause (b).**—The meaning this clause is that where the Court of the first instance, which passed the decree, has ceased to exist either by reason of its abolition or for any other such reason; or where it has ceased to have jurisdiction to execute it by reason of the creation, alteration or re-organisation of new districts or sub-divisions, by attachment, detachment, annexation and consolidation of districts and the transfer of territorial jurisdiction, then the application for execution shall be made to the Court which if the suit, wherein the decree was made, were instituted at the time of making application to execute it, would have jurisdiction to entertain and try the suit. The usual case to which the phrase "has ceased to have jurisdiction to execute it" applies, is the case where between the date of decree and the date of execution application, territorial jurisdiction over the property has passed from the Court of original trial to another Court.

S. 37, cl. (b) of the C. P. Code gives jurisdiction to execute the decrees of another Court when two conditions are substantially fulfilled, viz., (1) that the Court of first instance which passed the decree, must have ceased to exist, and (2) that it must have ceased to have jurisdiction to execute the decree; *Raja Jagannath Prasad v. Sheonandan Sahay*, 2 Pat. L. T. 374: 6 Pat. L. J. 304.

**"Where the Court of first instance has ceased to exist."**—A Court does not cease to exist, so as to be deprived of jurisdiction to entertain an application for execution, merely by reason of the head-quarters having been removed to another place, or of the local limits of the jurisdiction of such Court having been altered. See *Latchman v. Maddan*, 6 C. 513: 7 C. L. R. 521.

Although the plaintiff could not obtain a decree for the full amount claimed, yet she was held entitled to recover the whole of the costs incurred in a suit to which she had been forced by the defendant for the recovery of her property.—*Shih Pershad v. Ganga Monce*, 16 W. R. 291.

Where the decree in a suit directs the payment of costs by the plaintiff and defendants respectively in proportion to the amounts decreed and disallowed, the proper mode of giving effect to such a decree is to calculate the amount of the costs of the suit as laid, and then divide the entire sum proportionately between the parties according as they have respectively succeeded or failed.—*Leckie v. Joygobind Nath*, 7 C. L. R. 114; *Ramasoondery Debia v. Rogers*, 7 W. R. 127; 8 W. R. 55. See also *Tara Chand v. Jadoonath*, Marsh 79; 1 Hay 141; 1 Ind. Jur. O. S. 102.

Although an appellant only partly succeeded in his appeal, the whole of his claim having been opposed in the Court below on an untenable ground—held, that there was no reason for departing from the general rule that the defeated party should pay the costs.—*Radha Parshad v. Ram Parmeswar*, 9 C. 797; 18 C. L. R. 22.

The costs of an unsuccessful defendant in a pauper suit are to be dealt with under this section and original or appellate court has full power to give and apportion costs in any manner it thinks fit.—*Jetha Mulchand v. Gulraj Jasrup*, 8 B. 577.

The provisions of Or. XXIV, r. 4 as to payment of costs, apply only to suits to recover a debt or damages; and where a suit is not to recover a debt or damages, a Court has full discretion under this section to apportion the costs, and the Court of Appeal would not interfere with that discretion.—*Luzmon Nana Palit v. Moroba Ram Krishna*, 21 B. 502.

The ordinary rule should be observed, and the costs should follow the event. If a party substantially succeeds, he is entitled to his costs.—*Ghanasham Nilkant v. Moroba Ram Chandra*, 18 B. 474.

An unsuccessful litigant should ordinarily bear the costs of the litigation; but when the costs of a particular issue can be separated from the costs of the suit, it is usual to allow them to the party who is successful on that issue irrespective of the ultimate result of the suit.—*Mohendro v. Ashutosh*, 20 C. 762.

**Set-off of Costs.**—With regard to set off of costs provision is made in Or. XX, rr. 6 (3) and 19. See also Or. VIII, r. 6 and the cases noted thereunder.

**Payment of Costs by Third Persons.**—If the plaintiff on the record in a suit be only a sham one, the defendant may proceed against the real plaintiff for costs.—*Bama Soondary v. Anundo Lal*, *Bourke* O. C. 44 and 96; *Jaintee Chunder v. Anundo Lal*, 14 W. R. O. C. 1. Referred to in *Balabhader v. Radhasyam*, 16 I. C. 381; see 7 B. 484.

Where the Court finds any person, though not a party to the suit, guilty of champerty and maintenance, and setting in motion the process of the Court for improper purposes, such person will be made to pay the costs of such proceeding.—*Juggessur Coomar v. Prosonna Coomar*, 1 Ind. Jur. N. S. 282.

The effect of ss. 610 and 649 of the C. P. Code, 1882 (Or. XLIV, r. 15 and s. 37) is that the Court, which formerly had, but now no longer has territorial jurisdiction, ought, when the decree is sent to it, to exercise by its own motion, or when applied for, the provisions of s. 39, and transfer the decree for execution to the Court which has territorial jurisdiction.—*Girindro v. Jarawa Kumari*, 20 C. 105.

Where subsequent to the passing of a money decree, the area in which the judgment-debtor lived was transferred from the jurisdiction of the Court which passed the decree to that of another Court, it is open to the latter Court to execute the decree; *Muthukaruppa Chetty v. Paiga Kavundan*, 45 M. L. J. 210: (1923) M. W. N. 406.

Where a certain area was transferred from the jurisdiction of one District Judge into the jurisdiction of another District Judge, an appeal preferred after the date of transfer must be received and entertained by the District Judge into whose jurisdiction the area from which the appeal comes has been transferred.—*Allah Dei Begum v. Kesri Mal*, 28 A. 93: 2 A. L. J. 576.

### COURT BY WHICH DECREES MAY BE EXECUTED.

Court by which  
decree may be exe-  
cuted.

38. A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. [S. 223, para 1.]

### COMMENTARY.

This section provides that a decree may be executed by the Court which passed the decree or by the Court to which it is transferred for execution. The expression "Court which passed the decree" has been fully explained in the preceding section (37); and the circumstances under which the Court which passed the decree, may, on the application of the decree-holder, send it for execution to another Court, are specified in the following section (39).

Reading the provisions of sections 37 and 38 together, we get the following rules for execution of decrees:—

- (1) A decree may be executed by the Court which passed it.
- (2) The final decree of the first or of the second appellate Court (High Court), or of the Privy Council, is to be executed by the Court of the first instance [sec. 37, cl. (a)].
- (3) Where the Court which originally passed the decree has ceased to exist, or has ceased to have jurisdiction to execute the decree, the only Court that can execute the decree is the Court, which if the suit, wherein the decree was passed were instituted at the time of making application to execute it, would have jurisdiction to entertain and try the suit [sec. 37, cl. (b)].
- (4) A decree may be executed by the Court to which it is transferred for execution (sec. 39).

Scope of Section.—S. 38 of the C. P. Code is exhaustive and a decree can only be executed by the Court which passed it or by the Court to

it included interest not awarded by the decree, *held*, that an agreement, whereby the debtor obtained the release of his property on condition of paying by instalments the entire amount claimed, inclusive of the interest, as not void and unlawful under section 23 (2) of the Indian Contract Act.—*Seth Gohul Das v. Murli*, 3 C. 602, P. C.: 2 C. L. R. 150, P. C.

As to interest on costs, see also notes to section 34 under the heading "INTEREST NOT MENTIONED IN THE DECREE."

**Appeal on Question of Costs.**—An appeal will lie on the question of costs in the following cases: (1) where a matter of principle is involved; (2) where there is a clear misapprehension of fact and law; (3) where the court has exercised its discretion arbitrarily. A right to costs is not a vested right and there is a very limited right of appeal (21 B. 779 *referred to*). An order for costs is not a decree; it has to be included in a decree or may be a part of a decree. It is only appealable, if the original decree or order is appealable; and in that event an appeal on the question of costs alone will lie, if any question of principle is involved. There can be no second appeal for costs except on a ground of law.—*Shaikh Gulab v. Janki Kuar*, 5 Pat. L. J. 472.

An appeal will lie on a question of costs only, where a matter of principle is involved.—*Secretary of State v. Marjum Hossein*, 11 C. 359; *Bunwari Lal v. Drupnath*, 12 C. 179; and *Nawab Dildar Ali v. Bhowani Sahai*, 34 C. 878; 5 C. L. J. 642. *Raghunath Kahar v. Ramratan*, 52 I. C. 96; *Jalaluddin v. Ebrahim*, 63 I. C. 811; *Midnapore Zemindary Co., Ltd. v. Kristo Prasad*, 46 I. C. 544; *Shridhar Lazman v. Janardhan*, 72 I. C. 993. But no appeal lies on a question of costs unless there is a question of principle involved; *Umesh v. Bibhuti*, 47 C. 67; 56 I. C. 834; *Bunwari v. Drupnath*, 12 C. 179; *Amirul Hossain v. Khairunnissa*, 28 C. 567.

An appeal lies on a matter of costs only when the order as to costs proceeds upon a misapprehension of facts or law; *Ranchordas v. Bai Kasi*, 16 B. 676; *Justain Hall v. Paull*, 24 C. W. N. 352; 58 I. C. 421; or where there has been no real exercise of discretion in making the order as to costs; *Moshingan v. Mozari*, 12 C. 271; *Lalmani v. Chintamani*, 41 A. 254; 49 I. C. 696.

When the order of the lower Court as to costs is erroneous and improper, an appeal lies simply on the question of costs.—*Ranchordas v. Baikasi*, 16 B. 676; *Vasudeb Ram Chandra v. Bhavan Jivraj*, 16 B. 241; *Suddasook Kootary v. Ram Chander*, 17 C. 620; and *Bishen Doyal v. Bank of Upper India*, 13 A. 290.

The costs of and incident to all suits are in the discretion of the Court; such discretion should not be interfered with in appeal, unless it can be made out that the court has utterly failed to exercise its discretion, or has acted arbitrarily and in an unjudicial manner; *Iqbal Narain v. Suraj Narain*, 24 I. C. 673; *Aga Mahomed Shiraji v. Syed Md. Shoostry*, 21 C. W. N. 333; *Radhy Shiam v. Biharilal*, 40 A. 558. See also 22 B. 164 and *Divibashyam v. Peddinti*, 19 M. L. J. 86; 3 L. W. 189; *M. A. Lon v. Maung Tun*, 5 Bur. L. T. 104; 15 I. C. 429; *Gobind Sahai v. Ramchand*, 56 I. C. 971; *Saradindu v. Charu*, 22 C. W. N. 372.

Though the Judges of the appellate Court would if sitting as a Court of first instance, have come to a different decision it is not the practice of an

tained only by the Court which passed the decree and the Court to which a decree is transferred for execution has no jurisdiction to entertain it; *Monorath v. Ambika*, 9 C. L. J. 443: 13 C. W. N. 533.—See also *Amar Chandra v. Guruprosunna*, 27 C. 488.

The Court which passes a decree has jurisdiction to execute it notwithstanding that the total amount due under it by process of accumulation of interest subsequently exceeds the pecuniary limits of its jurisdiction.—*Shamrav Pandoji v. Niloji Ramaji*, 10 B. 200.

Though the value of the property may greatly exceed the value of the decree, the executing Court still has to decide the objections; *Musst. Rhan Debi v. Musst. Nihal Debi*, 101 P. R. 1915: 32 I. C. 43.

**"The Court to which the decree is sent for execution."**—The Court to which a decree is sent for execution is the only Court which has seisin of the execution proceedings, and it retains its jurisdiction to execute the decree till it certifies under s. 41 of the Code, to the Court which passed the decree, the fact of execution, or if it fails to execute the decree, the circumstances attending such failure. In such a case, the Court which passed the decree has no jurisdiction to entertain an execution application, unless concurrent execution had been ordered or proceedings in the Court to which the decree was sent, had been stayed for the purpose of executing the decree in the former Court.—*Maharaja of Bobbili v. Sree Raja Narasaraju*, 37 M. 231: 23 M. L. J. 236.

There is nothing in the C. P. Code which prohibits the simultaneous execution of a decree in two or more Courts. It is, however, a matter for the discretion of the Court to direct or to refuse concurrent jurisdiction; *S. R. M. M. C. T. Chetty v. Bowsinga*, 13 Bur. L. T. 235.

Notice under s. 248, C. P. Code of 1882 (Or. XXI, r. 22) may be served by the Court to which the decree is sent for execution or by the Court to which an application is made for transmission.—*Raja Sreenath Ray v. Romesh Chandra*, 12 C. W. N. 897.

**The Executing Court Can Not go Behind the Decree.**—The Court executing a decree cannot go behind the decree, i.e., cannot entertain any objection as to the legality or correctness of the decree; *Chhoti v. Rameshur*, 6 C. W. N. 76; *Grish Chundar v. Shoshi Shikharwar*, 27 C. 967: 27 I. A. 110; *Jar Gobind v. Patrisi Pratap*, (1907) A. W. N. 286. It cannot also alter, vary or add to the terms of the decree; *Udwant v. Tokhan Singh*, 28 C. 353; *Ishwargar v. Chudasama*, 13 B. 106; *Subbana v. Krishna*, 15 B. 644; *Ranmalsangji v. Kundankwer*, 26 B. 707. But where the decree sought to be executed is a nullity having been passed against a party to a suit who had died before the proceeding was concluded, there is no decree to be executed; *Jungli Lall v. Laddu Ram*, 4 Pat. L. J. 240 (F. B.).

**Construction of Decree.**—But though the executing Court cannot go behind the decree, it is quite competent to construe the decree where the meaning is ambiguous and where, without ascertaining its correct import, it is not possible to execute the decree; *Jagatjit v. Sarabjit*, 19 C. 159: 18 I. A. 165; *Lachmi v. Jwala*, 18 A. 344; *Shivlal v. Jumaklal*, 18 B. 542; *Kali Krishna v. Secy. of State*, 16 C. 173; *Ram Kirpal v. Rup Kuari*, 6 A. 269: 11 I. A. 37. For the purpose of ascertaining the meaning of a decree, it is competent to the Court to refer not only to the judgment but

in a regular suit by the attorney against his client.—*Doman v. Emaun Ally*, 7 C. 401. (Followed in *Mahomed Zahurrudden v. Mahomed Nooroodden*, 21 C. 85, and in *Ram Dayal v. Ram Das*, 27 C. 269: 4 C. W. N. 208). But see *Khetter Kristo v. Kally Prosunno*, 25 C. 887: 2 C. W. N. 508. (Followed in *Cullianji v. Raghavji*, 30 B. 27).

No attorney has a right to insist on the payment of past costs as a condition to the further prosecution of his client's cause.—*Basanta Kumar v. Kussum Kumar*, 4 C. W. N. 767. See also 26 C. 769.

Attorney's lien for costs.—See *Orr v. Norendra Nath*, 19 C. 368; and *Ramnath v. Matunginee*, 12 B. L. R. 110.

An order obtained from a Judge in chambers by an attorney against his client for the payment of costs is a decree or order, to the execution of which the provisions of Chapter XIX, C. P. Code, 1882, apply.—*In re Premji Trikundas*, 17 B. 514.

An attorney is not entitled to any reward for services rendered to his client beyond his just and fair professional remuneration.—*Brojendra Nath v. Luckhimoni*, 29 C. 595.

(d) **Arbitration.**—Where no provision is made in the award or where no award has been made by an arbitrator appointed by the court, the court has power to award costs of arbitration, as for instance, the arbitrator's fee as costs of a proceeding incident to a suit; *Gurdinomal v. Wadhupal*, 6 S. L. R. 226.

(e) **Certificate and Probate Cases.**—In an application for revocation of probate, the costs should be assessed as in a miscellaneous proceeding. The pleader's fee cannot be assessed as in a regular suit, and cannot therefore exceed Rs. 80.—*Protap Chandra v. Kali Bhanjan*, 4 C. W. N. 600; and *Garabini v. Pratap Chandra* 4 C. W. N. 602; *Sundra Bai v. Collector of Belgaum*, 33 B. 256; *Baij Nath v. Sham Sunder*, 41 C. 637: 18 C. L. J. 642.

An applicant for letters of administration to the estate of a widow, having concealed the existence and claims of the relatives of the deceased husband, was ordered to pay the costs of the application, and of the caveats entered by some of the relatives of the deceased husband.—*Jaikishan Das v. Harikishon Das*. 2 B. 9.

Held that the fund primarily liable for the costs of probate was the residuary estate; and a part of the residuary estate being as yet undistributed, it should, in the first instance, be applied to this purpose, and after that the appellant and the respondent should contribute in equal shares.—*Doyabhai v. Damodurdas*, 21 B. 75.

(f) **Estate, Costs out of.**—In a suit for construction of will held, that the difficulty of construction having been caused by the testator himself, and in regard of the circumstances and position of the parties, costs should come out of the estate.—*Indar Kumar v. Jaipal Kunwar*, 15 C. 725. See *Srinibash Das v. Monmohini Dasi*, 3 C. L. J. 224; *Chuni Lal v. Bai*

The Court has power to award costs in its discretion to a defendant out of deceased plaintiffs' estate even in a case where a suit abates by reason of *Samarth*, 38 B. 399 P. C.: 19 C. L. J. 563: 18 C. W. N. 844: 26 M. L. J. 647; *Rani Moni v. Radha Prosad*, 41 C. 1007 P. C.: 18 C. W. N. 873; *Aghore Nath v. Kamini Debi*, 11 C. L. J. 461.



be executed by another Court, then also the decree may be sent to another Court for execution.

**Concurrent or Simultaneous Execution.**—This section does not say that after a decree has been sent for execution to another Court, the Court passing the decree may not simultaneously carry on execution proceedings, but it is plain enough that this section intends that it is only for special reasons that the decree should be sent to another Court for execution. Thus, if there is sufficient property by the sale of which the debt may be realized, ordinarily no Court would be justified in sending the decree to another Court for execution. At the same time it is quite possible that concurrent execution may be necessary. If, for instance, a property within the jurisdiction of the Court which passed the decree is comparatively not of much value, and the property within the jurisdiction of the Court to which the decree is sent is also not comparatively of much value, then there can be no injustice to the judgment-debtor in carrying on execution proceedings in both the Courts. If the decree is sent for execution to two or more Courts to be executed at the same time and the amount realized in the aggregate is much higher than the judgment-debt, it would manifestly be an injustice to the judgment-debtor to allow the execution proceedings to go on at the same time. Further if the full amount of the decree is realized by two or three Courts it is difficult to see how matters can be worked out, which of the sales will be held valid and on what grounds, and, what interests would be acquired by the purchasers at those sales. It is true that the judgment-debtor may apply for stay of execution proceedings under Order XXI, rule 26, but he is not entitled to get the execution proceedings stayed. While, therefore, these sections may not show that concurrent execution cannot be carried on, they certainly show that such execution should be allowed in exceptional circumstances. It is only when such execution is necessary in the interests of decree-holder and when it can be carried on without hardship to the judgment-debtor that it ought to be allowed by the Court which passed the decree. When therefore concurrent execution is necessary, the Court which passed the decree may order it. But till such order is passed or permission is given, the decree-holder is not entitled to carry on execution proceedings simultaneously. The decisions in *Saroda Prosad v. Luchmeeput*, 14 M. I. A. 529 p. 540; 10 B. L. R. 214; 17 W. R. 289, and *Kristo Kishore v. Roop Lal*, 8 C. 687; 10 C. L. R. 609 seem to bear out this view. See *Maharaja of Bobbili v. Sree Raja Narasaraju*, 37 M. 231 23 M. L. J. 236 per Sankaran Nair, J. See also *Ahmed Chowdhury v. Khatoon*, 7 C. L. R. 537; and *Baij Nath v. Holloway*, 1 C. L. J. 315; *Sivakolundu v. Ganapathi*, 3 L. W. 336.

**Meaning of "Decree-holder" in this Section.**—The definition of decree-holder includes transferee of a decree and such person therefore is entitled to apply, to send it for execution to another Court.—*Chathoth Kunhi v. Saidindavide*, 20 M. 258. See, however, 27 C. 488; 2 A. 283; and 25 A. 443.

**Clauses (a) and (b).**—A Court should not as a rule, transfer a decree for execution to another Court until the properties situated within its jurisdiction are sold; but if a decree is transferred, the error in so doing does not invalidate the execution proceedings in the Court to which it is transferred.—*Kally Prosono v. Dina Nath*, 11 B. L. R. 56; 19 W. R. 434. A certificate transferring a decree for execution to another Court may be granted by the Court if the decree cannot be completely executed by the

(h) **Mortgage Suits.**—A mortgagee is, as a general rule, entitled to the costs of enforcing his security; but where the Court, in consideration of his usurious bargain, declines to award them wholly or in part, the High Court will not interfere.—*Corvalho v. Narbibi*, 3 B. 202. Improper defence or other misconduct will also entail forfeiture of costs; *Krishnasami v. Ramasami*, 35 M. 44; *Gouri Shankar v. Abu Jafar Khan*, 8 O. L. J. 204.

A decree directing its enforcement against the hypothecated property, cannot be executed against the person or other property of the judgment-debtor, though an order for costs contained therein may be so executed.—*Prankumar v. Durga Prashad*, 10 A. 127. See also *Rutnessur Sein v. Jusoda*, 14 C. 185. But see *Raj Kumar Singh v. Sheo Narain*, 12 C. W. N. 864. 35 C. 431; 8 C. L. J. 152.

Costs awarded in a decree for foreclosure is not a part of the money due upon the mortgage, and can be recovered by the mortgagee in execution after obtaining possession under the decree—*Damodar v. Budh Kuar*, 10 A. 179. But see *Raj Kumar Singh v. Sheo Narain*, 12 C. W. N. 864.

When mortgage-deed provided that costs of any proceedings necessitated by the default of tenants in payment of rents should be deducted from the revenues, and there was no express promise by the mortgagor to personally pay those expenses, held that the mortgagee was not entitled to a decree for such costs against the mortgagor personally.—*Ganesh. Dhara-nidar v. Keshav Rav Gobind*, 15 B. 625.

**Apportionment of Costs in Mortgage Suits.**—The power given by s. 220, C. P. Code, 1882 (s. 35) to a Court to apportion costs in any manner it thinks fit, is subject to the controlling power of the Appellate Court.—*Tara Prosunno v. Satis Chandra*, 4 C. W. N. 90.

(i) **Partition Suits.**—The costs of a suit for partition by one shareholder against his co-sharers, as well as of effecting a partition, must be borne by each party.—*Samasundari Davi v. Jardine Skinner and Co.*, 3 B. L. R. Ap. 120; 12 W. R. 160. Followed in *Nawab Dildar Ali v. Bhowani Sahai*, 34 C. 878; 5 C. L. J. 642; *Mohendro v. Ashutosh*, 20 C. 762; *Khetterpul v. Khelal Kristo*, 21 C. 904. See also *Satya Kumar v. Satya Kripal*, 10 C. L. J. 503; *Lokenath v. Dhakeshwar*, 20 C. W. N. 51 and *Mati Lal v. Girish Chandra*, 12 C. L. J. 346 in which the mode of awarding costs is clearly pointed out.

Costs in a partition suit up to the preliminary decree ought not to be given to plaintiff but to be borne by all the parties. Such an order may be made even though some of the defendants have not appealed from the decree ordering costs to plaintiff as is to their benefit; *Ambika Prasad v. Pardip Singh*, 42 C. 451; 19 C. W. N. 233.

The genera' rule is that in partition suits parties should have their own costs except with regard to the institution fee which should be borne proportionately by all parties; *Kasturibai Manibai v. Bai Mahalazmi*, A. I. R. 1923 Bom. 464.

Where one of the parties to a partition suit bears all the costs of the proceedings subsequent to decree, and others fail to pay their respective shares, execution cannot issue against the defaulters without first obtaining Court's order for payment.—*Brajolal Sen v. Mohendra Nath*, 18 C. 199.

In execution of a decree, property situate in three Munsifs was attached and sold by order of one Court. *Held* that sale was valid.—*Ram Lall v. Bama Sundari*, 12 C. 307. *See also Gunga Narain v. Anondamoyee*, 12 C. L. R. 404; and *Unnocool Chunder v. Hurry Nath*, 2 C. L. R. 334.

**Clause (d).**—A Sub-Judge exercising Small Cause Court powers may, for any good reason to be recorded in writing, transfer its decree to the other branch of the same Court for execution without requiring any certificate.—*Bhagvan Dayalji v. Balu*, 8 B. 230. *See also Dharamdas Santidas v. Vaman Gobind*, 9 B. 237, and 1 A. 624. *See, however, Kahanarama v. Ranga*, 8 M. 8, where it has been held that a Small Cause Court decree of a Sub-Judge may be transferred for execution against immoveable property to the Court of the Munsif having jurisdiction over the said property. In a Bombay case, the Court expressed a doubt whether cl. (d) enabled a Sub-Judge to transfer a decree for execution to a Small Cause Court, where the property attached was within the local jurisdiction of the Sub-Judge; *Krishna v. Bhan*, 18 B. 61.

**Cl. (2).**—"May of its own motion send it."—This clause corresponds with para. 3 of section 223 of the C. P. Code of 1882 with the addition of the words, "*Court of competent jurisdiction*." The addition seems to be very important; because in sub-section (1) the words "*competent jurisdiction*" have not been used. From this it is clear that when a Court on the application of the decree-holder sends its decree for execution to another Court, it can send it to any Court, although the suit in which the decree was passed was beyond such Court's pecuniary jurisdiction. But if a decree is transferred for execution under sub-section (2) by the Court of its own motion, then it must be sent to a Court of competent jurisdiction. This view has been taken by the Madras High Court in *Abdulla Sahib v. Ahmed Hussain*, 15 M. L. J. 148: (1914) M. W. N. 97: 22 I. C. 275, following 7 M. 397 and 17 M. 309. But contrary view was taken by the Calcutta High Court in 16 C. 457 and 465.

**Jurisdiction of the Court to Which the Decree is Sent for Execution.**—The Court which passed a decree may send it for execution to another Court, having jurisdiction and competent to execute that decree, having regard to the amount or value of the subject-matter of its ordinary jurisdiction.—*Durga v. Umataru*, 16 C. 465; *Gokul v. Aukhil*, 16 C. 457, and *Shamsundar v. Anath*, 37 C. 574: 14 C. W. N. 662. But see *Shanmuga v. Ramanathan*, 17 M. 309; and *Narasayya v. Venkata* 7 M. 397: 7 M. L. T. 132 and *Abdulla Sahib v. Ahmed Hussain*, 15 M. L. T. 148: (1914) M. W. N. 97: 22 I. C. 275. Thus there is a difference of opinion between the Calcutta and the Madras High Courts. The Madras High Court makes distinction between sub-sections (1) and (2) of this section by holding that where an application for transfer is made by a decree-holder under sub-section (1), it can be sent for execution to any Court, although the suit in which the decree was passed was beyond that Court's jurisdiction. But when a decree is transferred under sub-section (2), then it must be sent by a Court having jurisdiction to execute that decree having regard to the amount or value of the subject-matter. The reason being that the word competent occurs in sub-section (2) but not in sub-section (1).

The jurisdiction of a Court is circumscribed by and co-extensive with its territorial limits. Where property sought to be attached is *bona fide* without the jurisdiction of the original Court whose decree is sought to be

disapproving of the course taken, made the appellant liable for all costs.—*Jossoda Kcer v. Land Mortgage Bank of India*, 8 C. 916: 11 C. L. R. 348.

Held that in the case of a contract of indemnity, the liability of the party indemnified to a third person is not only contemplated at the time of the indemnity, but is the very moving cause of that contract, and in cases of such nature, costs reasonably incurred in resisting, reducing and ascertaining the claim, may be recovered.—*Bepin v. Chunder Sekhur*, 5 C. 811; 6 C. L. R. 167.

The plaintiff in a properly instituted interpleader suit is entitled to his costs, and has a lien for them on the fund.—*Secretary of State v. Mahomed Hussain*. 1 M. 860. See also *Bombay, Baroda and Central India Railway Co. v. Sassoon*, 18 B. 231.

When a wrong person being served with summons, instead of the real defendant, is dragged into Court, he is entitled to his costs of suit.—*London, Bombay and Mediterranean Bank v. Mahommed Ibrahim*, 4 B. 619.

There is nothing in section 12 of the Court Fees Act to preclude a Judge from exercising his discretion as to costs.—*Muthooranath v. Mohobuttoonnissa*, 20 W. R. 206.

Where proceedings were instituted through error of Courts, that is a circumstance to be considered in the exercise of discretionary power conferred by s. 220, C. P. Code, 1882 (s. 35), but it cannot be said that the error of a Court of Justice which leads a party to institute proceedings against another is sufficient to exonerate the losing party from paying the costs of the opposite party.—*Husaini Begum v. Collector of Muzaffarnagar*, 9 A. 11.

Under s. 620 of the C. P. Code, 1882 (Or. LXVI, r. 4), the costs of a reference to the High Court cannot be dealt with separately, but must be dealt with when awarding the costs of the suit. They are, however, in the discretion of the Court, and need not necessarily follow the event of the suit.—*Nicol v. Mathoora Das*, 15 C. 507.

The Official Assignee is entitled to his costs of appearing in an appeal against an order of adjudication.—*In the matter of Haroon Mahomed*, 14 B. 189.

The assignee of a decree, who is made respondent in an appeal from it, and take no steps actively to support it, ought not to be ordered to pay costs.—*Ram Morarji v. Ellis*, 20 B. 167.

Where an infant obtained a loan upon a false representation as to his age, held, that no suit to recover the money could be maintained against him but that the defendant (minor) should not be allowed costs in either Court.—*Dhanmull v. Ram Chunder*, 24 C. 268. See, however, *Saral Chand v. Mohim Bibi*, 25 C. 371.

Where appeals are heard *ex parte*, the respondent is nevertheless entitled to costs up to and including the judgment of the case, and also the costs of the application for that purpose.—*Sumbhunah v. Surjamani*, 25 C. 187 P. C.

tion for execution and the order granting the application for transfer, operates as revivor of the decree within the meaning of art. 180, Schedule II, of the Limitation Act, XV of 1877.—*Suja Hossein v. Monohur Das*, 24 C. 244: 1 C. W. N. (S. N.) xvii (17), reversing on review 22 C. 921, and following *Ashutosh v. Durga Charan*, 6 C. 504, and *Fatteh Narain v. Chandrabati*, 20 C. 551. But see *Nilmoni Singh v. Bissessur*, 16 C. 744.

An application for the transfer of the decree to another Court is a step in aid of the execution within the meaning of clause (4), art. 179 of the Limitation Act.—*Roma Nath v. Gowri Sanker*, 2 C. W. N. 415; *Chandra Nath v. Gurro Prossunno*, 22 C. 375; *Latchman v. Maddan*, 6 C. 513; *Collins v. Moula Baksh*, 2 A. 284; *Rajbullubh v. Joykissen*, 20 C. 29; *Husain Buksh v. Madge*, 1 A. 525; *Lachman v. Thondi Ram*, 7 A. 328, and *Villaya v. Jagannath*, 7 M. 307. See also *Barran v. Javerchand Sett*, 19 M. 67. See also *Panduranga Mudaliar v. Vithilinga*, 30 M. 537: 17 M. L. J. 417.

An application for the return to the decree-holder of a decree made to a Court to which it has been transferred for execution, and by which it has been partially executed, is not a step in aid of execution.—*Aghore Kali v. Prosunno Coomar*, 22 C. 427. But see *Krishnayyar v. Venkayyar*, 6 M. 81, where a contrary view appears to have been taken.

Where an application for transfer of a decree was made and granted, the decree-holder is entitled to the benefit of section 5 of the Limitation Act in making his application for execution under s. 230. C. P. Code, 1882 (Or. XXI, rr. 10, 21; s. 48).—*Peary Mohun v. Anunda Charan*, 18 C. 631. See also 22 M. 179.

An order by a Court passing a decree for the transmission of a decree for execution to another Court is not an order for the execution of the decree, nor is an application for the transmission, an application for execution.—*Jumandas v. Ranchodas*, 35 B. 103.

**Effect of Transfer of Small Cause Court Decree on the Question of Appeal.**—Where a Small Cause Court Decree was sent for execution to the regular Court, an order passed by that Court in the execution proceeding is appealable to the District Court, but a second appeal is barred where the decree is less than Rs. 500.—*Peary Lal v. Radha Nath*, 11 C. W. N. 861. See also *Harak v. Ram Sarup*, 12 A. 579; *Nazar Husain v. Kesrimal*, 12 A. 581; *Lala Kandha Pershad v. Lala Lal Behary Lal*, 25 C. 873; *Perumal v. Venkatarama*, 11 M. 130. *Atwari v. Maiku Lal*, 31 A. 1; *Veeramathari v. Subramania*, 2 M. W. N. 585; *Adhar Chandra v. Pulin Behari*, 20 C. L. J. 129.

**Appeal.**—An application for the transfer of the decree for execution is an application which involves a question relating to execution under s. 47. An appeal therefore lies against an order rejecting such an application.—*Bhabani Charan v. Pratap Chandra*, 8 C. W. N. 575 (16 C. 744 distinguished and 24 C. 244 followed). See also *Adhar Chandra v. Pulin Behari*, 20 C. L. J. 129.

**Award.**—An award filed under s. 11 of the Indian Arbitration Act, 1899, may be transferred for execution to another Court as a decree under this section; *Sital v. Clement Robson & Co.*, 43 A. 394: 61 I. C. 401. In the same way, an award made under rules framed under s. 43 of the Co-operative Societies Act may be transferred; *Krishnaji v. Mahadeo*, 46 B. 128: A. I. R. 1922 Bom. 877: 64 I. C. 387.

institution of fraudulent and dishonest suits, by empowering Courts to award compensatory costs in fraudulent suits. The evil exists to a larger extent in execution proceedings than in original suits, and consequently more effective means are to be provided to meet it.—*Statement of Objects and Reasons to Act IX of 1922.*

Compensation under this section can be awarded only after objection by the opposite party, *Hiralal v. Darbarilal*, A. I. R. 1926 Lah. 472: 91 I. C. 78.

it, or until it has fully executed the decree, and has certified that fact to the Court which sent the decree, or has executed it so far as that Court has been able to execute it within its jurisdiction, and has certified that fact to the Court which sent the decree, or until it has failed to execute the decree, and has certified that fact to the Court which forwarded the decree.—*Abda Begum v. Mazafar Husen*, 20 A. 129. Followed in *Maharaja of Bobbili v. Sree Raja Narasaraaju*, 37 M. 231; see 9 C. L. J. 448; 13 C. W. N. 533.

The jurisdiction of a Court, to which a decree has been transferred for execution, is limited to carrying out such execution and such Court cannot transfer it to another Court for execution.—*Shib Narain v. Bipin Behary*, 3 C. 512; 1 C. L. R. 339

If a Court, to which a decree is sent for execution, certifies to the Court which passed the decree that execution has failed, and that the application for execution has been dismissed for want of prosecution, it has no power to receive a subsequent application for execution and the proper Court then to deal with the decree, is the Court that passed it.—*Mathura Nath v. Kailas Chandra*, 3 C. W. N. (S. N.) cxxi (211).

When a decree of one Court has been transmitted to another Court for execution, and the proceedings have been struck off the file for default, the latter Court has jurisdiction to entertain a fresh application for execution and it retains its jurisdiction until the result of the execution proceedings is certified in the manner provided by this section; *Monorath v. Ambika*, 9 C. L. J. 448; 13 C. W. N. 533; 1 B. L. R. 91; 10 W. R. 46 F. B. referred to and 6 W. R. Mis 47 explained as overruled. See also *Abda Begum v. Musaffar*, 20 A. 129; and *Durgadas v. Umatul Hosein*, 9 C. L. J. 239.

"Where the former Court fails to execute the same."—It does not follow that because one application for execution fails in a Court to which the decree has been sent for execution, that Court is bound to send a certificate to the Court in which the decree was passed. It was intended that there should be complete failure such as would result in no benefit to the judgment-creditor for one reason or another and not merely a partial failure; *Vithu Daulata Patie v. Ganesh*, 25 Bom. L. R. 453.

Transfer of decree—Execution application dismissed by Court to which the decree was transferred for execution as barred by limitation.—Reversal of the order of dismissal on appeal by the High Court—Application by Decree-holder to the original executing Court for execution—Held that the effect of the order of the High Court was to put the parties in their former position and that the former executing Court was competent to proceed with the execution from the stage at which the proceedings were stopped by order of the Court of Appeal; *Udaibhan Partap Singh v. Sheoram*, 58 I. C. 997.

## 42. The Court executing a decree sent to it shall have

Powers of Court  
in executing trans-  
ferred decree.

the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself. [S. 228.]

The word "order" has been defined in s. 2, cl. 14 as the formal expression of any decision of a Civil Court which is not a decree. This section enacts that the provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of the orders.—*Parvathammal v. Chokalinga*, 41 M. 241: 1917 M. W. N. 602: 41 I. C. 341. Thus an order for the payment of adjournment costs to a party or an order directing the payment of money to a commissioner as remuneration for work done in connection with a partition suit may be executed as a decree, being an order within the meaning of s. 2, cl. 14.—*Shanks v. Secretary of State*, 12 M. 120; *Chandrakumar v. Kusum Kumari*, 52 C. 269: A. I. R. 1925 Cal. 57 But an order under s. 34 (c) of the Guardians and Wards Act, 1890, can not be so executed.—*Parvathammal v. Chokalinga*, 41 M. 241; nor an order for depositing additional costs of a Commissioner.—*Tadhin Prasad v. Sardar Coomar*, 10 C. W. N. 234.

Mode of Execution Orders.—See notes to Or. XX, r. 30.

Mode of Application for Execution.—See notes to Or. XXI, r. 11.

37. The expression "Court which passed a decree," or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include—

Definition of Court  
which passed a  
decree.

- (a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and
- (b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit. [S. 649, para. 2.]

## COMMENTARY.

**Alterations Made by the Section.**—This section corresponds with the second para. of section 649 of the C. P. Code of 1882 with some additions and alterations. In clause (a), the words "Court of first instance" have been substituted for the words "Court which passed the decree from which the appeal was preferred," which occurred in the old section. The reason of the alteration is that the Court of the first appeal never executes the decree passed in second appeal; it is the Court of the first instance that executes the decree passed in second appeal. The court of intermediate appeal never executes decree passed in second appeal.

"Court which passed a decree."—S. 37 defines the meaning of the expression "Court which passed a decree." S. 38 speaks of the Courts by which decrees may be executed. The object of this section is merely to avoid the cumbrous procedure which would result if the Court which passed the decree be held to be the only Court which could execute the



The Court to which a decree is transferred for execution has no power to entertain the transferee's application for a rateable share in the assets; such application can only be entertained by the Court which passed the decree.—*Tameshar Prasad v. Thakur Prasad*, 25 A. 443. Ref. to in *Baij Nath v. Holloway*, 1 C. L. J. 315 p. 318.

The Court to which a decree is sent for execution has the power to order restitution under s. 144 of the Code; *Mir Abdul v. Bibi Sena*, 7 S. L. R. 19: 20 I. C. 540.

The Court to which a decree is transferred for execution can enquire into the validity of a mortgage lien on attached property.—*Vishnu Dikshit v. Narsingrao*, 6 B. 584.

The Court to which a decree is sent for execution may exercise the powers under Or. XXI, r. 1 (b) and attach the decree of another Court; *Arumuga v. Yogamba*, 13 M. L. T. 227: 17 I. C. 323.

The executing Court can entertain an objection impugning the right of the decree-holder to proceed against property other than that charged in the decree, when the transmitting Court has made no order for execution but has merely transmitted the decree and the certificate of non-satisfaction; *Badri Prasad v. Gauri Nath*, 2 O. L. J. 18: 27 I. C. 597 (15 B. 28 *refd. to*).

In executing a decree of a Court of competent jurisdiction the Court executing it cannot question the validity of any portion of it. Its duties are only of a ministerial character.—*Ambaram Harivullobhdas v. Himat Sing*, 2 B. 109: and *Dabee Pershad v. Deldar Ali*, 13 W. R. 312. See, however, *Gobind Hari v. Sidhram Bin*, 7 B. H. C. 37.

"Same powers."—The Court to which a decree has been transferred for execution has under this section the same powers in executing such decree as if it had been passed by itself; *Sanwal Das v. Collector of Etah*, 46 A. 560: A. I. R. 1924 All. 700: 83 I. C. 848; *Mir Abdul v. Sona Dero*, 7 S. L. R. 19: 20 I. C. 540; *Sital v. Clement Robson and Co.*, 43 A. 394: 19 A. L. J. 187.

In execution of a decree for enforcement of hypothecation by sale of specific property, an objection by the judgment-debtor that the property is not transferable cannot be entertained.—*Madholal v. Katware*, 10 A. 130, 133 (note).

The Court executing a decree is not competent to go behind it.—*Ramphal v. Rambaran*, 5 A. 53. See also *Lalji Lal v. Barber*, 15 A. 334. Such Court must proceed on the assumption that the decree is valid and capable of execution; it cannot investigate the validity of the decree or its binding character; *Maharaj Kumar v. Lakpat Nath*, 15 C. W. N. 725. Nor can it refuse execution of the decree sent to it on the ground that the Court which passed it had no jurisdiction; *Chogala v. Trueman*, 7 B. 481; or on the ground that the decree is wrong in point of law, *Maharaja of Bharatpur v. Kanno Desi*, 23 A. 181; *Kashi v. Jamuna*, 31 C. 922; or that it is defective; *Rajerav v. Nanarav*, 11 B. 528; or that it directs sale of property which is not saleable within the meaning of s. 60 of the Code; *Sadasht v. Jayanti Bai*, 8 B. 185; *Madho Lal v. Katwari*, 10 A. 130; or that it was obtained by fraud, *Parvata v. Digambar*, 15 B. 307.

Where a decree-holder executes his decree, a judgment-debtor is competent to object that the decree is not the decree which is to be executed,

Where a Court, e.g., the Court of the Additional Subordinate Judge, is abolished but subsequently re-established, the Court does not cease to exist within the meaning of cl. (b) of this section; *Musst. Bibi v. Harihar*, 4 Pat. 688

S. 37, cl. (b) of the C. P. Code clearly has reference to transfers of territorial jurisdiction from one Court to another; *Venkatasami Naik v. Sivanu Mudali*, 42 M. 461.

**Where the Court of First Instance has Ceased to have Jurisdiction to Execute the Decree.**—Where after attachment of property in execution of a decree for money and an order for sale made by the Court which passed the decree, the property was transferred to the local limits of the jurisdiction of another Court newly established, *held*, that the Court which passed the decree ceased to have jurisdiction to continue the execution proceedings, and that the new Court having territorial jurisdiction over the property attached, was the proper Court to entertain an application for execution, by the sale of the property, and pass orders thereon; or in other words, if the Court which originally passed the decree has lost territorial jurisdiction, it could not even entertain and transmit an execution application; *Subbiah Naicker v. Ramanathan*, 37 M. 462: 26 M. L. J. 189: 22 I. C. 899. This view was overruled by a Full Bench of the same High Court in *Seeni Nadan v. Muthusami*, 42 M. 821 F. B. . 37 M. L. J. 284: 53 I. C. 218, where it was held that though the Court which originally passed the decree, has no jurisdiction to execute it because of the transfer of territorial jurisdiction, it has power to entertain an application and transmit it to the Court having territorial jurisdiction to execute the decree. The same question again came up for decision in *Muthukaruppa v. Paiya*, 45 M. L. J. 210 and *Satru Oherla v. Rajah of Jeypore*, 52 M. L. J. 605: 1927 M. W. N. 282: A. I. R. 1927 Mad. 627, where the same view as in the Full Bench case of *Seeni Nadan v. Muthusami*, 42 M. 821 F. B. was taken.

According to the Calcutta High Court, both the Courts, i.e., the Court passing the decree and the Court which subsequently got territorial jurisdiction over the property by transfer, are competent to entertain the execution application for the sale of the property but if the application is made to the Court which passed the decree, it should not order the sale but transfer the application to the Court having territorial jurisdiction for making, and executing the order for sale; *Latchman v. Maddan*, 6 C. 513; *Prem Chand v. Mokhoda*, 17 C. 699 F. B.; *Jafar v. Kamini*, 28 C. 238; *Udit v. Mathura*, 35 C. 974.

Although the High Court in its appellate side does not, as a general rule, execute its own decrees or orders, yet this circumstance in no way affects the vitality of its jurisdiction in this respect, and it cannot therefore be included among Courts which have ceased to have jurisdiction to execute decrees as specified under s. 649 of the C. P. C., 1882 (ss 36, 37), —*Hurro Pershad v. Bhupendro Narain*, 6 C. 201: 7 C. L. R. 79.

The terms of the section are general, and draw no distinction as to the nature of the cause which puts an end to the jurisdiction. It applies in cases where the territorial jurisdiction is changed as well as in cases where the status of parties is changed.—*Gauskha v. Abdul Ropkha*, 17 B. 162 See also *Vishnu Sakharam v. Krishnarao*, 11 B. 153 and 160-note.

" Shall be subject to the same rules in respect of appeal."—The order of the Court to which the decree is transferred for execution is subject to the same rules in respect of appeal as if the decree had been passed by itself. *See notes to s. 39, under the heading. "Effect of Transfer of Small Cause Court Decree on the Question of Appeal."*

A Small Cause Court decree was transferred for execution to the Court of a Munsif and an order was passed by that Court; *held*, that an appeal lay to the Court of the District Judge against the order; *Lareti v. Hazari Lal*, 14 A. L. J. 415: 33 I. C. 523.

An order for the arrest of a surety passed by an ordinary Court in execution of a Small Cause decree transferred to it for execution is appealable under ss. 42 and 47 of the C. P. Code in spite of the prohibition in s. 104 (h) of the Code; *Adhar Chandra v. Pulin Behary*, 20 C. L. J. 129: 19 C. W. N. 1085.

An order passed by a District Munsif in execution of a decree of a Small Cause Court transferred to him for execution against the immoveable properties of the judgment-debtor is appealable but a second appeal is prohibited by s. 102 C. P. Code; *Dattada Bhimaraju v. Sreerama Satrulu*, 37 M. L. J. 303: 53 I. C. 408.

**43.** Any decree passed by a Civil Court established in any part of British India to which the provisions relating to execution do not extend, or by any Court established or continued by the authority of the Governor-General in Council in the territories of any foreign Prince or State, may, if it cannot be executed within the jurisdiction of the Court by which it was passed be executed in manner herein provided within the jurisdiction of any Court in British India [S. 229.]

Execution of decrees passed by British Courts in places to which this Part does not extend or in foreign territory.

## COMMENTARY.

**Court Established by Authority of Governor-General.**—It not being shown that the Court of Dewan Akhilkar of Cooch Behar is a Court within the British territories, or a Court established by the Governor-General in a foreign State: *Held* that the Judge of Rajshahye had no jurisdiction to execute a decree of that Court.—*Jadab Chandra v. Dinanath*, 4 B. L. R. A. C. 184: 13 W. R. 154.

The Court of the Political Agent at Sikkim is a Court established or continued by the authority of the Governor-General in Council within the meaning of s. 43, C. P. Code; *Zamil Ahmed v. The Maharajah of Sikkim*, 15 C. W. N. 992: 38 C. 859. So is the Court of the Native Commissioner or Subordinate Judge of Kondh within the family domains of the Maharaja of Benares; *Probhu Narain v. Saligram*, 34 C. 576: 11 C. W. N. 622: 6 C. L. J. 30.

Decrees obtained in Scheduled Districts before the Code of 1877 came into force may be executed in the Regulation Districts without issue of the notification referred to in section 5 of the Scheduled Districts Act (XIV of



**By Notification.**—Notifications issued under this section are to be found in General Statutory Rules and Orders, Vol. I, pp. 622-25 and Vol. II, pp. 148; *Jirappa v. Jurgi*, 40 B. 551: 18 Bom. L. R. 486.

**Limitation Governing Execution of a Decree of a Native Court.**—The period of limitation for execution of a decree of a Native Court transferred for execution to a Court of British India is not the period prescribed by the law of such Native State but that prescribed by the law of British India, that is, within three years from the date of the decree (Limitation Act, Act No. 182); *Nabibhai v. Dayabhai*, 40 B. 504: 18 Bom. L. R. 481: 86 I. C. 368; *Hukum Chand v. Gyanender*, 14 C. 570.

**45.** So much of the foregoing sections of this Part as empower a Court to send a decree for execution to another Court shall be construed as empowering a Court in British India to send a decree for execution to any Court established or continued by the authority of the Governor-General in Council in the territories of any foreign Prince or State to which the Governor-General in Council has, by notification in the Gazette of India declared this section to apply. [S. 229-A.]

## COMMENTARY.

**Execution of Decrees in Foreign Territory.**—An application to a British Court to transfer its decree to the court of a Native State between which and the British Courts reciprocity prevails, is an application to take "step in aid of execution." The reason why the C. P. Code is silent as to the execution of decrees of British Courts by the courts of Native States is that the Indian Legislature has no power to legislate for foreign courts. *Janardan v. Narayan*, 42 B. 420: 20 Bom. L. R. 421. The policy of the Indian legislature has been to have the decrees of British Courts to be executed in the courts of Native States pursuant to the legislative authority of such States and not to make such courts in Native States to which decrees passed by British Courts are transferred, executing Courts for all purposes with authority to decide all questions relating to and arising in the course of the execution under s. 47, C. P. Code; *Pierce Leslie and Co. v. Perumal*, 40 M. 1069: 33 M. L. J. 130: 42 I. C. 294 (F. B.).

The tributary Mahals of Orissa, of which Mayurbhanj is one, do not form part of British India. Therefore, no decree of a Civil Court in British India, can be sent, by such Court for execution into a territory not forming part of British India without a prior notification as specified in the section. *Ratan Mahanti v. Khatoo Sahoo*, 29 C. 400: 6 C. W. N. 573. The Courts of British India have no jurisdiction to send their decrees for execution to any Court not situate in British India; *Kastur Chand v. Parshu Mohan*, 1 B. 230; *Chidambaram Chetty v. Ramanathan Chetty*, 32 M. L. J. 487.

By the notifications dated 29th March, 1889, and 3rd October, 1907, the Governor-General in Council declared, that s. 229A of the old Code (now s. 45) should apply to the Political Agent at Sikkim. A decree obtained in the Court of the Political Agent at Sikkim and transferred for execution to a Court in British India, could therefore be executed within the jurisdiction of that Court; *Zamil Ahmad v. Maharaja of Sikkim*, 38 C. 859: 15 C. W. N. 922.

also to the pleadings in the case; *Amolak v. Luchmi*, 19 A. 174; *Sri Nath v. Haripada*, 3 C. W. N. 637; *Syed Meer Hussain v. Subbaramappa*, 5 M. L. J. 230.

**39.** (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court—

Transfer of decree.

- (a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or
- (b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or
- (c) if the decree directs the sale or delivery of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it, or
- (d) if the Court which passed the decree considers for any other reason, which it shall record in writing that the decree should be executed by other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

[S. 223, paras. 2 & 3.]

### COMMENTARY.

This section corresponds with paras 2 and 3 of section 223 of the Code of 1882. It states the conditions under which a decree may be sent to another Court for execution, and specifies the circumstances under which the Court, which passed the decree, may on the application of the decree-holder or of its own motion, send it for execution to another Court.

*Clause (a)* provides that a decree may be transferred to another Court, if the judgment-debtor voluntarily resides or carries on business or works for gain within the local limits of the jurisdiction of that Court.

*Clause (b)* provides that a decree may be transferred, if the judgment-debtor has no property sufficient to satisfy the decree within the jurisdiction of the Court which passed the decree and has property within the local limits of the jurisdiction of the other Court.

*Clause (c)* provides that a decree may be sent to another Court for execution if the Court by which the decree was passed directs the sale or delivery of immoveable property situated outside the limits of its jurisdiction, and presumably within the limits of the jurisdiction of the Court to which it is sent for execution.

*Clause (d)* provides that if the Court which passed the decree considers for reasons which shall be recorded in writing, that the decree should

**Court which Passed the Decree can Issue precept even After decree Transferred to another Court.**—After the transfer of the decree for execution, the Court which passed it retains jurisdiction for certain purposes, the issuing of precept under s. 46 being one of those purposes. The object of a precept is to enable a decree-holder to obtain an *interim* attachment when there is ground to apprehend that he may otherwise be deprived of the fruits of his decree, and it can be issued by the parent Court even after the decree is transferred; *Galstaun v. Dinshaw*, 31 C. W. N. 653: A. I. R. 1926 Cal. 581.

**Validity of Precept cannot be Challenged by the Court to which it is Sent.**—The Court to which the precept has been issued cannot vest itself with jurisdiction to question the validity of the precept. The issuing Court makes the order, and the Court to which it is sent has only to carry it out. If any variation is to be made, it is the issuing Court which is competent to make it and not the Court to which it is sent; *Galstaun v. Dinshaw*, 31 C. W. N. 653: A. I. R. 1926 Cal. 581; 102 I. C. 573.

**"Unless the period of attachment is executed."**—Under section 46, C. P. Code, an attachment under precept is not invalidated by the fact that the order extending the statutory period of two months during which the attachment will remain in force is passed after the expiry of the said period, provided that the application for extension of time is put in before expiry of the said two months. In such a case the order relates back to the date of the petition and has retrospective effect; *Sivakolundu v. Ganapathy*, 3 L. W. 336 (13 W. R. 3, referred to).

**"In the manner prescribed in regard to" etc.**—The different modes of attachment of property in execution of a decree have been set forth in Or. XXI, Rules 41-57.

### QUESTIONS TO BE DETERMINED BY COURT EXECUTING DECREE.

**47. (1)** All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional Court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

**Explanation.**—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit. [S. 244.]

sale of the property in its own jurisdiction.—*Kali Das v. Lall Mohun*, 19 W. R. 37.

A Court of Small Cause may transfer a decree for execution to another Court, not only when the sale-proceeds of the moveables have not been sufficient to satisfy the decree, but also when no sale has taken place at all, and the decree remains unsatisfied by reason of there being no moveable property of the debtor within its jurisdiction.—*In re Chandra Kanto*, 3 C. L. R. 558.

A Mofussil Small Cause Court must adopt the machinery of this section in all cases where execution is sought against persons or property outside its local jurisdiction.—*Parbati Churn v. Panchanand*, 6 A. 243. See also *Hossein Aly v. Ashutosh*, 3 C. L. R. 30; *Abdul Gafur v. Albyn*, 30 C. 713; 7 C. W. N. 821; *Sayadkhan v. Davis*, 28 B. 198 and *Rango Jairam v. Balkishna Vithal*, 12 B. 44 and 45-n.

Where all the defendants against whom the certificate was made reside and the major portion of certificate property is situate within the jurisdiction of the Court which made the certificate, held that the section did not authorize the transfer of the certificate to another Court for execution.—*Girish Chandra v. Golam Kareem*, 33 C. 451; 10 C. W. N. 347; 3 C. L. J. 235.

A decree for rent can be transferred for personal execution against the judgment-debtor, notwithstanding that the tenure is situated within the jurisdiction of the Court which passed the decree.—*Bhabani Charan v. Pratap Chandra*, 8 C. W. N. 575.

A decree cannot be transferred to another Court for execution for a limited purpose only, e.g., to enable the decree-holder to share in the rateable distribution of sale-proceeds of a sale held by another Court; *Chatterpat Singh v. Kiratchand*, 1 Pat. L. W. 582.

**Clause (c).**—The provisions of section 38, read along with those of s. 39, plainly indicate that no Court can execute a decree in which the subject-matter of the suit or of the application for execution is property situated entirely outside the local limits of its jurisdiction.—*Begg Dunlop v. Jagannath*, 39 C. 104; 16 C. W. N. 402; 14 C. L. J. 228. *Veerappa Chetti v. Ramasami Chetti*, 43 M. 135. Clause (c) contemplates a case where the whole of the property and not any portion of it is situate beyond the local limits of the Court which passes the decree.—*Maseyk v. Steel & Co.*, 14 C. 661. *Aziz Bahsh v. Sultan Singh*, 43 P. R. 1918; 46 I. C. 9. See also *Gopi Mohan v. Doyboki Nundun*, 19 C. 13; *Tincouri Debya v. Shib Chandra*, 21 C. 639; and *Jagernath Sahai v. Dip Rani Koer*, 22 C. 871, where it has been held that a Court that has jurisdiction to pass a decree for the sale of property comprised in a mortgage has also power to carry out its decree by selling the property, even though a portion of the property be situate outside the local limits of the jurisdiction. The same view seems to have been taken in *Shurroop Chunder v. Ameerunnissa*, 8 C. 703. In *Premchand v. Mokhoda Debi*, 17 C. 699, F. B. and in *Dakhina Churn v. Bilas Chunder*, 18 C. 526, it has been held that a Court has no jurisdiction, in execution of a decree, to sell property over which it has no territorial jurisdiction at the time it passed the order of sale. The Full Bench case has impliedly overruled *Kartick Nath v. Tilukdhari Lall*, 15 C. 667, as has been pointed out in 37 M. 462.



The Explanation is new.—The conflicting rulings are noted under heading "*Explanation*," see *post*. "It is intended to put an end to conflict of judicial decisions."—See the Report of the Special Committee.

**Object and Scope of the Section.**—The subject matter of this section was at first dealt with in Act XXIII of 1861, amending the Code of 1832. Then it was followed by section 244 of 1877, in a modified form; subsequently the section appeared in section 244 of the Code of 1882 in a modified and enlarged form with the addition of the words *discharge and satisfaction*. It has now been re-enacted in the present Code after further extension of scope. The main object of this section is to prevent multiplicity of suits. This enactment, says their Lordships of the Judicial Committee, "was undoubtedly passed for the beneficial purpose of checking needless litigation, and their Lordships do not desire to limit its operation"; *Wahed Ali Muset. Jumae*, 18 W. R. 185; 11 B. L. R. 149 P. C. The section gives a cheap and speedy remedy to all suitors, by empowering the Courts to determine all questions arising between the parties to the suit relating to the execution, discharge or satisfaction of the decree, instead of driving them to a separate suit. The following observations of the Judicial Committee and of the High Courts will clearly explain the scope of the section. *Prosunno Coomar v. Kali Das*, 19 C. 623, their Lordships of the Privy Council said: "All objections to execution sales should be disposed of cheaply and as speedily as possible and the Courts in India have not placed any narrow construction on the language of s. 244 of the Code of 1832. Again in *Azgar Ali v. Asaboddin*, 32 C. 1031; 9 C. W. N. 134 p. 139, in 27 810; 4 C. W. N. 692; and in 26-A. 447, it has been held that, as wide as liberal construction is to be put upon s. 244 as is compatible with its provisions, so that questions which may be determined by the Court executing the decree should not be made the subject of separate suit and the parties should not be driven to an independent suit unless the case be clearly outside the scope and purview of the section. It would thus appear that by gradual legislation the scope of the section has been enlarged.

It should be noted here that section 244 of the Code of 1882, was a bar to a separate suit to set-aside an execution sale on the ground of fraud in publishing and conducting it, and that question was determinable under the section; but the addition of the word "*fraud*" in Or. XXI, r. 90 has taken away the application for setting aside a sale on the ground of fraud out of the operation of this section. The point will be fully considered hereafter under a separate heading. See *post*.

**Conditions Necessary for the Application of this Section.**—In order that this section may apply two conditions are essential: (1) The question must be relating to the *execution, discharge or satisfaction of the decree*; (2) the question must arise *between the parties to the suit in which the decree was passed or their representatives*. If the above conditions are fulfilled, the question must be determined by the Court executing the decree and not by a separate suit. In other words, a separate suit is barred by this section if the question relates to the execution, discharge or satisfaction of the decree and if it arises between the parties to the suit in which the decree was passed and not between strangers. It is thus manifest that the party must be arrayed as decree-holder or his representative on the one side and judgment-debtor or his representative on the other. Any question arising between decree-holder or his representative or between the judgment-debtor or his representative is clearly not a question within the purview of this

enforced and is in the hands of a third party who is not amenable to or permanently residing within the jurisdiction of the executing Court, the decree of the executing Court must be transferred to the Court, within the local limits of whose jurisdiction the property sought to be attached is for the time being; *Bank of Bengal v. Sarat Chandra*, 4 Pat. L. J. 141: 48 I. C. 943.

A decree cannot be transferred for execution to a Court which has no pecuniary jurisdiction to entertain the suit in which the decree was passed. The legislative changes introduced in s. 39 (2) i.e., that when the Court *suo moto* transfers a decree to a subordinate Court, the latter Court must be "of competent jurisdiction" does not mean that under s. 39 (1) a decree may be transferred to any Court for execution irrespective of its pecuniary jurisdiction; *Amrit Lal v. Murlidhar*, 3 Pat. L. T. 422: (1922) Pat. 229.

Where a decree was sent to a Court for execution, and was subsequently transferred by assignment, and the transferee applied for execution to the Court where it was sent for execution—*held*, that such application should be made to the Court which passed the decree.—*Kadir Baksh v. Illahi Buksh*, 2 A. 283.

Where a temporary Court is established without any definite local jurisdiction, execution against immoveable property in respect of a decree passed by it ought to be effected in the Court to which has been assigned local jurisdiction over the suits of such property, the decree being transferred for the purpose to that Court. *Held*, that the decree-holder should have applied under s. 39, C. P. Code, to have the decree transferred for execution to the Court having jurisdiction over the properties sought to be attached; *Venkatachelam v. Sithayamma*, 31 M. L. J. 22; 35 I. C. 296.

The Court to which a decree is transferred for execution has no jurisdiction to entertain an application for bringing on the record the legal representative of a deceased decree-holder. The application must be made to the Court which passed the decree, *Shriram v. Durga Prasad*, 55 I. C. 156.

The Court to which a decree for the sale of immoveable property is transmitted for execution has no power to pass a supplementary decree. The power of passing such a decree after judicial determination of the liability of the mortgagor is in the Court in which the mortgage suit was originally instituted; *Veluswami Naicker v. Eastern Development Corporation*, 33 M. L. J. 382.

**Transfer of Rent-decree by Revenue Courts for Execution by Civil Courts.**—Decree for rent made by Revenue Courts can be executed by a Civil Court to which they may be transferred under this section of the C. P. Code.—*Nitmoni Singh v. Tara Nath*, 9 C 295, P C 12 C. L. R. 361, P. C. See also *Ram Lochan v. Newaz Prosad*, 36 C 252-9 C. L. J. 125. *Contra*, 16 A 493.

A Civil Court has jurisdiction to execute a decree passed by a Revenue Court, after the transfer of its jurisdiction to the Civil Court —*Luchmeekant v. Bamun Dass*, 7 W. R. 472

**Step in Aid of execution**—Application to the Court where Decree is Transferred.—An application to the Court which passed the decree for a certificate to allow execution to be taken out in another Court is an applica-

The Explanation is new.—The conflictings rulings are noted under the heading "*Explanation*," see *post*. "It is intended to put an end to a conflict of judicial decisions."—See the Report of the Special Committee.

**Object and Scope of the Section.**—The subject matter of this section was at first dealt with in Act XXIII of 1861, amending the Code of 1859. Then it was followed by section 244 of 1877, in a modified form; subsequently the section appeared in section 244 of the Code of 1882 in a modified and enlarged form with the addition of the words *discharge and satisfaction*. It has now been re-enacted in the present Code after further extension of its scope. The main object of this section is to prevent multiplicity of suits. This enactment, says their Lordships of the Judicial Committee, "was undoubtedly passed for the beneficial purpose of checking needless litigation, and their Lordships do not desire to limit its operation"; *Wahed Ali v. Musst. Jumae*, 18 W. R. 185; 11 B. L. R. 149 P. C. The section gives a cheap and speedy remedy to all suitors, by empowering the Courts to determine all questions arising between the parties to the suit relating to the execution, discharge or satisfaction of the decree, instead of driving them to a separate suit. The following observations of the Judicial Committee and of the High Courts will clearly explain the scope of the section. In *Prosunno Coomar v. Kali Das*, 19 C. 688, their Lordships of the Privy Council said: "All objections to execution sales should be disposed of as cheaply and as speedily as possible and the Courts in India have not placed any narrow construction on the language of s. 244 of the Code of 1882." Again in *Azgar Ali v. Asaboddin*, 32 C. 1031; 9 C. W. N. 134 p. 139, in 27 C 810: 4 C W. N. 692; and in 26-A 447, it has been held that, as wide and liberal construction is to be put upon s. 244 as is compatible with its provisions, so that questions which may be determined by the Court executing a decree should not be made the subject of separate suit and the parties should not be driven to an independent suit unless the case be clearly outside the scope and purview of the section. It would thus appear that by gradual legislation the scope of the section has been enlarged.

It should be noted here that section 244 of the Code of 1882, was a bar to a separate suit to set-aside an execution sale on the ground of fraud in publishing and conducting it, and that question was determinable under that section; but the addition of the word "*fraud*" in Or. XXI, r. 90 has taken away the application for setting aside a sale on the ground of fraud out of the operation of this section. The point will be fully considered hereafter under a separate heading. See *post*.

**Conditions Necessary for the Application of this Section.**—In order that this section may apply two conditions are essential: (1) The question must be relating to the *execution, discharge or satisfaction of the decree*; (2) the question must arise *between the parties to the suit in which the decree was passed or their representatives*. If the above conditions are fulfilled, then the question must be determined by the Court executing the decree and not by a separate suit. In other words, a separate suit is barred by this section if the question relates to the execution, discharge or satisfaction of the decree and if it arises between the parties to the suit in which the decree was passed and not between strangers. It is thus manifest that the party must be arrayed as decree-holder or his representative on the one side and judgment-debtor or his representative on the other. Any question arising between decree-holder or his representative or between the judgment-debtor or his representative is clearly not a question within the purview of this

40. Where a decree is sent for execution in another province, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that province. [New.]
- Transfer of decree to Court in another province.

## COMMENTARY.

"As may be prescribed by rules in force in that province."—Where in different districts, different modes of execution are prescribed, and where the question is how a decree passed in one, but of which execution is sought in another of such districts, is to be executed, the executing Court must be guided by the rules in force in its own district.—*Martand Trimback v. Vinayak Kashinath*, 31 B. 5: 8. Bom. L. R. 832 But although a decree may be transferred by the Court which passed it to another Court for execution, the law of limitation applicable for its execution is that applicable to the decree of the former Court; *Tincowri v. Debendro*, 17 C. 491; *Sree Krishna v. Alumbi*, 36 M. 108.

To make the provisions relating to the transmission of decree of one Court to another for execution applicable, it is necessary that the provisions of the Code should regulate the procedure of both the Courts.—*Prabhu Narain v. Saligram Singh*, 34 C. 570: 11 C. W. N. 662.

41. The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same, the circumstances attending such failure. [S. 223, para. 4.]
- Result of execution proceedings to be certified.

## COMMENTARY.

Scope of the Section.—S. 41 requires that a Court to which a decree has been sent for execution shall certify to the Court which sent it that it has completely executed the decree or has failed to do so and is unable to do so any further. The section may also require certificates to be sent of the result of each application for execution that is made to the executing Court, but in any case such certificates have to be sent under the executive orders of the High Court. But the sending of a certificate does not of itself put an end to the jurisdiction of the Court to execute the decree and the sending of a certificate of the latter class cannot do so at all; *Indra Raj v. Murad Khan*, (1922) Nag. 210: 68 I. C. 657 (37 M. 231 Distd; 20 A. 129, followed).

"Shall certify to the Court which passed it."—S. 41, C. P. Code, does not prescribe any particular way in which the Court to which a decree is sent for execution should inform the Court as regards the result of the same. Where a Court has both Small Cause powers and original jurisdiction and a decree passed under the former is executed under the latter and an entry of satisfaction is made in the Small Cause Register, the section has been complied with; *Maniram Peerchand v. Vithu Ramji Patil*, 76 I. C. 549: (1923) B. 371.

The Court to which the decree is sent for execution retains its jurisdiction to execute the decree until the execution has been withdrawn from

debtor was dead at the date of the decree; *Ramacharya v. Anantacharya*, 1 B. 314; *Surrendro v. Durga Soondary*, 19 C. 513, 538; *Chetan v. Balhadra*, 21 A. 314; *Radha Prasad v. Lal Saheb*, 13 A. 53; *Janardhan v. Ram Chandra*, 26 B. 317; *Sripat v. Tribeni*, 40 A. 423: 45 I. C. 21.

A question relating to the liability of the sons for a debt contracted by the father and its binding nature upon them; *Shiv Ram v. Sakha Ram*, 3 B. 39: 10 Bom. L. R. 939; or a question relating to an inquiry into the extent of the son's liability for a father's debt, i.e., as to how far the property of the father in the hands of the son is liable; *Ram Kishore v. Suraj*, 18 C. W. N. 188, 141: 9 C. L. J. 5; or as to the liability of the ancestral property in the hands of the son governed by the Mitakshara School; *Deno Nath v. Ram Chander*, 6 C. L. J. 527, *Rash Beharee v. Bibee Wajim*, 11 W. L. 516, *Shurut Soonduree v. Paresh*, 12 W. R. 85; or the question whether the debts were contracted without legal necessity or tainted with immorality or illegality, *Sheikh Karoo v. Rameshwer*, 6 Pat. L. J. 451, *Umed Hathi v. Domani Bhaiji*, 20 B. 385; *Chandra Prosad v. Sham Koeri*, 33 C. 676, 6 C. L. J. 131, *Amar Chandra v. Sebak Chand*, 34 C. 642 F. B.: 11 C. W. N. 93: 5 C. L. J. 491, *Shib Ram v. Sakha Ram*, 33 B. 39, *Peary v. Chandi Dharan*, 11 C. W. N. 163: 5 C. L. J. 80, *Chhakaure v. Ganga*, 39 C. 862; *Ram Krishna v. Narayan*, 40 B. 126; or whether the property is ancestral or self acquired, liable or not in the hands of the sons to satisfy their father's debt under the Hindu law.—*Kashi Nath v. Baji Pandurang*, 11 Bom. L. R. 99; *Jagadip Singh v. Narain Singh*, 4 P. R. 1913 F. B.: 173 P. L. R. 1912; or whether a Hindu widow incurred debts for legal necessities or not and whether the debts were her personal debts; *Gajadhar v. Bindubashini*, 29 I. C. 181.

A question between the decree holder and the judgment debtor as to the saleability or otherwise of an occupancy holding; *Gahar Khalifa v. Kashimuddi*, 27 C. 415: 4 C. W. N. 557; *Bhiram Ali v. Gopi Kant*, 24 C. 355, *Durga v. Kali Prasanna*, 26 C. 727: 3 C. W. N. 586.

A question to the legality of an execution Court's procedure or as to its jurisdiction or power to order a sale; *Baldeo Das v. Bombay Mercantile Bank*, 6 O. L. J. 640.

The question whether the judgment-debtor has committed waste, e.g., cut down trees, after a decree against him for possession; *Hari v. Shakharam*, 25 Bom. L. R. 449: A. I. R. 1923 Bom. 391: 73 I. C. 443.

The question whether the decree-holder in collusion with the court-peon had made away with the bulk of the property which had been attached and that only a small portion of the whole had been put up for sale; *Gajadhar v. Babu Arjun*, 1 Pat. L. J. 558: 36 I. C. 280.

The question whether certain property is an accretion to the mortgaged property is a question to be determined under this section in execution of a decree for redemption obtained by the mortgagor against the mortgagee; *Moti Lal v. Bai Mani*, 52 I. A. 137: 49 B. 233: A. I. R. 1925 P. C. 86.

An application by the auction purchaser for refund of the sale price can be made under this section; *Bindeshri v. Badal Singh*, 45 A. 369: 21 A. L. J. 228.

The question whether a person alleged to be a representative of a deceased party to a suit is such representative and also the question whether property against which execution is sought in the hands of the representative

## COMMENTARY.

The Court to which a decree is transferred for execution has the same powers in executing such decree, as the Court which passed the decree; it has no more powers in execution than a Court executing its own decree. The order in executing such a decree is subject to the same rules in respect of appeal as if the decree had been passed by itself. It cannot question the validity of the decree nor can it entertain any objection to its legality or correctness. *Rajerav v. Nanarao*, 11 B. 528 p. 532. *Maharaja of Bharatpur v. Rani Kanno Dei*, 23 A. 181 P. C. : 5 C. W. N. 137. It cannot refuse execution where no fraud is suggested. *Subramanian v. Panjamna*, 4 M. 324. A Court to which a decree is sent for execution can go into the question of jurisdiction of the Court passing the decree, (see *Bhagwantappa v. Vishwanath*, 28 B. 378: 6 Bom. L. R. 342; and 15 B. 216; 17 A. 478; 10 B. 65; 7 B. 481 and 4 B. 638); as also into the question of fraud, (15 B. 216). The Court to which a consent decree is sent for execution cannot entertain the question of fraud, mistake or misrepresentation (see *Tirumbakrao v. Balwantrao*, 30 B. 101: 7 B. L. R. 659). Under the new Code, an executing Court cannot go into the question of the jurisdiction of the Native Court passing the decree.—*Veeraraghava v. Muga Seit*, 14 M. L. T. 96: (1923) M. W. N. 605: 20 I. C. 704.

**Powers and Functions of Court to which a Decree is Transferred for Execution.**—It is beyond the jurisdiction of the Court to which a decree has been transferred for execution to question the correctness, legality or propriety of the order under which the decree was sent to such Court for execution.—*Beer Chunder v. Maymana Bibee*, 5 C. 786; *Mulla Abdul v. Sakinaboo*, 21 B. 456; *Ram Lal v. Radhey Lal*, 7 A. 330. Nor can it refuse execution on the ground that the execution of the decree was barred by limitation on the date on which the order for execution was made and that the order was therefore illegal; *Hussain v. Saju*, 15 B. 28. Where, however, the transmitting court has made no order for execution but has merely transmitted the decree and the certificate of non-satisfaction, the court to which the decree is sent for execution has jurisdiction to decide whether or not the execution was barred by limitation; *Chhotay Lal v. Puran Mull*, 23 C. 39, *Leake v. Daniel*, 10 W. R. 10 F. B., *Bykuntath v. Jaygopal*, 7 W. R. 19. It may also stay execution under Or. XXI, r 26, pending the decision of the objection as to limitation by the Court which passed the decree, *Srihary v. Murari*, 13 C. 257.

Although the Court to which a decree is transferred for execution has no power to entertain any objection regarding the legality or propriety of the order directing execution or the right of the person shown in the order as the person entitled to execute the decree, yet it is the duty of the executing Court, on being acquainted with facts showing that the decree is no longer in existence, being superseded by another decree of the appellate Court, to refuse to allow the sale to proceed; *S. M. Hashim v. J. A. Martin*, A. I. R. 1927 Rang. 104 (A. I. R. 1926 P. C. 93, relied on).

An application by the transferee of a decree for execution after substitution of his name cannot be entertained by the Court to which a decree has been transferred for execution.—*Amar Chandra v. Guru Prosunno*, 27 C. 488. *Manorath v. Ambika*, 9 C. L. J. 443: 13 C. W. N. 533. See also *Kadir Baksh v. Ilahi Baksh*, 2 A. 283. See, however, 26 M. 258; *Lingam Krishna v. Raja of Vijayanagaram*, 26 M. L. J. 185. 15 M. L. T. 143: 23 I. C. 235.

will lie from it.—*Rahima v. Nepal Rai*, 14 A. 520. *Shashibhusan v. Charushila* 36 I. C. 809. An order refusing to enlarge the time prescribed in a decree, for redemption is appealable under s. 244, C. P. Code, 1882 (s. 47).—*Rango v. Bomshetti*, 26 B. 121.

An appeal lies against an order for stay of sale of property directed to be sold in execution of a mortgage-decree notwithstanding that the said order is in terms of one under s. 291. C. P. Code, 1882 (Or. XXI, r. 6).—*Shyam Kishen v. Soondar Koer*, 31 C. 373 (25 B. 300 dissented from).

A decree for possession on payment of a certain sum within a certain time.—The payment was made after the time. The decree-holder applied for execution. *Held* that the question was relating to execution and hence appealable; *Kauri Upadhaya v. Dwarka Singh*, 12 A. L. J. 12: 22 I. C. 926.

An order granting or rejecting an application under s. 293, C. P. Code, 1882 (Or. XXI, r. 71) for recovery of the loss occasioned by re-sale, is an order relating to execution within the meaning of s. 244, C. P. Code, 1882 (s. 47) and is therefore appealable.—*Bajinath v. Moheep Narain*, 16 C. 535. *See also Kali Kishore v. Guru Prosad*, 25 C. 99; 2 C. W. N. 408; *Amir Baksha v. Venkatachala*, 18 M. 439; *Rajendra Nath v. Ram Charan*, 2 C. W. N. 411; and *Vallabhan v. Penguni*, 12 M. 454. But see *Deoki Nandan v. Tapesri Lal*, 14 A. 201; *Ilahi Baksh v. Baij Nath*, 13 A. 530; and *v. Rahim Baksh v. Dhuri*, 12 A. 397.

A judgment-debtor, who had been arrested in execution of a decree of a District Munsif, applied for his release under s. 337 (a), C. P. Code, 1882 (Or. XXI, r. 38) and his application was granted. *Held* that an appeal lay against the order granting the application.—*Abdul Rahaman v. Mahamed Kasim*, 21 M. 29.

An order refusing to confirm a sale on the ground that there was no subsisting decree at the date when the confirmation of the sale is applied for, is appealable, as the question raised is one relating to the execution or satisfaction of the decree within the meaning of s. 244, C. P. Code, 1882 (s. 47).—*Doyamoyi v. Sarat Chunder*, 25 C. 175; 1 C. W. N. 656. *See also Set Umedmal v. Srinath Roy*, 27 C. 810; 4 C. W. N. 692.

Where a judgment-debtor applies to set aside a sale on the ground that the decree in execution of which the decree-holder purchased the property has been subsequently set aside, such an application falls under this section and is appealable.—*Ramyad Sahu v. Bindeswari Kumar* 6 C. L. J. 102 (27 C. 810: 31 C. 499 followed).

Two persons holding a joint decree purchased the property of their judgment-debtor in execution, and one of them only put in a receipt for part of the decretal amount under cl. (2) of s. 294, C. P. Code, 1882 (Or. XXI, r. 72) and on that ground the Court set aside the sale and directed a re-sale of the property. *Held*, that the order passed by the Court was an order under s. 244, C. P. Code, 1882 (s. 47), and was therefore appealable.—*Makka v. Sri Ram*, 24 A. 108.

Where an order requiring the decree-holder to give security within three days is made under s. 540, C. P. Code, 1882 (s. 96) by the Court executing the decree, such order is appealable as a decree under ss. 2 and 244, C. P. Code, 1882 (ss. 2 and 47).—*Luchmiput Singh v. Sitanath*, 8 C. 477; 10 C. L. R. 517.

and therefore not capable of execution; and when a decree is altered behind his back he can raise an objection as to the validity of such amendment.—*Abdool Hayai v. Chunia Kuar*, 8 A. 377.

In execution proceedings the decree must be taken as it stands, and it is not open in such proceedings to extend the scope of the decree—*Muttia v. Verammal*, 10 M. 283.

The Court executing a decree has no power to extend time for redemption allowed by the decree.—*Ishwargar v. Chuda Sama*, 13 B. 106.

All the Indian High Courts have now recognised it to be settled law that, where the decree is silent touching interest, the Court executing the decree cannot give execution for such interest.—*Sadasiva Pillai v. Ramalinga Pillai*, 15 B. L. R. 383, P. C.: 24 W. R. 103, P. C. The Court, in executing a decree, has no power to allow interest on costs when not mentioned in the decree. The proper course for obtaining such interest is to apply to the Court which passed the decree to amend it.—*Ulfutunnissa v. Mohan Lal*, 6 B. L. R. Ap. 33. See also *Brajo Soonduree v. Anund Moyee*, 16 W. R. 302.

**Power of the Court to which a Decree has been Transferred, to Determine Questions of Limitation.**—The Court to which a decree is sent for execution has jurisdiction to decide whether or not the execution is barred by limitation.—*Chhotay Lal v. Puran Mull*, 23 C. 39. See also *Leake v. Daniel*, B. L. R. Sup Vol 970: 10 W. R. 10 F. B.; *Narsing Dayal v. Hurryhar Saha*, 5 C. 897; *Jossoda Koer v. Land Mortgage Bank of India*, 8 C. 916; *Soihary Mundal v. Murari Chowdry*, 13 C 257. But see *Soomunt Dass v. Bhoobun Lal*, 21 W. R. 292: 13 B. L. R. Ap 28: 24 W. R. 151; *Ramu Rai v. Doyal Singh*, 16 A. 290; *Husein Ahmed v. Sayu Mahammad*, 15 B. 28; *Lutfullah v. Kirat Chand*, 13 B. L. R. Ap. 30: 21 W. R. 330.

**Continuance of Jurisdiction of Court executing Transferred Decree.**—The Court to which a decree is sent for execution retains its jurisdiction to execute the decree until the execution has been withdrawn from it, or until it has fully executed the decree and has certified that fact to the Court which sent the decree, or has executed it so far as that Court has been able to execute it and certified that fact to the Court which sent the decree, or until it has failed to execute the decree and has certified that fact to the Court which forwarded the decree; *Abda Begam v. Muzaffar*, 20 A. 129; *Vithu v. Ganesh*, 25 Bom. L. R. 453: A. I. R. 1923 Bom. 396; *Shidlingappa v. Shidmalappa*, 26 Bom. L. R. 345: A. I. R. 24 Bom. 359; until then, the Court which passed the decree has no jurisdiction to entertain an application for execution, and if any such application is made to that Court, it cannot be regarded as a step in aid of execution so as to save limitation; *Maharaja of Bobbili v. Narasaraju*, 43 I. A. 238: 39 M. 640; *Jnanendra v. Kumar Jogendra Narain*, 2 Pat 247: A. I. R. 1923 Pat. 384: 74 I. C. 608; *Ranga Swami v. Sheshappa*, 47 B. 56: A. I. R. 1922 Bom. 359: 68 I. C. 506.

**Limitation.**—Although a decree may be transferred by the Court which passed it to another Court for execution, the law of limitation applicable for its execution is that applicable to the decree of the former Court, i.e., of the Court which passed it.—*Sree Krishna v. Alumbi Ammal*, 36 M. 103. See also *Tincourie v. Debendra*, 17 C. 491; *Jogemoya v. Thakomoni*, 24 C. 473, F. B.; *Samba Sira v. Panchanada*, 31 M. 24.



a decree obtained against the latter formed part of the estate of the deceased is appealable in as much as this proceeding come under s. 47 and not under Or. XXI, r. 58; *Fakir v. Giribala*, 22 C. L. J. 304: 31 I. C. 321 (17 C. 711: 20 C. L. J. 481, 485 *fol.*).

An order setting aside a sale on the ground of fraud practised by the judgment-creditor on the judgment-debtor in connection with the sales in consequence of which the property was sold at an under-value, and purchased by the judgment-creditor himself, is appealable under s. 244, C. P. Code, 1882 (s. 47) as the order involves the decision of a question between the parties to the suit relating to the execution, discharge, or satisfaction of the decree.—*Ballodeb Lall v. Anadi Mohapatro*, 10 C. 410.

A party improperly brought on the record as representative of a deceased judgment-debtor objected that he was not such representative and his objection was allowed, but the Court did not give him his costs. *Held*, that, under the circumstances, he could appeal on the question of costs alone.—*Bishen Dayal v. Bank of Upper India*, 13 A. 290.

An order appointing a Receiver was appealable under s. 47 read with s. 51 (d) of the C. P. Code, if made in the course of an execution proceeding; *Syed Asad Raza v. Wahidunnissa*, 30 C. L. J. 231.

An order refusing to remove a Receiver is appealable, being an order made in respect of a question arising between the parties to a suit relating to the execution of the decree.—*Mithibati v. Nawroji*, 5 B. 45; *Maharajah Sir Rameshwar Singh v. Hitendra Singh*, 3 Pat. L. J. 513.

Where an application by the executor to the estate of a Hindu lady to execute a decree which fell to her share upon a partition of her husband's estate between herself and her sons, was refused on the objection of the sons and the judgment-debtors that the lady had only a life interest in the decree and that it passed to her sons on her death. *Held* that an appeal lay from the order under s. 244, C. P. Code, 1882 (cl. 47), the question being between the legal representatives of the lady and two judgment-debtors.—*Haridoy Kant v. Behari Lal*, 11 C. W. N. 239.

An order allowing or disallowing an application for execution by a transferee under s. 232, C. P. Code, 1882 (Or. XXI, r. 16) on any ground, is appealable under this section.—*Badri Narain v. Jai Kishen*, 16 A. 483; *Ganga Das v. Yakub Ali*, 27 Cal. 670 (26 C. 250; and 16 A. 483, *followed*). See also, *Subbuthayammal v. Chidambaram*, 25 M. 383; *Krishnama v. Appasami*, 25 M. 545; *Afsal v. Ram Kumar*, 12 C. 610 and *Gulsari Lal v. Daya Ram*, 9 A. 46; *Bolla Brahmada v. Ruddodaju Venkataraju*, 33 I. C. 71.

An application was made by judgment-debtors to stay the sale on the ground that, in the sale proclamation, the value of the property had been under-estimated. The Court dismissed the application, holding that the under-valuation was immaterial. *Held*, that the order, having been made with reference to a question which related to the execution, was appealable under s. 244, C. P. Code, 1882 (s. 47); *Sivasami Naicker v. Ratnasami Naicker*, 23 M. 568.

A complaint relating to the violation of Or. XXI, r. 66 C. P. Code, on the ground that notice was not given to all the parties concerned before the proclamation was settled is not covered by Or. XXI, r. 90 and can only be

1874), but not so where the decrees were obtained after that Code came into force.—*Kashi Mohun v. Bishnoo Pria*, 15 C. 365.

The Tributary Mahals of Orissa do not form part of British India; therefore, in the absence of a prior notification as specified in ss. 44 and 45, no decree by a Court in British India can be sent for execution to a territory such as Moyoorbhunj, which is a Tributary Mahal.—*Ratan Mahanti v. Khatso Sahoo*, 29 C. 400: 6 C. W. N. 573. See also *Kastur Chand v. Parsha Mahar*, 12 B. 230.

**44.** The Governor-General in Council may, by notification in the Gazette of India, declare that the decrees of any Civil or Revenue Courts situate in the territories of any native Prince or State in alliance with His Majesty and not established or continued by the authority of the Governor-General in Council, or any class of such decrees, may be executed in British India as if they had been passed by the Courts of British India. [S. 229 B.]

Execution of  
decrees passed by  
Courts of Native  
States.

## COMMENTARY.

**Execution of Decrees Passed by Courts of Native States.**—A Court in British India has power to refuse to grant execution on the ground that the Court of the Native State had no jurisdiction to pass the decree. S. 44 does not compel a British Court to grant execution of the decree of a Native Court. The language of the section is permissive in form. The word "may" in the section does not import "shall"; it does not empower the Governor-General in Council to direct that such a decree shall in all cases be executed by the British Court. A Court in British India has jurisdiction to entertain a suit on a judgment of a Native State. Such jurisdiction cannot be affected by an enactment of a permissive character such as that laid down in s. 44, C. P. Code (*per Sundara Iyer, J., Sadasiva Iyer, J., dissenting*); *Veeraghava Iyer v. Muga Sait*, (1918 M. W. N. 605: 14 M. L. T. 96: 20 I. C. 704: confirmed on appeal in 39 M. 24 F. B.: 27 M. L. J. 537. See also *Rama Aiyar v. Krishna Patter*, 39 M. 733: 30 M. L. J. 148; *Jirappa v. Jurgi*; 40 B. 551: 18 B. L. R. 486.

No Court in British India is bound to execute a decree of a foreign Court obtained by fraud. This section does not remove the decree of a Native State falling within its purview from the category of foreign judgments. It merely alters the procedure by which such a judgment can have effect given to it in British India.—*Haji Musa Haji Ahmed v. Parmanand Nursay*, 15 B. 216.

The judgment of a foreign Court obtained on a decree of a Court in British India is no bar to the execution of the original decree.—*Fakuruddin Mahomed v. Official Trustee of Bengal*, 7 C. 82.

A decree of a Civil Judge of Cooch Behar was sent for execution to the District Court of Rungpur and the copy of the record was signed by the *Sheristadar* instead of the Judge himself. *Held*, that certified copies of judicial record of the Courts of Cooch Behar cannot be received in evidence in the Courts of British India.—*Ganes Mahomed v. Tarini Charan*, 14 C. 540

*Pillai*, 21 M. 416. Followed in *Manickka Odayan v. Rajagopala*, 30 M. 507: 17 M. L. J. 291. But where the auction-purchaser is a third person and not the decree-holder and where the judgment-debtor's application to set aside the sale under s. 310-A of the C. P. Code, 1882 (Or. XXI, r. 89) is not contested by the decree-holder, the order does not fall under s. 244, C. P. Code, 1882 (s. 47) and is therefore not appealable.—*Amir Rai v. Baldeo Singh*, 5 C. L. J. 204.

Where the auction-purchaser is the decree-holder, and is obstructed by the judgment-debtor in his efforts to obtain possession, and the application of the auction-purchaser for possession is rejected. Held that the question was one relating to the execution and the order was appealable under s. 47.—*Muttia v. Appa Sami*, 13 M. 504. Followed in *Hari Charan v. Monmohan*, 18 C. W. N. 27, *Chockalingam v. Chidambaram*, (1920) M. W. N. 562; *Sivasamba Iyer v. Kuppan*, 29 M. L. J. 629. Where the obstruction was caused by a transferee of the suit properties, not a party to the suit, and appeal lay; *N. K. M. Meyyappa Chetty v. V. E. Meyyappan*, (1921) M. W. N. 698.

An application by a judgment-debtor dispossessed of immovable property disputing the right of the decree-holder to be put into possession is one under s. 244, C. P. Code, 1882 (s. 47) and the order rejecting the application is therefore appealable.—*Hardin Singh v. Lachman Singh*, 25 A. 343.

An appeal lies from an order under s. 231, C. P. Code, 1882 (Or. XXI, r. 15) such an order being one relating to the execution of a decree within the meaning of s. 244, C. P. Code, 1882 (s. 47).—*Lakshmi Ammal v. Pon-nassa Menon*, 17 M. 394.

An application by the judgment-debtor against the decree-holder and auction-purchaser to have the sale, at which the latter purchased the judgment-debtor's property, set aside on the ground of irregularity and fraud, comes under s. 244, C. P. Code, 1882 (s. 47) and a second appeal lies from the order rejecting the application.—*Heera Lal v. Chandra Kanto*, 26 C. 539.

An appeal lies from an order dismissing an application by some defendants to set aside the delivery of possession to the decree-holder purchaser as the dismissal was under s. 47; *Sivasamba Iyer v. Kuppan Samban*, 29 M. L. J. 629.

One who had attached a decree, and, obtained leave to bid at the sale in execution, purchased the property at a sum less than the amount due under the decree. The Court made an order under s. 308, C. P. Code, 1882 (Or. XXI, r. 86) cancelling the sale, and ordering a re-sale on the ground that the purchaser had not paid the full amount within the time limited. Held that an appeal lay against the order.—*Sha' Man Mull v. Kanagasabapathi*, 16 M. 20.

An order passed by a Court disallowing the objection of a judgment-debtor, that the value of the property specified in the sale proclamation under Or. XXI, rr. 66, 70 was grossly inadequate, comes under s. 47, and is therefore appealable.—*Lakshpati Koor v. Harko Singh*, 6 M. L. T. 252: 3 I. C. 342; *Rameswar v. Sham Kissen*, 8 C. W. N. 257; *Saurendra Mohan v. Kurruk Chand*, 12 C. W. N. 542; *Lachman Pershad v. Ganga Pershad*, 15 C. W. N. 713: 6 I. C. 180: 23 M. 568; *Ganga Prasad v. Raj Coomar*,

"By notification."—For Notification issued under this section, *see* General Statutory Rules and Orders, Vol. I, pp. 618-21.

**46.** (1) Upon the application of the decree-holder, the Court which passed the decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.

**Precepts.**

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree:

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property. [New.]

### COMMENTARY.

**Object of the Section.**—The object of this section is clearly stated in the Report of the Special Committee, which is reproduced below. The main object is to protect the decree-holder from being deprived of the fruits of his decree. When any such apprehension exist, the decree-holder can apply to the Court which passed the decree for issue of precepts; and if the Court is satisfied as to the truth of the decree-holder's allegations, it may issue precepts to any other Court which would be competent, that is which would have territorial and pecuniary jurisdiction, to execute such decree, *Galstaun v. Dinshaw*, 31 C. W. N. 653: A. I. R. 1926 Cal. 581: 102 I. C. 518.

"Though a system of execution based on precepts is, in the opinion of the committee, open to grave objection, they think that the idea may be utilised for the purpose of enabling a decree-holder to obtain an *interim* attachment where there is ground to apprehend that he may otherwise be deprived of the fruits of his decree. They have, for this purpose, introduced Clause 46 into the Bill. They think it expedient to fix a time for the continuance of this *interim* attachment, but at the same time they have empowered the Court to extend the period to meet the exigencies of particular cases.

"After careful consideration they have come to the conclusion that notwithstanding attachment under a precept, re-attachment on the ordinary application for execution will still be necessary. Though at first sight it may appear a better course to provide that re-attachment shall not be necessary when the issue of the precept is followed by the ordinary application for execution, after careful consideration they have come to the conclusion that it will be safer to require re-attachment, having regard to the agency by which execution is carried into effect." *See the Report of the Special Committee.*

an appeal lies therefrom; *Appiah Rukmani Ammal v. Narasimha Aiyar*, 41 M. L. J. 54: 63 I. C. 730.

An order directing rateable distribution under s. 73, of money paid under Or. XXI, r. 55 comes under this section and therefore second appeal lies; *Sorabji v. Kala*, 36 B. 156: 13 Bom. L. R. 1193. See also 29 M. L. J. 96: 17 M. L. T. 427. *Venkatakrishna Pattar v. Krishna Pattar*, 31 M. L. J. 820. But see *Hurmoozi Begum v. Musst. Ayesha*, (1921) Pat. 204: 5 Pat. L. J. 415, in which it was held that an order under s. 73 is not an order under s. 47 in as much as the question which arises is not one between the parties to the suit and the order rejecting the application does not otherwise come within the definition of decree in s. 2 because it does not conclusively determine the rights of the parties. So an order under s. 73 is not appealable.

An order for the arrest of the surety passed by an ordinary Civil Court in execution of a Small Cause Court decree transferred to it for execution is appealable under this section; *Adhar Chandra v. Pulin Behari*, 20 C. L. J. 129.

An order passed on appeal by the High Court determining a question mentioned in s. 244, C. P. Code, 1882 (s. 47) is a final "decree" within the meaning of s. 595, C. P. Code, 1882 (s. 109), and therefore such order is appealable to Her Majesty in Council, notwithstanding the value of the subject-matter of the suit in which the decree was made was less than Rs. 10,000—*Ram Kripal v. Rup Kuar*, 5 A. 693.

Where a decree of the High Court directed its holder to nominate a competent person as a manager of the property of a religious institution, and also directed the Subordinate Court to make the appointment after enquiring as to his fitness—*held* that the question of appointment of the manager related to the execution of the decree within the meaning of s. 244, C. P. Code, 1882 (s. 47) and that the order of the Court with regard to the appointment was appealable.—*Ponnambala v. Sivagnana*, 17 M. 848, P. C.

A mere allegation of fraud in an application under s. 311, C. P. Code 1882 (Or. XXI, r. 90) without any attempt to substantiate it, cannot give a right of second appeal in a case which would not otherwise have arisen.—*Umakant v. Deno Nath*, 5 C. W. N. 124: 28 C. 4. But see *Kokil Singh v. Edal Singh*, 31 C. 385.

Where a Court fixes mesne-profits arbitrarily and directs the production of evidence accordingly, such an order comes under s. 244, C. P. Code, 1882 (s. 47) and is therefore appealable.—*Surja Pershad v. Reid*, 29 C. 622: 6 C. W. N. 409.

Where a Small Cause Court decree is sent for execution to a regular Court and an order is passed under this section, such order is appealable.—*Peary Lal v. Radha Nath*, 11 C. W. N. 861.

A decision in execution proceedings determining the period for which mesne-profits are recoverable is appealable.—*Raja Bhup Indar v. Bijai Bahadur*, 5 C. W. N. 52, P. C.: 23 A. 152, P. C. (affirming 19 A. 296)

Attachment of property by two Courts in execution of the same decree—Dismissal of case by one Court. *Held* that the order of the Court dismissing the case in his file was one relating to execution and therefore appealable; *Surendra v. Shyama Charan*, 26 C. L. J. 42.

## COMMENTARY.

**The Old Section and the New Compared.**—Several alterations have been made in this section. Clause (a) of section 244 which ran as follows, "*questions regarding the amount of mesne-profits as to which the decree has directed enquiry,*" has been omitted from this section. The reason for the omission is that questions regarding the amount of mesne-profits are not properly matters for determination by the Court executing a decree; its duty does not arise until the amount of mesne-profits is ascertained in the suit; therefore the Legislature deemed it expedient, that such questions should be determined in the suit itself, in the manner provided by Or. XX, r. 12 and not by the Court executing the decree.

Clause (b) of section 244 which related to the determination of questions regarding the amount of any mesne-profits between the date of the institution of the suit and the execution of decree and questions regarding interest has also been omitted on the same principle and for similar reasons as will appear from the following Report of the Special Committee.

"The Committee have omitted sub-clauses (a) and (b) of sec. 244 of the existing Code; because they are strongly of opinion that questions regarding the amount of any mesne-profits or interest should be determined by the decree and not in execution."

Sub-section (1) corresponds to clause (c) of section 244 with the substitution of the words, "*all questions*" for the words "*any other questions*" and with the omission of the words "*or to the stay of execution thereof,*" both of which expressions occurred in the old section. The reason for the substitution and omission above referred to, is to enlarge the scope of the present section, in accordance with the observations of the Judicial Committee in *Prosunna Coomar v. Kali Das*, 19 C. 683, p. 689. The words "*stay of execution*" which occurred in the old section, have been omitted as being unnecessary, as they will now come within the words "*all questions*" at the commencement of the present section (*see* 14 C. L. J. 489).

Sub-section (2) is new. It has been added to give legislative sanction to the practice which was hitherto followed by the Courts under the Code of 1882. It empowers the Court to treat an application under this section as a suit and *vice versa*, subject to any objection as to limitation or jurisdiction, and to direct the payment of additional court fees where necessary. *See the notes and cases noted hereafter under the heading:—Sub-section (2).*

In the face of this sub-section, the dismissal of a suit on the ground that the plaintiff must have applied for executing a decree and not have sued to enforce specific performance of a contract is bad in law. The mere fact that the Court which decided the suit would have had no jurisdiction to determine the matter in execution is not a sound reason for not treating the suit as an application in execution; *Lakshi Manan Chetty v. Muthiah Chetty*, 18 M. L. T. 247.

Sub-section (3) has been re-drafted for the reasons stated in the following Report of the Special Committee: "The Committee have re-drafted sub-clause (3) and made it compulsory on the Court to determine questions arising as to representatives of parties. In their opinion it is inexpedient that separate suits should be instituted for the decision of such questions. The delay and expense involved are often very great and result in the needless protraction of litigation."

An application by a purchaser to set aside a sale in execution of a decree or for compensation on the ground of deficiency in the area of the land sold, does not fall within the provisions of s. 244, C. P. Code, 1882 (s. 47) inasmuch as the interest of the purchaser is adverse to the interest of the judgment-debtor.—*Ram Narain v. Dwarka Nath*, 4 C. W. N. 13: 27 C. 264.

Where the judgment-debtors apply for restitution of property purchased by the auction-purchaser at an execution sale on the ground that the decree-holders had sold certain property not covered by the decree. *Held* that the application was not maintainable under s. 47; *Munna Lal v. The Collector of Shahjahanpur*, 45 A. 96; 74 I. C. 995.

When an order absolute for sale of mortgaged property has been made, any question that arises as to that order absolute for sale is not a question relating to the execution of the decree within the meaning of s. 254, C. P. Code, 1882 (s. 47).—*Akikunni Bibee v. Roop Lall*, 25 C. 133. (21 C. 818; 22 C. 924 and 931; and 16 A. 23, *followed*). See also *Tara Pado v. Kamini Dassi*, 29 C. 644; *Hatem Ali v. Abdul Goffur*, 8 C. W. N. 102; *Pramatha Chundra v. Khetra Mohan*, 29 C. 651; and *Gopi Narain v. Bansidhar*, 9 C. W. N. 577, P. C.; 27 A. 325; 2 C. L. J. 173; 15 M. L. J. 191; 7 B. L. R. 42; 2 A. L. J. 336, (24 A. 179, *reversed*). But see *Kedar Nath v. Lalji Sahai*, 12 A. 61; *Oudh Behari Lal v. Nageshar Lal*, 13 A. 278; *Malikarjunadu v. Linga Murti* 25 M. 244, F. B., and *Bansidhar v. Gaya Prasad*, 24 A. 179. It would thus appear that there was a difference of opinion on this point between the several High Courts; but the above Privy Council case has settled the point; the rulings of the Calcutta High Court have been approved and 24 A. 179 has been reversed.

Satisfaction by the mortgagor of a decree for sale on a prior mortgage with money borrowed on the security of a subsequent mortgage of the same property—Suit by subsequent mortgagee for sale not barred by s. 244, C. P. Code, 1882 (s. 47).—*Tufail Fatima v. Bitala*, 27 A. 400 (24 A. 179, *distinguished*).

S. 244, C. P. Code, 1882 (s. 47) does not apply to a suit brought by one of two joint judgment-debtors who has been compelled to satisfy the decree in full against the other judgment-debtor for contribution; the liability being one which could not have been decided in execution of decree.—*Ram Saran v. Janki Panda*, 18 A. 106.

The question whether the plaintiff had paid the purchase-money into Court within time under a conditional decree in a pre-emption suit, is not one relating to execution of the decree within the meaning of this section, but is one which should be decided in the suit itself.—*Muhummad Ali v. Devi Din Rai*, 4 A. 420.

A dispute between judgment-debtors, does not relate to the execution, discharge or satisfaction of the decree and cannot be gone into by a Court executing the decree. When certain property was sold in execution, and the purchaser applied under s. 318, C. P. Code, 1882 (Or. XXI, r. 95) that possession be made over to one of the judgment-debtors and the other judgment-debtor objected that the property was purchased with his money and not with the money of the other. *Held*, that the dispute did not relate to execution.—*Kastura Kumar v. Gya Prasad*, 29 A. 207; 4 A. L. J. 47: A. W. N. (1907) 29.





before the property could be sold a second time; the decree-holder purchaser continued in possession. *Held*, that a suit by judgment-debtor for recovery of the property is not barred by this or by s. 144 of the Code, as after the close of the execution proceedings, the question was not one relating to execution, discharge of satisfaction of the decree; *Girdhari Lal v. Khushaliram*, 31 A. 364; 6 A. L. J. 383.

**Orders In Execution Proceedings, Not Appealable.**—No second appeal lies from an order setting aside a sale under s. 312, C. P. Code, 1882 (Or. XXI, r. 92) although an allegation of fraud is made in the application for setting aside the sale, when no attempt is made to substantiate the allegation.—*Umakanta Roy v. Dino Nath*, 28 C. 4: 5 C. W. N. 124. *See*, however, *Rajoni Kant v. Hossainuddin*, 4 C. W. N. 538; and *Kokil Singh v. Edul Singh*, 31 C. 385.

Where a decree-holder auction-purchaser applied for delivery of possession of the properties purchased and obtained delivery of possession by order of Court notwithstanding objections by the judgment-debtor that the properties did not pass by the sale, the judgment-debtor preferred an appeal. *Held*, that no appeal lay; *Haji Abdul Gani v. Raja Ram*, 20 C. W. N. (F. B.): 1 Pat. L. J. 232.

No second appeal lies from an order refusing to set aside an auction sale for irregularities; *Babulal v. Chandra*, 6 P. W. R. 1915; 38 P. L. R. 1915; *Maung Shwe Myat v. Maung Shwe Bin*, 11 Bur. L. T. 26; *Jagadish Narain v. Mahamuddin*, 46 I. C. 529.

No second appeal lies from an order under Or. XXI, r. 89, C. P. Code; *Rasiaddin v. Bindeshri*, 36 I. C. 769.

It is only when Or. XXI, r. 90 as well as s. 47 applies to the application to set aside an auction sale, that a second appeal is incompetent. But where s. 47 applies there is a second appeal from the order; *Anantha Rama v. Kovilamma*, 30 M. L. J. 611.

An application for review of an order dismissing an execution case for non-payment of process-fees is not an application under s. 244, C. P. Code, 1882 (s. 47) but one for review, and no appeal lies therefrom.—*Raja Padmanund Singh v. Doorga Pershad*, 4 C. W. N. 39; *Gour Chandra v. Janardan*, 68 I. C. 337.

An order passed in a suit for partition, subsequently to the preliminary decree appointing a commission to make the partition is not an order in execution, and is therefore not appealable under s. 47.—*Jogodishury v. Kailasha Chandra*, 24 C. 725, F. B. *See also Srinivasa Mudali v. Ramasami Muddali*, 18 M. L. T. 145; 1915 M. W. N. 725 (28 M. 127; 18 M. L. J. 23 *folld.*; 36 A. 350; 28 M. L. J. 471 *distd.*)

An order dismissing an application for execution for default of the decree-holder is not appealable; *Gour Chandra v. Janardan*, 4 Pat. L. T. 204.

An order under s. 174, Bengal Tenancy Act (VIII of 1885), is not one under s. 244, C. P. Code, 1882 (s. 47) and therefore not appealable.—*Kishori Mohun v. Sarodamoni*, 1 C. W. N. 80.

There is no appeal against an order under s. 47 determining the questions between the parties to a suit as to the amount of mesne-profits

section. (*See* 31 A. 82 F. B.). Each of the above two conditions have been separately considered below under different headings and sub-headings.

**"Questions relating to the execution, discharge or satisfaction of the decree."**—The answer to the question whether an order in execution proceedings is within the scope of s. 47 depends upon its nature and contents. If it decides a question relating to the execution, discharge or satisfaction of the decree and if the decision has been given between the parties to the suit or their representatives in interest, the order falls within the scope of s. 47; *Raghubar v. Jadunandan*, 16 C. W. N. 736: 15 C. L. J. 89; *Joytara v. Prankrishna*, 13 C. L. J. 257, *Srinivas v. Kesho Prosad*, 38 C. 754: 14 C. L. J. 489; *Shasi Bhusan v. Radha Nath*, 20 C. L. J. 433. The words "questions relating to the discharge or satisfaction of the decree" must be limited to the question of discharge or satisfaction arising in course of execution, or in connection therewith; *Jogmaya v. Tackomoni*, 24 C. 473. The questions contemplated by s. 47 relate to enforcement of the obligation created by the decree and must have reference to matters arising subsequent to the passing of the decree and not antecedent to it; *Ariabudra v. Dorasami*, 11 M. 418; *Narain Singh v. Mt. Rameshawar*, 6 C. W. N. 796, S. 47 contemplates that there must be some question in controversy and conflict in execution which has been brought to a final determination and conclusion, so as to be binding upon the parties to the proceedings and which must relate in terms to the "execution, discharge or satisfaction of decree." *Hulas Rai v. Pirthi Singh*, 9 A. 500.

**Questions within the Section.**—The following questions relate to the "execution, discharge or satisfaction of the decree" and as such have been held to be within the section:—

Claim for excess land taken in execution of a decree; *Biru Mahata v. Shama Charan*, 22 C. 483; *Pratab v. Beniram*, 2 A. 61; *Abdul Karim v. Istamunnissa*, 38 A. 339; *Ganpatrao v. Anandrao*, 44 B. 97.

Question whether the property is liable to be sold in execution of a decree; *Mungeshwar v. Jumoona*, 16 C. 603; and whether the property sold was liable to attachment in execution of the decree; *Mohan Singh v. Panchanan*, 53 C. 837: A. I. R. 1927 Cal. 106: 99 I. C. 180.

Restitution of property taken in execution of a decree, when the decree is amended; *Niratan v. Ramratan*, 5 C. W. N. 627.

Proceedings for delivery of possession of property purchased by the decree-holder; *Sadashiv v. Narayana*, 35 B. 452.

A question whether assets held by Court can be rateably distributed; *Sorabji Coovarji v. Kala Raghunath*, 36 B. 156.

Restitution of property sold in execution when the sale is set aside; *Viraraghava v. Venkata*, 16 M. 287; *Daulat Singh v. Jugul Kishore*, 22 A. 108.

Question whether omission to serve notice under Or. XXI, r. 22 has resulted in substantial injury to the owner of the property sold; *Kumed v. Prasanna*, 40 C. 5.

Claim by legal representative of a deceased judgment-debtor for restitution of property taken in execution, on the ground that the judgment-

execution, discharge or satisfaction of decree.—*Jagarnath v. Kartick*, 7 C. L. J. 436.

No appeal lies from an order granting a review and directing the amendment of a sale-certificate by correcting the boundaries of the land sold, as the question raised is not one relating to execution, discharge, or satisfaction of the decree, which has already been executed.—*Bujha Roy v. Ram Kumar*, 26 C. 529; 3 C. W. N. 374. See also *Mammod v. Locke*, 20 M. 487.

An order refusing to amend a sale-certificate is not appealable either under s. 244 or under s. 588, C. P. Code, 1882 (s. 47 and s. 104; Or. XLIII, r. 1).—*Suddo Kunwar v. Bansi Dhar*, 23 A. 476.

An application to stay execution of, and to set aside a decree passed with the consent of the guardian of a minor defendant, for want of sanction of the Court under s. 462, C. P. Code, 1882 (Or. XXXII, r. 7) was rejected. Held, that no appeal lay against the order of rejection, as it is not a question relating to execution of the decree.—*Arunachallam v. Murugappa*, 12 M. 503.

No appeal will lie from an order under s. 295, C. P. Code, 188 (s. 73) dismissing, on the ground that the decree was barred by limitation, a decree-holder's application to share in the assets realized under another decree against the same judgment-debtor. Such an order cannot be regarded as a decree under ss. 2 and 244, C. P. Code, 1882 (ss. 2 and 47).—*Kashi Ram v. Mani Ram*, 14 A. 210. Referred to in *Ram Chandra v. Hamiran*, 6 C. L. J. 437; 11 C. W. N. 433. See, however, 36 B. 156; 13 Bom. L. R. 1189. Distinguished in *Balmer Lawrie & Co. v. Jadunath*, 42 C. 1; 19 C. W. N. 1202 on the ground that an order under s. 73 of the Code between two rival decree-holders, which does not affect or interest the judgment-debtor is an order in execution proceeding but is not a decree, as all the conditions enumerated in s. 47 are not present, and consequently not appealable; see also *Jagadish Chandra v. Kripanath*, 36 C. 180 where it has been held that an order under s. 73 as between parties who are not the same as in the decree, in execution of which the assets were realized is not a decree and no appeal lies against the order.

An objection by the reversioner in execution to the attachment on the ground that the decree is not binding on his reversionary right is not triable under s. 244, C. P. Code, 1882 (s. 47) and any adjudication thereon is not appealable.—*Tailapragada v. Boorugapalli*, 30 M. 402; 17 M. L. J. 288.

An order refusing to discharge a surety under s. 336, C. P. Code, 1882 (s. 55) for an insolvent judgment-debtor filing his petition, where the surety was entitled to his discharge, is not an appealable order.—*Baima Mal v. Jamma Das*, 15 A. 183.

An order of a Court fixing a valuation of the judgment-debtors' property under Or. XXI, r. 66 is not a decree and therefore not appealable; *Deokinandan v. Raja Dhakeshwar Prasad*, 2 Pat. L. J. 13.

No appeal lies against an order settling the terms of a sale proclamation under Or. XXI, r. 66, C. P. Code; *Giridhanlal v. Altaf Ali*, 46 I. C. 564.

No second appeal lies from an order setting aside a sale under s. 294, C. P. Code, 1882 (Or. XXI, r. 72) notwithstanding that s. 244, C. P. Code,

of a deceased party was in fact the property of such deceased party and not the separate property of the representative; *Beni Prasad v. Lukhna Kunwar*, 31 A. 823.

The question whether the subject-matter of the petition was an adjustment of the decree within the meaning Or. XXI, r. 2; *Erusapa v. Commercial Bank*, 23 M. 877; or whether an adjustment of decree out of Court is fraudulent; *Mahammed Kazim v. Rukia Begum*, 41 A. 443; 17 A. L. J. 677: 50 I. C. 65.

A question regarding the appointment or removal of a receiver appointed by a decree in an administration suit; *Mithibai v. Lamji Nowroji*, 6 B. 54.

The question whether a person in whose favour a will has been executed is entitled to execute a decree obtained by the testator as his legal representative; *Bhavani Shankar v. Narain Shankar*, 23 B. 536.

The question as to the amount of security to be given by a defendant against whom a decree has been passed, when a stay of execution is granted pending appeal; *Ishwargar v. Chudasama*, 12 B. 80. See also *Dagdu v. Chandra Bhan*, 24 B. 314.

The question whether execution is barred by the law of limitation; *Nejabat Ali v. Shaikh Moha*, 11 B. L. R. 42; *Sumeer Sirdar v. Asseemooddem*, 23 W. R. 257.

A claim preferred by the legal representative of a defendant should be properly investigated under the section; *Subramania v. Manika*, 2 I. C. 432.

An agreement that the decree-holder would not take possession for two years after confirmation of sale comes within the purview of this section; *Hari v. Monmohan*, 18 C. W. N. 27.

**Orders in Execution Proceedings, Appealable.**—In deciding whether an appeal is competent, the substance of the order must be looked at, and the provision of the law quoted by the Court passing the order is not decisive; *Mangayya v. Sriramulu*, 21 M. L. J. 477: 13 M. L. T. 347 10 I. C. 448.

An order refusing to execute a decree is a decree with the meaning of s. 47 C. P. Code and an appeal lies from such order, 10 Bur. L. T. 169: 36 I. C. 10. An order of the Court finally negating the right of the decree-holder to proceed against the land of the judgment-debtor is appealable; *Sardarn Datar Kuar v. Ramrattan*, 2 Lah. L. J. 398.

An order dismissing an application under s. 258, C. P. Code, 1882 (Or. XXI, r. 2) that adjustment of a decree be recorded as certified, falls within the words "any other question relating to satisfaction" of s. 244, C. P. Code, 1882 (s. 47) and is therefore appealable.—*Lingayya v. Narasimha*, 14 M. 99. See also *Jamna Prasad v. Mathura Prasad*, 10 A. 129; *Guruvayya v. Vudayappa*, 18 M. 20 and *Rama Kamlessuri v. Sukhan Singh*, 7 C. W. N. 172.

An order refusing application for appointment of commissioner to effect division of property by metes and bounds in a partition suit is appealable as decree.—*Latchmanan v. Ramanadhan*, 28 M. 127.

An order under section 87 of Act IV of 1882, extending the time for the payment of the mortgage-money by a mortgagor, is a decree within the meaning of ss. 2 and 244, C. P. Code, 1882 (ss. 2 and 47), and an appeal

No appeal lies against an order under Or. XXI, r. 66 (4); *N. C. Chatterji v. R. M. K. Chetty*, 10 Bur. L. T. 115.

An order settling the terms of a sale proclamation and directing its issue is not appealable; *Joges Chandra v. Hemendra*, 35 C. L. J. 170.

An order directing delivery of possession by the judgment-debtor to the auction-purchaser after confirmation of the sale, is not an order relating to the execution, discharge or satisfaction of the decree, and is not appealable; *Sasi Bhusan v. Radhanath*, 19 C. W. N. 835; 20 C. L. J. 433; 25 I. C. 267; *Aduram v. Nakuleswar*, 29 C. L. J. 48; 49 I. C. 137.

**Questions arising both Before and After Completion of Execution Come under this Section.**—The expression "questions arising" not only means and includes questions which arise in the course of the execution proceedings, but also questions which arise between the parties after the completion of the execution proceedings and the satisfaction of the decree. In other words, this section applies as well to a dispute arising between the parties after the decree has been executed, as it does to a dispute arising between them previous to execution. See *Imad v. Jagan Lal*, 17 A. 478; 15 A. W. N. 109; see also *Dhan Kunwar v. Mahtab*, 22 A. 79 F. B. where the application of the judgment-debtor to recover the excess amount realized by the decree-holder was entertained under this section, after satisfaction of the decree. See also *Collector of Jaunpur v. Bithal Das*, 24 A. 291. Similar view was also taken in *Nilratan v. Ram Rattan*, 5 C. W. N. 627 where it has been held that even after the final disposal of an execution case on the ground of all satisfaction, an application for refund of excess money made by mistake of calculation, is entertainable under this section. This case was followed in 2 O. C. 106, p. 107. But in the following cases a different view was taken. In *Fakaruddin Mahomed v. The Official Trustee*, 10 C. 538, it has been held that the words, "the following questions shall be determined by order of the Court executing the decree," must be interpreted to mean the Court executing the decree at the time when the application is made, and do not include the Court which has executed the decree, and has therefore, become *functus officio*. This case was followed in 101 P. L. R. (1901): 63 P. R. (1901). See also 113 P. L. R. (1904): 45 P. R. 1904. See also *Girdhari Lal v. Khusali Ram*, 31 A. 364; 6 A. L. J. 383; *Nizam Din v. Bhagatram*, 60 I. C. 516.

An application to set aside a sale for fraud is maintainable under this section, even after the confirmation of the sale; but an application under Or. XXI, r. 90 should ordinarily be made before its confirmation; *Golam Ahmad v. Judhister*, 30 C. 42; 7 C. W. N. 305. Followed in *Harihar v. Rama Pandar*, 39 B. 698; 11 Bom. L. R. 1113; see also *Pita v. Chuni Lal*, 31 B. 207.

**Determination of Questions, where, by Mistake or Misrepresentation, Smaller Sums are Realized in Full Satisfaction.**—Where on the representation of both the parties, an execution case was disposed of on full satisfaction. Held, that an application to allow the execution proceedings to be re-opened was maintainable under s. 244, C. P. Code, 1892 (s. 47), on the ground that the decree-holder had acted under a mistake or misrepresentation in calculating the amount due under the decree.—*Nilratan v. Ram Rattan*, 5 C. W. N. 627. See also *Paranjpe v. Kannade*, 6 B. 148. But see *Fakaruddin Mahomed v. The Official Trustee of Bengal* 10 C. 538.

An order by which security offered by the decree-holder for getting delivery of possession of the property forming the subject matter of the decree is accepted and the delivery of possession is directed to be made to the decree-holder is appealable in as much as the order directing delivery of possession is a final order and not an interlocutory or intermediate one; *Rudra Narayan v. Naba Kumar*, 22 C. W. N. 657.

An order requiring a surety for a receiver to pay up money due under s. 145, C. P. Code can be executed against the surety and an appeal lies from such an order under s. 47; *Maung Po Thein v. Ma Waing*, 13 Bur. L. T. 91.

*Held* that a Collector applying, on behalf of Government, under s. 411, C. P. Code, 1882 (Or. XXXIII, r. 10) for recovery of Court-fees by attachment of a sum of money payable under a decree to a plaintiff suing in *forma pauperis*, might be deemed to have been a party to the suit in which the decree was passed within the meaning of s. 244, C. P. Code, 1882 (s. 47) and that an appeal would therefore lie from an order granting such application.—*Janki v. Collector of Allahabad*, 9 A. 64. But see *Collector of Ratnagiri v. Janardan*, 6 B. 590; and *Collector of Trichinopoly v. Sivarama Krishna*, 23 M. 73.

A judgment-debtor applied under s. 284, C. P. Code, 1882 (Or. XXI, r. 64) that certain property attached in execution of a decree against him should be sold in successive shares, but the Court refused the application. *Held* that the question between the parties was relating to execution of a decree, and therefore the order was appealable.—*Chaudhari Sital Pershad v. Jhumah Singh*, 4 C. L. R. 27. See also, *Samu Pillai v. Krishnasami*, 21 M. 417.

The Privy Council after discharging the decrees of the two appellate Courts directed the original Court to frame rules for carrying out a scheme of management. *Held* that the District Court in framing the rules acted in execution of the decrees and his order was therefore appealable; *Prayaga Das v. Tirumala*, 31 M. 406 (17 M. 334 approved).

An order for arrest and detention made in execution of a decree is an order made under s. 47 of the Code, and being an order for the execution of the decree appealable; *Ardeshrji Framji v. Kalyan Das*, 32 A. 3: 6 A. L. J. 912; *Mehr Chand v. Ram Lal*, 73 I. C. 766. An order of the executing Court refusing to arrest the judgment-debtor in execution of a decree is an order under s. 47 and therefore appealable; *Lala Das v. Mina Mal*, 4 Lah. L. J. 286; A. I. R. 1922 Lah. 259; *Rajkarni v. Karam Elahi*, 23 P. L. R. 1920: 53 I. C. 68.

An order for attachment and sale of property in execution of a decree is an order "of the same nature" with an order made in the course of a suit for attachment of the debtor's property, and is, therefore, appealable under this section.—*Polokdhari Rai v. Radha Pershad*, 8 C. 28, P. C. (reversing 5 C. 50; 4 C. L. R. 342).

An order refusing to allow the legal representative of a deceased decree-holder to take out execution until certificate under the Succession Certificate Act has been obtained, is an order falling under this section, and is therefore appealable.—*Hati Lall v. Hardeo*, 5 A. 212.

A decision as to whether a property standing in the name of the legal representative of a deceased judgment-debtor, and attached in execution of

By a decree upon a compromise, the plaintiff obtained a greater quantity of land than claimed. In execution the defendant objected that the plaintiff cannot get a greater quantity than originally claimed by him, and the Court allowed the objection. The plaintiff then sued for possession of the larger amount of land mentioned in the compromise. *Held*, that the suit was not maintainable, and that the matter might properly be determined in execution proceedings.—*Mohibullah v. Imami*, 9 A. 229.

**Determination of Questions as to Transferability of Occupancy-holding.**—When an application is made to execute a decree for money by the attachment and sale of an occupancy holding, the judgment-debtor is entitled, under this section to raise the question as to whether the holding is saleable according to custom or usage, and to have that question determined by the Court executing the decree.—*Majed Hossen v. Raghubeer*, 27 C. 187; *Gahar Khalifa v. Kasimuddi*, 27 C. 415; 4 C. W. N. 557. See also *Durga Charan v. Kali Prasanna*, 26 C. 727; 3 C. W. N. 586; *Umed v. Jas Ram*, 29 A. 612; *Bhiram Ali v. Gopi Kant*, 24 C. 355; *Basti Ram v. Fattu*, 8 A. 146, and *Peary Mohun v. Jote Kumar*, 11 C. W. N. 83; *Sadek Sardar v. Kali Prasanna*, 7 I. C. 48. This section is not a bar to an adjudication of a question raised by a party not seeking such adjudication as plaintiff, but resisting the plaintiff's claim as a defendant.—*Bhiram Ali v. Gopi Kant*, 24 C. 355; 1 C. W. N. 396. See also *Nilkamal v. Jahnabi*, 26 C. 946 and *Durga Charan v. Karamat Khan*, 7 C. W. N. 607; *Chandramoni v. Halijennessa*, 9 C. L. J. 464; *Thathu v. Kondu*, 32 M. 242.

If the judgment-debtors were aware of the order for sale and did not object to it they would be precluded from questioning the propriety of the order and consequently of the sale that took place under that order.—*Sheikh Murullah v. Sheikh Burullah*, 9 C. W. N. 972 (26 C. 727; 3 C. W. N. 686 *folld.*, and 24 C. 355 *distd.*). Referred to in *Dwarka Nath v. Tarini Sankar*, 34 C. 199; 11 C. W. N. 513; 5 C. L. J. 294; *Sri Krishna v. Ram Saran*, 1 Pat. L. T. 267.

Question of transferability of an occupancy holding does not arise between third parties; *Samiruddin v. Benga*, 18 C. W. N. 630.

**"Separate suit will not lie."**—The expression "not by a separate suit" means that a separate and independent suit is barred and the questions comes within the purview of this section and is to be determined under this section. The parties are therefore debarred from bringing a separate suit and must seek relief by an application under this section. All that this section enacts is that certain questions therein specified shall be determined by the order of the Court executing the decree and not by a separate suit; the section bars a suit brought for determination of certain questions, but does not bar the trial of any issue involved in those questions, if the issue is raised at the instance of the defendant in a suit brought against him; *Venkataramanachariar v. Meenakshisundaramaier*, 10 M. L. J. 1; 4 M. L. T. 285; 1 L. C. 193 (24 C. 355 and 26 C. 946 *folld.*). *Munshi Chinda Dandusi v. Munshi Pedda*, 41 M. L. J. 261. See *Thathu v. Kondu*, 32 M. 242; 5 M. L. T. 248. A defendant in a suit is debarred by this section from raising a point in defence of his title even though he could have raised it, but did not raise it in the former execution proceedings to which he was a party; *Chandramoni v. Halijennessa*, 9 C. L. J. 464. A suit for a declaration that a decree has been fully satisfied and is incapable of execution is barred under s. 47; *Ram Labhaya v. Firm of*

under s. 47 and there is an appeal and a second appeal against a decision relating thereto; *Thekkedath Neelu v. Subramania Moothan*, (1919) M. W. N. 897.

An order refusing an application under section 173, Bengal Tenancy Act (VIII of 1885), comes properly under s. 244, C. P. Code, 1882 (s. 47) and is therefore appealable.—*Chand Moni v. Santo Moni*, 1 C. W. N. 534.

An application to deposit landlord's fee as prescribed by the B. T. Act (VIII of 1885) and for confirmation of the sale and the granting of the sale certificate, may be regarded as one under s. 244 (c) of the C. P. Code, 1882 (s. 47) and as such, an appeal and second appeal lie from an order passed thereupon.—*Krishna Chandra v. Anukul Chandra*, 6 C. W. N. 190.

An objection by the judgment-debtor to the invalidity of a sale for non-payment of the landlord's fee under s. 13 of the B. T. Act (VIII of 1885), comes under this section, and a second appeal lies from an order passed allowing the objection.—*Mohim Chandra v. Ram Lochan*, 7 C. W. N. 591.

An order refusing to accept a deposit tendered under s. 310-A of the C. P. Code, 1882, (Or. XXI, r. 89) is an order falling within s. 244, C. P. Code, 1882 (s. 47) and is appealable.—*Imtiaz Begam v. Dhumai Begam*, 29 A. 275; 4 A. L. J. 135; A. W. N. (1907), 135 (19 A. 140, not followed).

The question whether the purchaser of a portion of an occupancy holding is entitled to come under s. 310A of the C. P. Code, 1882 (Or. XXI, r. 89) to make a deposit and to have a sale set aside is one that comes under s. 244, C. P. Code, 1882 (s. 47), and an appeal and second appeal will lie in that case.—*Omar Ali v. Basiruddin*, 7 C. L. J. 282. An order of the Court extending time for payment of the decretal amount during the pendency of an application by the judgment-debtor to set aside a sale under Or. XXI, r. 90 is appealable; *Shashi Bhusan v. Charushila*, 36 I. C. 809.

Where in execution of decree obtained against a firm, an order was made under Or. XXI, r. 22 directing execution against a partner under Or. XXI, r. 50 (c)—*Held* that the order was not interlocutory but a final one and essentially a decree as it determines a question relating to the rights and liabilities of the parties with reference to the relief granted by the decree; such order falls under s. 47 and is therefore appealable, *Baishnab Charan v. Bank of Bengal*, 19 C. L. J. 581; *Mohim Chandra v. Mohendra Kumar*, 57 I. C. 905.

An appeal and second appeal lie from an order passed under s. 310-A of the C. P. Code, 1882 (Or. XXI, r. 89) refusing to set aside a sale, where the dispute relates to the execution, discharge or satisfaction of a decree, and thus comes within section 244 (c), C. P. Code, 1882 (s. 47).—*Muralidhar v. Anandrao*, 25 B. 418.—*See also Raghubar Dyal v. Jadu Nandan*, 15 C. L. J. 89. An appeal lies from an order under s. 310-A of the C. P. Code, 1882 (Or. XXI, r. 89) where the case falls under s. 244, C. P. Code, 1882 (s. 47)—*Pita v. Chuni Lal*, 31 B. 107; 9 Bom. L. R. 15 (25 B. 418, qualified). But see *Sitanath v. Hari Krishna*, 6 I. C. 573.

An order under s. 310-A, C. P. Code, 1882 (Or. XXI, r. 89) is one under s. 244 (c), C. P. Code, 1882 (s. 47) and therefore an appeal lies from that order at the instance of the decree-holder who is also the auction-purchaser.—*Phul Chand v. Nur Singh Pershad*, 28 C. 73. *See also Kripa Nath v. Ram Lahshi*, 1 C. W. N. 703; *Srinivasa Ayyangar v. Ayyathorai*



Where a person obtains a decree in a pre-emption suit for possession on payment of the purchase money and pays the money but fails to obtain possession, he cannot maintain a fresh suit for possession on the basis of the decree; *Ramanand v. Jairam*, 18 A. L. J. 1001: 59 I. C. 632.

Where a decree of Court awards a person possession of properties, his duty is to proceed under the C. P. Code and if obstructed to proceed under the provision of Or. XXI, rr. 97-100. A subsequent suit for declaration of title is barred by s. 47; *Sovanji Jena v. Bhima Roy*, 7 Pat. 157.

An auction purchaser whose application for possession under s. 311, C. P. Code, 1882 (Or. XXI, r. 95) was dismissed as time-barred, is precluded by the provision  
 property purchased by  
 A. W. N. (1906) 87.  
*Nagabhatta v. Nagappa*, A. I. R. 1923 Bom. 62.

Where plaintiff obtained a decree for possession of salt pans in default of payment of proper compensation, such compensation may be determined in the execution proceedings and no separate suit should be brought for the purpose—*Collector of Chingleput v. Sunaya Medaless*, 29 M. 181.

After confirmation of an execution sale, a notice was received that the judgment-debtor had been adjudicated insolvent and accordingly all proceedings were stayed. The purchaser then applied for a refund of his purchase money from the decree-holder, and order was made for such refund. The decree-holder then sued the purchaser and the original judgment-debtor to recover the amount refunded by him. Held that the suit was barred by s. 244, C. P. Code, 1882 (s. 47).—*Solano v. Ahmeida*, 10 C. L. R. 573.

Where immoveable property has been given by the judgment-debtor as security for the due performance of the decree pursuant to an order of Court under Or. XLI, r. 5 (3) C. P. Code, the property can be realised by the decree-holder in execution and no separate suit is necessary or maintainable for such realisation, *Subramania Chettiar v. Raja Rajeswara*, 41 M. 327: 43 I. C. 187.

Plaintiff obtained a decree for possession of the property in dispute in the suit. An appeal was filed by the defendant who remained in possession. The appeal was eventually dismissed and the plaintiff thereafter discovered that the defendants while in possession of the property pending the appeal committed waste by cutting trees. The plaintiff decree-holder thereupon applied in execution for ascertaining the damages alleged to have been committed by the respondents. Held that the question raised was one relating to the execution, discharge or satisfaction of the decree and that it must be determined in execution and not by separate suit; *Hari Shridhar v. Sakharan*, 25 Bom. L. R. 449. 73 I. C. 443.

In execution, certain property was sold in pursuance of an order under s. 244, C. P. Code, 1882 (s. 47) and purchased by a third party who subsequently obtained possession. That order was subsequently set aside. In a suit by the judgment-debtor to recover possession of the property from the auction-purchaser by setting aside the sale. Held that the order directing the sale had the force of a decree and that the plaintiff was not entitled to the relief sought.—*Murari Singh v. Prayag Singh*, 11 C. 362.

No suit will lie for recovery of possession of property at the instance of a transferee from the judgment-debtor during the pendency of the execu-

30 C. 617. Dissented from in *Sivagami Achi v. Subrahmanya*, 27 M. 259, F. B. and in *Deoki Nandan v. Bansi Singh*, 14 C. L. J. 35; 16 C. W. N. 124; *Md. Ehasar v. Tara Prasanna*, 22 I. C. 548.

The question whether the Court could sell the property attached subject to the encumbrances existing on the property and notified in the sale proclamation is a question relating to the execution of the decree. Therefore an order of the Court allowing the judgment-debtor's objection that property could not be sold subject to the encumbrances is appealable; *William Maling Grant v Suraj Mal*, 1 Pat. L. R. 53 (1923) Pat. 76: 72 I. C. 860.

An order passed on an application by a judgment-debtor objecting to the sale of certain immoveable property in execution of a decree is, as between the parties to the suit an order under s. 47 and is appealable even though it also disposes of objections made by third parties to the delivery of possession; *Muruqesa Mudaly v. Sama Goundan*, 81 I. C. 102.

Where the auction-purchaser is a *benamidar* for the judgment-debtor in an application to set aside a sale under s. 172, Bengal Tenancy Act, and s. 311, C. P. Code, 1882, (Or XXI, r. 90), a second appeal lies from the order made on the application, as the application is one under s. 244, C. P. Code, 1882 (s. 47).—*Chand Monee v Santo Monee*, 24 C. 707. But see *Bhiramooee v. Anantaram*, 46 I. C. 748.

Certain property was sold at the instance of an attaching creditor under s. 273, C. P. Code, 1882 (Or. XXI, r. 53). The judgment-debtor applied to set aside the sale on the ground that, after the publication of the sale proclamation one of the advertised lots was sub-divided into various lots for the purposes of the sale, and his application was refused. *Held* that the order was appealable under s. 311, C. P. Code, 1882 (Or. XXI, r. 90) though not under s. 244, C. P. Code, 1882 (s. 47).—*Sami Pillai v. Krishna Sami Ghatti*, 21 M. 417.

It is not competent to the holder of a decree which has been attached to apply to enter up satisfaction of the decree even though notice of the attachment was not given to the judgment-debtor under Or. XXI, r. 53 (6).  
made parties to the decree-holder's  
the question that arises between  
P. Code and an appeal lies there-  
(1918) M. W. N. 874: 48 I. C.

109.

An order dismissing objections to execution of decree for default is an order determining a question "relating to the execution, discharge or satisfaction of the decree" within the meaning of ss. 2 and 244, C. P. Code, 1882 (ss. 2 and 47) and is therefore appealable.—*Lal Narain v. Mahomed Rafiuddin*, 28 C. 81. (15 A. 859 and 2 C 115 and 827, distinguished).

Questions between the execution-creditor and persons placed on the record as representatives of the deceased judgment-debtor are questions in execution of the decree, and the order refusing objections made by such representatives is appealable — *Shankar Dat v. Harman*, 17 A. 245.

Where an application under Or. XXI, r 100 is fought out between persons who were parties to the suit or their representatives, the application falls under s. 47, C. P. C., the order thereon is a decree within s. 2 (2) and

Where an objection to a sale in execution of a decree is allowed, the decree-holder if aggrieved thereby has his remedy by way of appeal and second appeal and if he omits to appeal, the order of the executing court is final and binding upon the parties. s. 47 forbids the institution of a regular suit to avoid the consequence of such an order; *Parbhu Dayal v. Anandi Din*, 17 A. L. J. 832.

A claim by the judgment-debtor under a mortgage decree for the recovery of properties alleged to have been wrongfully delivered in execution to the court auction-purchaser comes within s. 47 even though the purchaser was a stranger to the mortgage suit. The remedy of the judgment-debtor is by an application under s. 47 and not by a suit; *Jainulabdin v. Krishna Chettiar*, 41 M. L. J. 120: 63 I. C. 200 (43 M. 107: 38 M. L. J. 32 F. B. *expld.*).

The question whether the transferee of a decree is entitled to execute, is one falling within this section and no separate suit will lie for a declaration of that right; *Venkataratnam v. Annabattulla*, 28 I. C. 906.

An objection by the judgment-debtor that he is entitled to get credit for a larger amount than was allowed by the decree-holder and from an earlier date and that the interest was erroneously claimed at a higher rate should be investigated under this section and not by a separate suit; *Surendra Nath v. Mammotha Nath*, 9 I. C. 382.

Security bonds hypothecating immoveable properties as security for the due performance of a decree can be enforced by execution without a separate suit for sale; *Mahalakshmi Bai v. Chaudhuri Badan Singh*, 45 A. 649: 21 A. L. J. 604.

**Separate Suit Will Lie.**—As has already been said, a separate suit will lie if the question does not relate to the "execution, discharge or satisfaction of the decree," or if it does not arise between the parties to the suit or their representatives.

If a judgment-debtor or his representative objects to the execution of the decree on the ground that the decree is not valid, the question as to the validity of the decree, not being a question relating to the "execution, discharge or satisfaction" of the decree cannot be disputed in the execution proceedings under this section. Such a question can only be decided by a regular suit brought for the purpose.—*Chintaman v. Chintaman*, 22 B. 475; *Kumeretta v. Sabapathy*, 30 M. 26; *Gomathan v. Komandur*, 27 M. 118; *Khetrapal v. Shyama*, 32 C. 265; *Liladhar v. Chaturbuj*, 21 A. 277; *Hira Lal v. Parmeshwar*, 21 A. 356; *Rangasami v. Thirupati*, 28 M. 26; *Rashbehari v. Thakur Joyananda*, 4 C. L. J. 475; *Raja Ram v. Chhadammil Lal*, 48 A. 574: A. I. R. 1026 All. 475. So also a judgment-debtor's objection to the execution on the ground that the decree was fraudulently obtained, must be determined by a separate suit; *Sudindra v. Budan*, 9 M. 80; *Dhaniram v. Luchmiaswar*, 23 C. 639. Similarly the objection raised by a reversioner to the attachment of his reversionary interest on the ground that the decree obtained against the widow of the last male owner is not binding on him can only be determined in a separate suit; *Tallapragada v. Boorugapalli*, 30 M. 402. The same rule applies where the reversioners, as the legal representatives of a Hindu widow, object to the execution of the decree obtained against her on the ground that the debt was contracted without legal necessity; *Jagannath v. Shir Gulam*, 31 A. 45: 5 A. L. J. 745; *Kameshwar v. Bahadur* 12 C. 458.

An appeal will lie to the District Judge from an order of an Assistant Collector, if such order, by the force of s. 2 amounts to a decree.—*Kharag Singh v. Pola Ram*, 27 A. 81.

Decision as to whether a declaratory decree is executable or not is a decree under this section and as such appealable.—*Lakshmi v. Marudēvi*, 37 M. 29; 21 M. L. J. 1063; 10 M. L. T. 437.

An order dismissing an application by the decree-holder praying for the restoration to file of execution case which had shortly before on his own request been struck off the file as fully satisfied is appealable under s. 47; *Jagannath v. Jaladhar*, 26 C. L. J. 317.

An order passed on an application made by Government under Or. XXXIII, r. 12 for payment of Court-fees under r. 10 or r. 11 is an order under s. 47 and is therefore appealable; *Secretary of State v. Narayan*, 35 B. 448; 13 Bom. L. R. 686.

An order passed on review of a previous order in an execution proceeding is an order under this section and therefore appealable; *Adhar Mandal v. Keshab Chandra*, 5 I. C. 483.

An order dismissing an application of a judgment-debtor pleading exemption from arrest under s. 185 of the C. P. Code, 1908, is an order under this section and is therefore appealable; *Nayana Naicken v. Syed Golam*, 20 M. L. J. 136; 8 M. L. T. 122.

An appeal lies from an order in execution proceedings of a compromise decree passed in appeal from an order confirming the sale; *Janak Prosad v. Net Ram*, 22 I. C. 497.

**Questions Not Relating to Execution, Discharge or Satisfaction of the Decree.**—Distribution of assets amongst several rival decree holders under s. 73 of the C. P. Code is not a question relating to execution, discharge or satisfaction of the decree, and can only be raised by a separate suit.—*Katumsahiba v. Hajee Badsha*, 38 M. 221; see *Venkatarama v. Esumasa*, 20 M. L. J. 330; 7 M. L. T. 143; 5 I. C. 92; *Somasundaram v. Sundaresa*, 32 M. L. T. 155.

An objection to the jurisdiction of the Court that tried the suit is not one of the questions arising between the parties to the suit and relating to execution, discharge or satisfaction of the decree within the meaning of s. 47; *Radha Krishna Aiyar v. Vinakaswamiar*, A. I R. 1926 Mad. 128.

Some of the representatives of a judgment-debtor objected to the sale of a house in execution of a decree but the objections were dismissed for default. The decree was fully satisfied later on. Subsequently all the representatives of the judgment-debtor brought a suit for a declaration that the house belonged to them and was not liable to sale. Held that s. 47 did not bar the suit; *Nizam Din v. Bhagat Ram*, 60 I. C. 516.

The questions contemplated by s. 244, C. P. Code, 1882 (s. 47) are those which relate to the enforcement of the obligation created by decree. The obligation to pay the father's debts out of the son's share of the ancestral estate is not an obligation created by decree against the father.—*Ariabudra v. Dorasami*, 11 M. 413; *Lachmi Narain v. Kunji Lal*, 16 A. 449; and *Juga Lal v. Audh Behari*, 7 C. W. N. 223; *Ramayya v. Venkataratnam*, 17 M. 122. But see *Umed Hathi Singh v. Gomain Bhajji*, 20 B. 385.

L. J. 475. A suit to set aside a decree and a sale thereunder on the ground of fraud; *Bhaiji v. Jharula*, 18 C. W. N. 1027 P. C. A suit to prove an adjustment out of Court which cannot be taken cognizance of under Or. XXI, r. 2; *Iswar v. Haris*, 25 C. 718: 2 C. W. N. 247; *Banumal v. Newandmal*, 83 I. C. 860: 16 S. L. R. 207 F. B. A suit by an auction-purchaser, who is not a representative of the judgment-debtor, to set aside a sale; *Balrant v. Umabai*, 45 B. 812; 23 Bom. L. R. 254. A suit for a declaration that a decree purchased in the name of the defendant, who had wrongfully taken out execution of the same in his own name, had been really purchased by the plaintiff for his own benefit and that the defendant was only his *benamidar*; *Gour Mohan v. Dino Nath*, 25 C. 49: 2 C. W. N. 76. A suit by the execution-purchaser against the judgment-debtor for recovery of possession; *Girija Kanta v. Mohim*, 23 C. L. J. 587. A suit by the decree-holder auction-purchaser against judgment-debtor and stranger to recover possession of the property purchased; *Goba Nathu v. Sakharan*, 44 B. 977: 22 Bom. L. R. 1101, *Har Gorind v. Bhudar*, 48 B. 550: 26 Bom. L. R. 601: A. I. R. 1924 Bom. 429. A suit by judgment-debtor to have an uncertified payment or adjustment out of Court recognized; *Kutubulla v. Durga Charan*, 13 I. C. 424; *Parma v. Lehna*, 53 I. C. 448. A suit for refund of purchase-money on cancellation of a sale for irregularity; *Jotindra v. Mahomed Basir*, 32 C. 382. A suit for money paid to a decree-holder out of Court and the payment of which, not being certified, could not be recognized, and which the decree-holder had not returned, but taking out execution of the decree a second time, through the Court; *Shadi v. Ganga Sakai*, 3 A. I. A suit to recover damages for breach of a contract not to execute a decree, *Hanmant v. Subbabbhat*, 23 B. 394. A suit for contribution for plaintiff's share of the costs of execution; *Gadicherla v. Gadicherla*, 21 M. 45. A suit for contribution by one of the judgment-debtors against the other; *Ram Saran v. Janki*, 18 A. 106. A suit for declaration that the sale is void; *Balgauda v. Mallappa*, 44 B. 551: 22 Bom. L. R. 759: 27 I. C. 249. A suit to recover from the decree-holders, the amount alleged to have been illegally realized; *Mohan Lal v. Jagannath*, 85 A. 243. A suit by a judgment-debtor for a declaration that the decree obtained against him has been satisfied and should not be executed; *Bishu Singh v. Mahindra Singh*, 1 Lah. Cas. 79 I. C. 125. A suit to enforce a compromise decree containing extraneous matters, *Arjun Kapali v. Asvini*, 78 I. C. 317. A suit by a decree-holder for declaration of the liability of the assets of the judgment-debtor to attachment and sale in execution; *Bansidhar v. Sham Lall*, 71 I. C. 1012: A. I. R. 1923 All. 292. A suit by a decree-holder against the executor to the estate of a deceased judgment-debtor for accounts on the footing of *mal-administration*; *Saratmani v. Bata*, 35 C. 1100. A suit by a puisne mortgagee for recovery of money due on his mortgage; *Brahmandam v. Allamanomi*, 49 I. C. 466. A suit by mortgagee of a decree for the recovery of his mortgage amount from the amount realized in execution of the decree and kept in deposit in Court; *Yenkatarama v. Esumus*, 29 M. L. J. 330; 7 M. L. T. 143. A suit for a declaration that the mortgage decree against a deceased person does not bind the property of his representative, the plaintiff; *Kanai v. Shashi*, 6 C. 777; *Gourmani v. Jagat*, 17 C. 57; *Beni Prasad v. Mukhtesar*, 21 A. 316; *Sanwaldas v. Bismillah*, 19 A. 480. A suit by a transferor for recovery of possession of property from the transferee of the judgment-debtor; *Hira v. Amar Singh*, 2 I. C. 454. A suit by an auction-purchaser who is not a representative of the judgment-debtor to set aside a sale; *Balrant v. Umabai*,

S. 47 has no application where the dispute relates solely to the rights *inter se* of the judgment-debtors and the decree-holders has no interest in the decision; *Anavarsada Khan Pani v. Misiri Khan Pani*, 31 M. L. J. 44.

A suit by a judgment-debtor as part purchaser of a decree for a declaration of his right of purchase, and for recovery of his share of money, is not barred by this section, as the claim is not within the words "relating to the execution of the decree" in s. 244, C. P. Code, 1882 (s. 47).—*Hara Gobind Das v. Issuri Das*, 15 C. 187 (11 B. 6, referred to).

Where a judgment-debtor applied to the executing Court, asking that the decree-holder should be ordered to demolish certain structures which he had erected beyond the limits prescribed by the decree, and obtained an order as prayed for. *Held* that the question is not one relating to execution and cannot be determined in execution.—*Debi Dass v. Ejaz Hussain*, 28 A. 72: 2 A. L. J. 749: A. W. N. (1905) 191.

Questions that may arise after the sale are not questions relating to the execution, discharge, or satisfaction of decree, within the meaning of s. 244, C. P. Code, 1882 (s. 47); but as soon as there has been a sale, the execution of the decree, so far as the decree-holder is concerned, is over, and the question whether the purchaser had purchased anything by the sale, is not a question as to the execution of the decree.—*Ram Chhaibar Misra v. Bechu Bhagat*, 7 A. 641.

An objection by the reversioner, in execution, to the attachment on the ground that the decree is not binding on his reversionary right is not triable in execution under s. 244, C. P. Code, 1882 (s. 47).—*Tallapragada v. Boorugapalli*, 30 M. 402: 17 M. L. J. 288.

The plaintiff obtained a decree against the defendant for possession of certain shares in an estate. Before he took out execution, partition-proceedings took place, whereby the defendant's interests in the estate was converted into a smaller estate in lieu of his share of the whole estate. The plaintiff then sued for a declaration that the defendant's share in the entire estate had passed into a smaller estate.—*Held*, that the suit was not barred by s. 244, C. P. Code, 1882 (s. 47) as the required transformation of the defendant's interest could not be effected in the execution proceedings. The question that arose, though between the parties to the former suit, could not be regarded as a question relating to the execution of the decree in the former suit.—*Krishna Roy v. Jawahir Singh*, 20 C. 260.

The decree in a partition suit directed that, in satisfaction of the plaintiff's decree, the defendant should pay to him a certain sum of money forthwith, and also a further sum of money upon the plaintiff's delivering to the defendant two vessels. After the decree, one of the vessels was lost in the sea, the plaintiff offered to pay its value (Rs. 1,000); but the defendant demanded a larger sum. The plaintiff thereupon applied to Court under s. 244, C. P. Code, 1882 (s. 47) to fix its value. *Held*, that the decree having become incapable of execution by reason of events subsequent to decree, the question was not one arising in the course of execution.—*Shaik Essa v. Essa Bin*, 18 B. 495.

A decree-holder purchaser obtained possession of the property; subsequently the decree was set aside and another decree in a contested suit was passed, and thereupon the judgment-debtor paid the decretal amount

transferred for execution are questions arising between the parties to the suit, and relating to execution within meaning of s. 244, (s. 47) and as such appealable.—*Ghazidin v. Fakir Baksh*, 7 A. 73 (8 C. 477, *folld.*). See also *Kristo Mohiny v. Bama Churn*, 7 C. 733; 9 C. L. R. 344; *Steel v. Ichamoyi*, 13 C. 111; and *Musaji Abdulla v. Damodar Das*, 12 B. 279. *Kyanksema v. Aparna Charan*, 62 I. C. 342; *Fitz Holmes v. Waryam Singh*, 75 I. C. 419. But in almost all the cases decided under the new Code it has been held that orders staying or refusing to stay execution are no longer to be considered as orders determining questions relating to the execution of a decree and no appeal lies from such orders; *Rajendra Kishore v. Mathura*, 25 C. W. N. 555 (20 C. L. J. 512 *folld.*) *Janardan Trimbak, v. Martand Trimbak*, 45 B. 241; 22 Bom. L. R. 1212; *Rajendra v. Mathura*, 55 I. C. 228; see *Ram Chandra Kasturchand v. Balmaknud*, 29 B. 71 (12 B. 279 *doubted*), and *Ram Prosad v. Anukul Chandra*, 20 C. L. J. 512; *Sardar Khan v. Fatch Din*, 68 I. C. 751.

The existence and validity of an agreement to stay or not to enforce a decree ought to be determined under this section and not by a separate suit; *Rukmoni Ammal v. Khishnamachary*, 9 M. L. T. 464; 8 I. C. 1071 (22 B. 463 *folld.*). It was held in *Chidambaram Chettiar v. Krishna Vathiyar*, 40 M. 233; 32 M. L. J. 13 (F. B.) that such an agreement can be given effect to in execution proceedings under s. 47 so as to operate as a stay of execution of the decree.

There is no appeal against an order by the appellate Court refusing to stay execution under Or. XLI, r. 5 of the C. P. Code; *Malamal Vital v. Kanalappara*, 27 M. L. J. 171; 25 I. C. 47. See also *Ram Prosad v. Anukul Chandra*, 20 C. L. J. 512; *Kanhaiyalal v. Ram Gopal*, 68 I. C. 49.

**Power of Executing Court to Construe Decree.**—A decree must be executed as it stands and a Court of execution is confined within the four corners of the decree. But a decree like any other document is open to construction and it ought, if possible, to be construed so as to conform with the judgment. When there is a variance between the decree and the judgment, the remedy by construction is only appropriate if the language of the decree is ambiguous. But when the language of the decree is plain and there is no ambiguity, the proper remedy is by an application for amendment of the decree. The executing Court should not amend the decree under the guise of interpretation; *Shoshi Kanta v. Sarat Chandra*, 36 I. C. 500 (18 C. 108 P. C.; 28 C. 853 P. C.; 23 A. 181; 21 C. 504; 22 W. R. 330 *refd to*).

**Whether Section 47 Restricts the Operation of Or. XXI, r. 2 relating to Payment or Adjustment of Decree out of Court.**—Where a decree is satisfied by an agreement out of Court, and such satisfaction is not certified to the Court, a subsequent suit is not maintainable if the object of the suit is to restrain the execution of the decree in contravention of the agreement. See *C. 437*. Followed in *Deno Bundhu v. Hari Moti*, 31 C. 480; 8 C. W. N. 395 and in *Laldas v. Kishordas*, 22 B. 463, F. B. See also *Harish Chandra v. Jagabandhu*, 12 C. W. N. 282; 7 C. L. J. 581; *Gadadhar v. Shyam Churn*, 12 C. W. N. 485; *Ramayyar v. Ramayyar*, 21 M. 856; *Trimbakram Krishna v. Hari Lazman*, 34 B. 575; 12 Bom. L. R. 686; *Bibijan v. Sachi Bewah*, 31 C. 863; 8 C. W. N. 684; See also *Palaniappa v. Somasundaram*, 7 Bom. L. R. 367; 28 I. C. 268. But in *Iswar Chandra v. Harish*

recovered by the plaintiff subsequently to the decree, and as to the amount payable on account of costs of the execution of that decree.—*Dalpathbhai v. Amarsang*, 2 B. 553.

An order of the executing Court overruling the judgment-debtor's objection to the valuation put in by the decree-holder in the sale proclamation and refusing the judgment-debtor's prayer for adjournment of the sale and issue of a fresh proclamation is not appealable; *Bejoy Krishna v. Dharendra*, 47 I. C. 512.

An application under s. 396, C. P. Code, 1882 (Or. XXVI, rr. 13, 14) for the appointment of a commission is not a matter which comes within the scope of s. 244, C. P. Code, 1882 (s. 47). No appeal lies from the order made on the application.—*Mallayya v. Subbarayudu*, 17 M. L. J. 144.

An order of a Judge confirming the report of the Commissioner for taking accounts, by which he refused to require the defendants to give inspection of certain books, is not an order within the contemplation of this section, and is therefore not appealable.—*Rustomji Burjorji v. Kessowji Naik*, 8 B. 287.

In execution of a decree against a firm, certain property was attached as property of the firm, to which one of the partners preferred a claim alleging that the property attached was his private property. The objection was disallowed. *Held*, that the order was not one under s. 244, C. P. Code, 1882 (s. 47), but under s. 281, C. P. Code, 1882 (Or. XXI, r. 61) and therefore not appealable.—*Abdul Rahman v. Muhammad Yar*, 4 A. 190; *Gulam Kavusha v. Bhuvaraha Iyengar*, 38 I. C. 152; *Gande Lal v. Manjee*, 47 I. C. 904.

An order directing accounts to be taken in an administration suit is not an order in the nature of a final decree nor one in execution of a decree, within the meaning of this section, and is therefore not appealable.—*Sreenath Roy v. Radha Nath*, 9 C. 773.

No second appeal lies against an order allowing payment of the money directed by decree after the date fixed for such payment as such order does not fall under s. 47; *Imamali v. Karim Buksh*, 30 C. L. J. 32.

Where the question is not between the plaintiff and the defendant nor between their representatives, but between the plaintiff and a person who claims to be the purchaser of plaintiff's interest in the suit, it is not a question between the parties to the suit, but is a question between the plaintiff and a stranger, and an order refusing application for execution by such person is not appealable under ss. 2 and 244 C. P. Code, 1882 (ss. 2 and 47).—*Mohabir Singh v. Ram Baghowan*, 11 C. 150.

Attachment of debts due to judgment-debtor.—Improper realization of such debts by third party in defiance of the Court's order of attachment.—Application to compel third party to disgorge is not an application in execution of the decree and no appeal therefore lies from the order; but it is an application to the Court to exercise its inherent power of punishing for contempt.—*Godu Ram v. Suraj Mal*, 27 A. 378 and 380: 2 A. L. J. 16 and 18.

No appeal lies against an order refusing to grant a certificate of sale to the decree-holder (auction-purchaser), as the question is not one relating to



P. Code, 1882 (s. 47).—*Baba Mahomed v. Webb*, 8 C. 780; 8 C. L. R. 86.  
But see *Sankaran v. Kanara*, 22 M. 182.

Questions as to part-satisfaction of a decree cannot, according to s. 244 (c), C. P. Code, 1882 (s. 47), be raised in a separate suit. That section alludes to parties or their representatives, but it is not on that account open to a plaintiff to evade the section by adding an unnecessary party to the suit.—*Kristo Mohinec v. Kali Prasunno*, 8 C. 402.

No separate suit would lie to set aside a sale held in execution of a decree, on the ground that the decree had been adjusted out of Court when in fact no such adjustment had been certified in the manner provided by s. 258, C. P. Code, 1882 (Or. XXI, r. 2).—*Saikaran Bharati v. Raghunath Singh*, 20 A. 254; *Asaram v. Yeswantrao*, 15 N. L. R. 158; 50 I. C. 956.

Under s. 244 (c) and 258, C. P. Code, 1882 (s. 47 and Or. XXI, r. 2), no compromise of a decree which has not been duly certified under the provisions of the last-mentioned section can be recognized by any Court, and a separate suit to enforce such compromise is not maintainable.—*Harmasji Dorabji v. Burjorji Jamsetji*, 10 B. 155.

A suit will not lie to enforce an uncertificated agreement or adjustment of a decree against judgment-debtor, the consideration for which is, that it shall operate in satisfaction of the decree; as there is, in that case, no consideration, which the Court can recognize, and therefore no valid consideration for the judgment-debtor's agreement.—*Abdul Rahman v. Khoiji Khaki*, 11 B. 6; referred to in 15 C. 187.

An application by a decree-holder to set aside an order entering up satisfaction of the decree on the ground of fraud of the judgment-debtor is maintainable. S. 47, C. P. Code, bars a regular suit; *Usir Gazi v. Maher Naskar*, 57 I. C. 899; *Mahomed Kazim v. Rukia Begum*, 41 A. 443.

An application was made to a Court praying that an adjustment of certain decrees, more than three years old, might be certified. Held, that the question raised by the application related to the satisfaction of the decrees within meaning of s. 244, C. P. Code, 1882 (s. 47) and was appealable under section 2 of the C. P. Code.—*Rangji v. Bhaji*, 11 B. 57. See also, *Ram Kamlessuri v. Sukhan Singh*, 7 C. W. N. 172; *Jadunandan v. Shoonandan*, 3 Pat. L. T. 487; 69 I. C. 645; *P. R. P. L. Chetty Firm v. G. Lon Pow*, 1 Bur. L. J. 48; 69 I. C. 924.

A question as to satisfaction of a decree between the transferees of the decree and the judgment-debtor, although such satisfaction was not certified to the Court under s. 258, C. P. Code, 1882 (Or. XXI, r. 2) is to be determined under this section.—*Rama Ayyar v. Sreenivasa Pattar*, 19 M. 230.

An adjustment of decrees was made out of Court, but was not certified to the Court. The decree-holder then executed his decree, and in execution-sale himself purchased the judgment-debtor's property. Held, that the judgment-debtor was entitled to prove the adjustment, and to have the sale set aside.—*Ramayyar v. Ramayyar*, 21 M. 350; *Subramania Pillai v. Kumara Velu*, 39 M. 541.

1882 (s. 47) bars a separate suit in such a case; that section (s. 47) whilst it precludes a right of suit, does not enlarge the right of appeal which is limited strictly by s. 589, C. P. Code, 1882 (s. 104, Or. XLIII, r. 1).—*Bhagbut Lall v. Narku Roy*, 21 C. 789. See however, *Makka v. Sri Ram*, 24 A. 108.

No appeal lies from an order refusing to determine a dispute between two judgment-debtors, each of whom alleged that the auction-purchaser purchased the property with his money.—*Kastura Kunwar v. Gya Prosad*, 29 A. 207; 4 A. L. J. 47; A. W. N. (1907) 29.

An order setting aside a sale under s. 173, Bengal Tenancy Act, is not a "decree" nor does it fall within s. 47 and is therefore not appealable.—*Roghu Singh v. Misri Singh*, 21 C. 826; *Jadab v. Joy Gopal*, 19 C. L. J. 81.

An application by the assignee of an auction-purchaser to be placed on the record cannot be dealt with under s. 244, C. P. Code, 1882 (s. 47) and no appeal or second appeal lies from an order refusing such application.—*Sreenath Ghose v. Rama Nath*, 3 C. W. N. 276.

If the Court to which a decree is sent for execution, declines to go into the question as to whether the first Court had jurisdiction to pass the decree, the order so passed is not an order under s. 47 and is therefore not appealable.—*Bhagwantappa v. Vishwanath*, 28 B. 378.

When an application is made by the assignee of the decree-holder purchaser for an order under s. 318, C. P. Code, 1882 (Or. XXI, r. 95) the mere fact that the judgment-debtor put in an objection, does not make it an application under s. 47 so as to entitle the judgment-debtor to appeal against the order of the first Court or of the Court of first appeal.—*Mahomed Mosraf v. Habil Mia*, 6 C. L. J. 749.

In execution of a rent-decree against certain talukdars, their other properties, hypothecated as security for the rent, were attached, whereupon A preferred a claim, alleging himself to be assignee for the talukdars, but his claim was disallowed. Held, that A could not be considered a representative of the talukdars within the meaning of s. 244, C. P. Code, 1882 (s. 47) and was, therefore, debarred from appealing from the order disallowing his objection.—*Rashbehary v. Surnomoyee*, 7 C. 403; 9 C. L. R. 79.

Where a decree had been purchased *benami*, and the party alleging himself to be the real purchaser had not been put upon the record as a party, and an application for execution made by him had been refused and there was a dispute as to who was the real purchaser—held, that the order refusing the application for execution was not appealable, as the applicant was not a party to the suit within the meaning of s. 244, C. P. Code, 1882 (s. 47).—*Sobha Bibee v. Sakhawat Ali*, 3 C. 371; 1 C. L. R. 331. (2 C. 827, P. C. *fold*).

No second appeal lies against an order in execution of a decree in a suit, valued at less than Rs. 500 of the nature cognizable by Small Cause Court; *Waresh Munshi v. Aptabuddin*, 10 I. C. 412.

An order refusing a decree-holder to withdraw the bid which he had himself made and upon which the hammer had fallen does not adjudicate any rights. It is not a decree and no second appeal lies; *Rajendra v. Vipendra*, 21 C. L. J. 174; 19 C. W. N. 633.

five years rent-free, executed his decree against the judgment-debtor, who then brought the present suit for a declaration that the decree was satisfied, and for damages against the decree-holder. *Held*, that such a suit would lie.—*Paramanand v. Khepoo*, 10 C. 354. See also *Mussuti v. Sahharan*, 6 M. 41; *Sitaram v. Mahipal*, 3 A. 533; *Tegh Singh v. Amin Chand*, 5 A. 269 and 289; *Mallama v. Venkappa*, 8 M. 277; and *Ishan Chunder v. Indro Narain*, 9 C. 788; 12 C. L. R. 391; *Jaman Ram v. Kishen Ram*, 234 P. L. R. 1914; 42 P. R. 1914.

A suit for a declaration that a particular decree has been satisfied and cannot be executed is barred by s. 47. The proper remedy is by a suit for damages.—*Palaniappa v. Somasundaram*, 7 L. B. R. 367; 28 I. C. 468. See also *Paramanand v. Khepoo*, 10 C. 354.

**Mode of Enforcing Contracts Superseding Decrees.**—The parties to a decree presented a petition to the Court executing the decree, stating that they agreed that the decretal amount was to be paid by instalments, and that upon default, the whole amount due should be realized by execution of the decree. *Held*, that, upon default being made, the decree-holder's remedy was by execution, and not by a suit to enforce the terms of the agreement.—*Champat Rai v. Pitambar Das*, 6 A. 16. Followed in *Mukund Ram*, 6 A. 228 (3 A. 78, *distd.*; 4 A. 240 *folld.*).

A decree for partition having been compromised by an agreement, and communicated to the Court which passed the decree—*held*, that the effect of the decree was extinguished by the agreement, which could only be enforced by a fresh suit, and not by an application for execution of the former decree—*Hari Raghunath v. Kishnaji Anant*, 19 B. 546.

**Parties to the Suit in which the Decree was Passed.**—The expression "parties to the suit" no doubt imports "between parties opposed to each other in the suit" but does not necessarily mean between parties who are plaintiff and defendant respectively in the suit. In partition suits parties who are co-defendants are often arrayed against each other; *S. Mangayya v. S. Sriramulu*, 24 M. L. J. 477; 18 M. L. T. 347; 19 I. C. 448; *Hussan Ammal v. Ismail*, 28 M. L. J. 642; *Budaraju Hanumantha v. Allamneni*, 70 I. C. 329.

The section is not limited in its application to questions arising only between parties who are opposed to each other in the suit; *Vedavyasa Aiyar v. The Madura Hindu Labha Nidhi Co., Ltd.*, 18 L. W. 311; 45 M. L. J. 478.

"Party" means a person who is duly represented. A minor represented by a married woman or person with adverse interest, is not a party within the meaning of this section; *Rashedunnissa v. Md. Ismail Khan*, 13 C. W. N. 482 P. C.; 10 C. L. J. 318; 6 A. L. J. 822; 31 A. 572; 11 B. L. R. 1225; 6 M. L. T. 279. See also *Matadin v. Gayadin*, 31 A. 599; 6 A. L. J. 799; *Alam Din v. Allah Dad*, 67 I. C. 547.

The auction-purchaser being also decree-holder is a party to the suit within the meaning of s. 244, C. P. Code, 1882 (s. 47).—*Jagannath v. Kartick*, 7 C. L. J. 436; *Lachusa Motilal v. Maheralal*, 44 I. C. 503; *Sadasiv v. Narayan*, 35 B. 452.

Section 244, C. P. Code, 1882 (s. 47) alludes to parties to the decree or their representatives, but it is not on that account open to a plaintiff to

**Alteration of decree after execution.**—Decretal amount reduced by alteration—Subsequent application by the judgment-debtor for refund of the excess amount realised by the decree-holder. *Held*, that the application falls under s. 244, C. P. Code, 1882 (s. 47) and the period of limitation for such an application is that prescribed by art. 178 of the Limitation Act and begins to run from the date of the amendment of the decree—*Harnam Chunder v. Muhammad Yar Khan*, 27 A. 458: A. W. N. (1906), 63.

**Determination of Questions regarding Excess Lands Wrongfully Taken in Execution.**—No separate suit will lie for the recovery of lands taken by the decree-holder in excess of the terms of his decree, if the decree-holder has been put in possession of such lands by the officer of the Court executing the decree. But where the suit has been instituted in the Court which has jurisdiction to execute the decree, the plaint may be regarded as an application for determining the question in the execution proceedings.—*Biru Mahata v. Shyama Churn*, 22 C. 483; *Jogendro Narain v. Surnomoyee*, 12 B. L. R. 203 (note); 14 W. R. 39. But in such cases it should be distinctly found how the dispossession occurred, whether through the Court or by act of the defendant himself. In the latter case a separate suit will lie.—*Muddon Mohun v. Kanyee Dass*, 12 B. L. R. 201, *Shurut Soonduree v. Puresh Narain*, 12 W. R. 85; 12 B. L. R. 207 (note). See also *Appa Rao v. Venkataramanayamma*, 23 M. 55.

If a decree-holder in a foreclosure suit, takes possession of a greater area of land than what is actually decreed, the judgment-debtor cannot bring a regular suit to recover possession of that land, his only remedy is by an application under s. 244, C. P. Code, 1882 (s. 47).—*Arjun Singh v. Machchal Singh*, 3 A. L. J. 601. See also *Rajaram v. Itraj Kunwar*, 17 O. C. 94; 24 I. C. 187.

Where by mistake of the parties, certain property not included in the mortgage-bond was included in the plaint, and also wrongly included in the decree passed in the suit. *Held*, that the defendant was not concluded by s. 244, C. P. Code, 1882 (s. 47) from subsequently suing to recover the property wrongly included in the plaint and in the decree.—*Ram Chandra v. Kando*, 22 A. 442.

Where a decree directed certain land to be taken from first defendant and put into plaintiff's possession for a certain term, and a claim was put in by second defendant's assignees to part of the land, *Held*, that an objection by first defendant to the claim was a matter to be determined in the execution proceedings and not by separate suit.—*Rahiman Khan v. Patcha Miyah*, 4 M. 285.

The question whether certain land received by the defendant in execution of a decree is included in that decree or not is a question relating to the execution of the decree within the meaning of s. 244, C. P. Code, 1882 (s. 47), which bars a separate suit.—*Raghunath Ganesh v. Mulna Ahmad*, 12 B. 449.

Where a judgment-debtor applied to the executing Court, asking that the decree-holder should be ordered to demolish certain structures which he had erected beyond the limits prescribed by the decree and obtained an order as prayed. *Held*, that the question cannot be determined in execution.—*Devi Das v. Ejaz Husain*, 28 A. 72; 2 A. L. J. 749: A. W. N. (1905) 191.

A purchaser of a disputed property from a party to a suit who preferred a claim in the execution proceedings is not a party to the suit within the meaning of this section, and is therefore not debarred from bringing a suit to recover damages for tort.—*Aga Syed Abdool v. Lenaine*, 13 M. I. A. 69.

A person against whom a decree was passed in his representative capacity is not a party to a suit in his individual capacity, and is therefore not debarred from bringing a fresh suit for recovery of his private property sold in execution of a decree passed against him as representative of his deceased father.—*Chowdry Wahed Ali v. Jumayee*, 2 B. L. R. 73, F. B. : W. R. 1 (F. B.). Affirmed by the P. C. with some modifications in 11 B. L. R. 149, P. C. : 18 W. R. 185, P. C.

A question between the auction-purchaser and the judgment-debtor is not a proceeding between the parties to the suit within the meaning of this section; *Surendra Mohini v. Amaresh*, 39 C. 687: 16 C. W. N. 570.

S. 47 is not applicable when a question arises between the judgment-debtor and a person who was his partner in the subject-matter of the suit but not a party to the suit; *Ram Khelawan v. Asgar Ali*, 36 I. C. 681.

Disputes among co-decree-holders as to the right of one to execute a joint decree to the exclusion of the other, are not questions between parties to a suit; *Budaraju Hanumantha v. Allamneni*, 70 I. C. 329.

The question whether a fraud has been committed in an execution sale, either by the decree-holder alone or by the decree-holder and auction-purchaser together, is one which arises between parties to the suit and is triable under this section. But the question of fraud by the auction-purchaser alone is not triable under that section; *M. Ahmad v. Bank of Upper India*, 12 O. C. 175.

Order under Or. XXI, r. 53 (3) refusing attachment of a decree, which the judgment-debtor obtained against third parties, is not a question between the parties to the suit and relating to execution and therefore does not fall within s. 47 of the Code; *Piari Lal v. Mohammad*, 17 O. C. 374: 27 I. C. 363.

A, a decree-holder, applied for execution, but was opposed by B, the judgment-debtor, on the ground that A had sold his decree to a third party, from whom it had passed to B's son. Held that this was a question arising between the parties to the suit and relative to the execution of the decree.—*Ramdhan v. Panchanan*, 1 B. L. R., S. N. 9: 10 W. R. 144.

The purchaser of a share of a decree is not a party to the suit in which the decree was passed, nor the representative of any such party: therefore a separate suit by him for declaration of his right of purchase after dismissal of his application under s. 232, C. P. Code, 1882 (Or. XXI, r. 16) is not barred under the provisions of s. 244, C. P. Code, 1882 (s. 47).—*Halodhar Shaha v. Hargobind Das*, 12 C. 105.

An auction-purchaser at a sale in execution of a decree sued to recover his purchase-money after reversal of the decree in appeal and restitution of the property purchased by him. Held that, notwithstanding s. 244, C. P. Code, 1882 (s. 47), he was entitled in this suit to recover the purchase-money as he was not, in his character as an auction-purchaser, a party to the execution proceedings, and for the purposes of the suit was to be treated as a third person.—*Hira Lal v. Gour Money*, 13 C. 326.

*Mukund Mal Kapurchand*, 3 L. 310: 67 I. C. 593 F. B.; *Manjunathu Chetty v. Apabya*, 31 M. L. J. 429.

Omission to issue a fresh proclamation under Or. XXI, r. 69 is an irregularity; in such a case it is open to the judgment-debtor to object to the confirmation of the sale, but he cannot bring a regular suit to impeach the sale.—*Gajrajmati v. Saiyid Akbar*, 29 A. 106, P. C.: 5 C. L. J. 188: 11 C. W. N. 393: 17 M. L. J. 112: 9 Bom. L. R. 83.

Decree for sale in mortgage suit—decree not in accordance with the provisions of the T. P. Act—Sale in execution and purchase by mortgagee decree-holder—Suit by mortgagor to redeem the mortgage.—*Held* that as the original decree for sale was not appealed the present suit by the mortgagor was barred by s. 47; *Ganpathy v. Krishnamachariar*, 41 M. 403: 22 C. W. N. 553. 45 I. A. 54 (P. C.).

Where in execution of a decree, the plaintiff found that buildings had been erected on the land comprised in the decree, and an application for execution was refused on the ground that the decree was silent as to the demolition of the buildings.—*Held* that his remedy was by an appeal against that order, and not by a fresh suit to get the buildings removed.—*Radha Gobind v. Brojendra Coomar*, 7 W. R. 372.

An executing Court can set aside a sale on any ground not falling within Or. XXI, r. 90, C. P. Code on an application under s. 47 and no separate suit will lie for that purpose; *Anantha Rama v. Kovilamma*, 30 M. L. J. 611.

In a suit for possession, the defendants resisted execution on the ground that they were cultivators, and the decree only authorised plaintiff to recover possession as proprietor. The objection was overruled, and the defendants were ejected. They then sued to set aside the order made in the execution proceedings and for possession. *Held*, that the suit was barred under s. 47.—*Najhan v. Mahomed Taki Khan*, 9 C. 872: 12 C. L. R. 571.

In a suit by a judgment-debtor against the decree-holder to set aside a sale on the ground that the land was not liable to sale under section 9 of the North-Western Province Rent Act. *Held*, that the question between the parties was clearly one relating to execution and satisfaction of the decree, and that a separate suit was therefore barred by s. 47.—*Janaki Singh v. Ablak Singh*, 6 A. 393. Followed in *Ram Gopal v. Khiall Ram*, 6 A. 448.

When a prior mortgagee has been made a party in a puisne mortgagee's suit, he is entitled to have his rights settled in one application under this section without bringing a separate suit; *Bhajahari v. Gajendra*, 37 C. 282: 14 C. W. N. 672.

A suit for possession after failure, omission, or negligence to execute the decree giving possession, is barred by this section.—*Kisen Nandram v. Anandaram*, 10 B. H. C. 433 (5 M. H. C. 375 followed); *Kristo Gobind v. Gunga Pershad*, 25 W. R. 372; *Lolit Coomar v. Ishan Chunder*, 10 C. L. R. 258; and *Nasrudin v. Venkutesh*, 5 B. 382. See also *Kristo Das v. Behari Lal*; 57 I. C. 900. But a separate suit will lie for actual possession after delivery of formal possession.—*Shama Charan v. Madhub Chundra*, 11 C. 93.

1882 (s. 47) as the question is not between the parties to the suit in which the decree was passed, but between parties who both claim to be representatives of one of such parties.—*Gour Mohan v. Dina Nath*, 25 C. 49: 2 C. W. N. 76. (14 M. 167 distinguished).

In execution of a decree on a mortgage, certain property was sold, which the plaintiff in this suit claimed as his own, under a sale to himself by the court of the mortgagee. The plaintiff sought to set aside the sale, but failing to do so, he applied to the court for a declaration that the question could not be determined in the execution proceedings, as it did not arise between the parties in the former suit or their representatives.—*Shiv Ram v. Jiva*, 13 B. 84.

The question which, under s. 244, C. P. Code, 1882 (s. 47), may be determined by a Court executing a decree must be between the parties to the suit in which the decree was passed, and must relate to the execution of the decree. A person who was not on the record when the decree was made does not constitute himself a party to the suit by applying for execution, and a question as to his legitimacy is, consequently, not one which the Court executing the decree is competent to entertain.—*Abidunnissa Khatun v. Amirunissa*, 2 C. 327, P. C.

A surety becoming liable for decree in a suit and against whom an order was made for its execution, is a party to the suit within the meaning of this section.—*Linga Reddy v. Hussain Reddy*, 28 M. 177; *Nga Kye v. Nga Kyu*, 10 Bur. L. T. 15: 34 I. C. 247.

Prior mortgagees.—*ex parte* decree on subsequent mortgage against him—Application by him to prevent execution comes under s. 47 being a question between the parties; *Gadadhar v. Mustt. Auladin*, 27 I. C. 164.

**Sub-section (3).**—This sub-section corresponds with the last para. of section 244 of the C. P. Code, of 1882 with some additions and alterations.

The words "the Court may either stay, execution of the decree until the question has been determined by a separate suit" which occurred in the old section have been omitted; and the words "*such question, shall for the purpose of this section, be determined by the Court,*" have been substituted—the effect of the substitution is that it is no longer discretionary with the Court to leave the question to be decided by a separate suit, as was held in *Vakulavarana v. Rangaiyan*, 28 M. 357. It has given legislative sanction to the views expressed in *Rajrup Singh v. Ram Golam*, 16 C. I. and in *Beni Prosad v. Lukhna Kunwar*, 21 A. 223, by expressly laying down that the Court executing the decree shall determine such question. Thus sub-section (3) makes it obligatory upon the Court executing the decree to determine the question.

Under s. 47 of the Code where a question arises as to whether any person is or is not the representative of a party it must be determined by the executing Court; *Musst. Muna Koer v. Durga Prasad*, 2 Pat. L. J. 192; *Raghavachari v. Paramaswami*, 11 L. W. 173; *Khan Muhammed v. Chellaram*, 11 S. L. R. 74.

The expression "*representative of a party*" in this section does not mean the representative of a party to the execution proceedings but it means the representative of a party to the suit; *Sreenath v. Romanath*, 3 C. W. N. 276.

tion, against the decree-holder purchaser in Court-auction. The question is one relating to execution and arises between parties or their representatives and must be dealt with in execution; *Deoba v. Lazman*, 44 I. C. 978; *Nagabhatta v. Nagappa*, A. I. R. 1923 Bom. 62.

Failure by the person declared to be the purchaser at a Court-sale to make the deposit of 25 per cent on the amount of the purchase-money in the manner required by s. 306, C. P. Code, 1882 (Or. XXI, r. 84) constitutes material irregularity in conducting the sale, which must be enquired into upon an application under s. 311, C. P. Code, 1882 (Or. XXI, r. 90) and consequently a separate suit to set aside a sale on such ground will not lie—*Bhim Sing v. Sarwan Singh*, 16 C. 33 (5 A. 316 *dissented from*).

Section 244, C. P. Code, 1882 (s. 47) appears to be intended to prohibit a separate suit in cases where one might be brought, and to enable the question to be determined in the execution proceeding.—*Ponnambala Tambiram v. Sivaganana Desika*, 17 M. 343, P. C.

A suit questioning propriety of order passed in execution proceedings is not maintainable because it was a question relating to the execution of the decree; *Harjas Mal v. Dy. Commr., Sitapur*, 3 O. L. J. 756.

Where in the former suit the minor sons of a deceased zemindar were represented by the Collector, who was made a defendant as their guardian *ad litem*—held that a suit brought by one of such minors, on his attaining majority to set aside the sale of a portion of the zemindary property attached in execution of the decree given in the former suit, is barred by s. 244, C. P. Code, 1882 (s. 47).—*Subramanya Pandya v. Siva Subramanya*, 17 M. 316. See also, *Ram Chandra v. Ranjit Singh*, 27 C. 242: 4 C. W. N. 405.

Where a mortgagee decree-holder, after several unsuccessful attempts to realise the decretal amount in execution of the estate of the mortgagor after the that the suit was not maintainable by reas 1882 (Or. XXI, rr. 10, 21, s. 48 and s. 47), the questions arising in the suit being such as should have been determined in execution of the mortgage decree.—*Jogmaya Dassi v. Thackomoni*, 24 C. 473.

Where a decree directed permanent closing of a door, and the judgment-debtor after formally complying with the order shortly afterwards reopened it. Held that the decree-holder could proceed under this section to have the door closed, and no separate suit is necessary; *Habibullah v. Abdullah*, 12 A. L. J. 347: 23 I. C. 247.

A person who was a *proforma* defendant objected to the execution of the decree, and having failed in it brought a suit for a declaration that the property attached was his and did not belong to the judgment-debtor. Held that the suit was barred and the only remedy was to appeal against the order disallowing his objection to the attachment; *Muhammad v. Ram Dial*, 25 P. L. R. 1915: 28 I. C. 14 (10 W. R. 191 *followed*).

The question that a sale in execution of a mortgage decree was invalid, on the ground that it was not warranted by the terms of the decree, cannot be raised in a separate suit; *Gunniah v. Perumal*, 10 M. L. T. 527: (1912) 1 M. W. N. 44.



**Auction-purchaser and Private Purchaser.**—The term "representatives" as used in s. 244, C. P. Code, 1882 (s. 47) when taken with reference to the judgment-debtor or the decree-holder, does not mean only his legal-representative, that is, his heir, executor, or administrator, but it means his representative in interest, and includes a purchaser of his interest, who so far as such interest is concerned, is bound by the decree. There is no reason for excluding from its signification an execution-purchaser of the judgment-debtor's interest.—*Ishan Chunder v. Beni Madhub*, 24 C. 62, F. B. 1 C. W. N. 37, F. B. (This decision in effect partially overrules *Gour Sunder v. Hem Chunder*, 16 C. 355; and *Narain Acharjee v. Gregory*, 8 W. R. 304.) See also *Dwar Buksh v. Fatik Jali*, 26 C. 250; 3 C. W. N. 222; *Badri Narain v. Jaikishen*, 16 A. 483; *Ganga Das v. Yakub Ali*, 27 C. 670; *Gur Prasad v. Ram Lall*, 21 A. 20. (16 A. 286 explained); *Lalji Mal v. Nand Kishore*, 19 A. 332; *Hurdwar Singh v. Bhawani*, 2 C. W. N. 429; *Mathewson v. Gobardhan*, 5 C. W. N. 654; and *Kashinatha Ayyar v. Uthamausa*, 25 M. 520. See, however, *Mahabir Prosad v. Protab Chand*, 22 A. 450; *Sabhajit v. Srigopal*, 17 A. 222, p. 224; *Ghulam Shabbir v. Dwarka Prasad*, 18 A. 36; *Madho Das v. Ramji*, 16 A. 286; and *Vishvanath Charlu v. Subraya*, 15 B. 290. The term "representatives" as used in this section, when taken with reference to the judgment-debtor or decree-holder, includes a purchaser of his interest.—*Minakshi Achi v. Chinnappa*, 24 M. 689, p. 692; *Veyindramuthu Pillai v. Maya Nadan*, 43 M. 107 (F. B.). See also *Akhoy Kumar v. Bejoy Chand*, 29 C. 813; 7 C. W. N. 54; and *Gulzari Lal v. Madho Ram*, 26 A. 477, where it has been further held that the term "representative" includes a private purchaser as well as a purchaser at a judicial sale. Followed in *Imtiaz Begum v. Dhuman Begum*, 29 A. 275; 4 A. L. J. 135; A. W. N. (1907) 64; *Radha Kishen v. Hem Chandra*, 11 C. W. N. 495. See, however, *Magan Lal Mulji v. Doshi Mulji*, 25 B. 631; *M. Ahmed v. Bank of Upper India*, 12 O. C. 175.

A purchaser from a decree-holder purchaser under a money decree is the representative of the judgment-debtor within the meaning of s. 47 C. P. Code for the purpose of an enquiry into a question relating to the execution of that money decree or any other decree affecting the purchased property and against the same judgment-debtor; *Veyindramuthu Pillai v. Maya Nadan*, 38 M. L. J. (F. B.): 43 M. 107.

An auction purchaser is the representative of the judgment-debtor, not of the decree-holder; *Anandi v. Ajudhia*, 30 A. 379. See also *Bhagmati v. Banwar*, 31 A. 82; *Manicka Gramani v. Parasurama*, 1920 M. W. N. 787; 59 I. C. 894; *Matharasapha v. Muttu Chettiar*, 9 L. W. 596.

An auction-purchaser at a sale in Court auction in execution of a decree is a stranger to the suit. He is not a representative of any of the parties to the suit. Any question arising between him and the parties to the suit or their representatives must be determined by a separate suit. The question as to the legality of the sale raised by the judgment-debtor is one between the parties to the suit, i.e., between the decree-holder and the judgment-debtor. Even though the auction-purchaser is interested in the result of the case, the judgment-debtor cannot bring a suit to set aside the sale; *Baimani v. Ranchodlal*, 25 Bom. L. R. 147; 72 I. C. 256 (34 B. 546 folld.).

A stranger purchaser in execution of a money decree can never be treated as representative of the decree-holder. The true rule is: The

Where a judgment-debtor objects to the execution of the decree on the ground that the decree-holder had, before the passing of the decree, agreed not to execute the decree against him and such agreement is denied by the decree-holder, the question whether there was any such agreement between the judgment-debtor and the decree-holder is not one relating to the "execution, discharge or satisfaction" of the decree and can therefore be decided only by a regular suit; *Hassan Ali v. Gauzi*, 31 C. 179; *Benode v. Brajendra*, 29 C. 810. The Madras, Bombay and Allahabad High Courts took a contrary view on this question and held that the question ought to be determined in execution under this section and not by a separate suit; *Rukmani v. Krishnamachary*, 9 M. L. T. 464, *Subramania v. Kumaravelu*, 39 M. 541: 33 I. C. 66; *Chidambaram v. Krishna*, 40 M. 233 F. B.; 37 I. C. 836; *Velu v. Krishnasami*, 48 M. L. J. 277: A. I. R. 1925 Mad. 591: 87 I. C. 297; *Laldas v. Kishordas*, 22 B. 463 F. B.; *Gauri Singh v. Gajadhar Das*, 6 A. L. J. 403: 2 I. C. 608.

A suit by a judgment-debtor against the decree-holder for a declaration that the decree has been satisfied in full for a lesser sum by a private arrangement with the decree-holder and for an injunction restraining the decree-holder from executing the decree, is barred under s. 47 because the principal question in the suit, viz., whether the decree has been satisfied, is a question relating to the "satisfaction" of the decree and therefore falls within the scope of the section; but if the decree is executed, the judgment-debtor may bring a suit against the decree-holder for damages for breach of the contract, because the question in such a suit is not a question "relating to the execution, discharge or satisfaction" of the decree but whether the decree-holder agreed to accept a lesser sum in full satisfaction of the decree, and if so to what damages for breach of the contract the judgment-debtor is entitled.

A decree which simply declares the rights of the parties, and does not direct any act to be done, is incapable of execution. Hence a separate suit will lie to enforce the rights declared by such a decree; *Sri Krishna v. Singara*, 4 M. 219. Thus if the decree in a maintenance suit only states that the plaintiff is entitled to a monthly allowance, the decree is merely declaratory, and in such a case, if the defendant fails to pay the maintenance allowance for any one month, the plaintiff's remedy is not in execution under s. 47 but by a separate suit; *Nawazish v. Vilayetee Khanum*, 2 Agra 23; *Madhavrao v. Ramrao*, 22 B. 267. But if the decree directs payment, by the defendant, of a certain monthly allowance to the plaintiff every month, then on default, the payment can only be enforced by execution proceedings under this section and not by a separate suit; *Ashutosh v. Lukhimoni*, 19 C. 139 (*Matangini v. Chooneymoney*, distd.).

An execution sale may be challenged on the ground of fraud in execution proceedings; it may also be challenged on the ground that the decree, on which the proceedings are founded, is itself tainted with fraud. In the former case the remedy of the person affected is by an application under this section; in the latter case, the remedy is by a regular suit. *Debendra Nath v. Prasanna*, 5 C. L. J. 828.

A separate suit was held to lie in the following cases.—A suit by judgment-debtor against auction purchaser to recover possession of property to which he is not entitled; *Maharaja Singh v. Jagannath*, 10 I. C. 714: 14 O. C. 70. A suit by a judgment-debtor, who has paid twice over privately and in execution, to recover the over-paid amount; *Gendo v. Nepal*, 5 A.

under Or. XXI, r. 90 C. P. Code; *Dharohar Singh v. Ram Prasad Narayan*, 1 Pat. L. R. 139; 72 I. C. 862.

A person for whom the predecessor of the judgment-debtors was the *benamidar* and who is therefore really interested in protecting the property, is a representative of the judgment-debtors within the meaning of s. 244, C. P. Code, 1882 (s. 47).—*Shib Kumar Lal v. Maidhur Gazi*, 7 C. L. J. 299.

The term representative has not a limited signification and means a representative in interest. The transferee of the interest of the judgment-debtor, in order that he may be clothed with the legal character of his representative, must be bound by the decree, that is, must be liable to have the decree executed against property in which he has an interest. If the decree can be executed against him and if he will be affected by the sale he is a representative.—*Peari Lal v. Chandi Charan*, 5 C. L. J. 80; 11 C. W. N. 163.

A suit for pre-emption was decreed on condition of the pre-emptors paying the price fixed by the Court, and the pre-emptor accordingly paid the amount to the vendees. The suit was, however, dismissed on appeal. The pre-emptor then assigned to the plaintiff his right to recover the amount paid to the vendees; and the assignee, after unsuccessful application under s. 244, C. P. Code, 1882 (s. 47) to recover the amount from the vendees, instituted the present suit. Held that the assignee was a representative of the pre-emptor in the pre-emption suit, and the suit was therefore barred by s. 244, C. P. Code, 1882 (s. 47).—*Ishur Das v. Koji Ram*, 10 A. 354.

An *ijadar* of a property of the judgment-debtor is his representative within the meaning of s. 244, C. P. Code, 1882 (s. 47). A suit by a decree-holder against the judgment-debtor and his *ijadar* to have it declared that the *ijara* was null and void is barred by s. 244, C. P. Code, 1882 (s. 47).—*Mathewson v. Gobardhun*, 5 C. W. N. 654; 28 C. 492.

Though an auction-purchaser in execution of a decree is not a party to the suit in which the decree is passed, and though he is not a representative of either the decree-holder or the judgment-debtor for the purposes of this section, yet if the question raised by the judgment-debtor as to the legality of the sale is virtually one between the parties to the suit, that is, between the decree-holder and the judgment-debtor, and if in the decision and result of that question the auction-purchaser is interested, the judgment-debtor should not be allowed to attack the sale in a separate suit, because he was precluded by this section from raising the question by relying upon it as a defence in any proceedings other than those under this section; *Gokul Singh v. Kisan Singh*, 34 B. 546; 12 Bom. L. R. 539. See, *Kuriyali v. Mayan*, 7 M. 225.

**Mortgagee of the Judgment-Debtor.**—A mortgagee is a representative of the judgment-debtor within the meaning of s. 244, C. P. Code, 1882 (s. 47).—*Paramananda Das Mahabeer*, 20 M. 378. So also a second mortgagee.—*Sheo Narain v. Chuni Lal*, 22 A. 243. See *Narayanasawmi v. Seshappier*, 17 M. L. J. 321. But mortgagees deriving title prior to the decree and tenants—at will, could not be regarded as representatives of the judgment-debtor; *Devi Das v. Nathu Mal*, 122 P. L. R. 1917; 89 J. C. 772.

45 B. 812; 23 Bom L. R. 251. A separate suit by an auction-purchaser for refund of the purchase-money, after reversal of the sale under Or. XXI, r. 90, is maintainable; *Jalindra v. Mahomed Basir*, 32 C. 332. A suit by one of two joint decree-holders to recover his share from the other decree-holder who has recovered the whole amount due under the decree; *Somasundaram v. Krishnasami*, 20 M. 183. A suit for damages resulting from acts done under cover of execution; *Deno Nath v. Ram Kumar*, 6 C. L. J. 527; *Abinash v. Bhuban*, 25 C. W. N. 756; *Gendo v. Nehal*, 5 A. L. J. 475; 30 A. 464; *Krishna v. Narayan*, 14 M. L. J. 295; *Kashi Nath v. Noor Khan*, 7 W. R. 45. A suit for compensation by an auction-purchaser for trespass against a decree-holder and judgment-debtor; *Maina v. Davachi*, 17 M. L. J. 543. A suit for an injunction and damages when the decree-holder agrees not to execute the decree but nevertheless assigns it and the assignee applies for execution; *Mukund v. Haridas*, 17 B. 23. A suit to recover mesne profits subsequent to the institution of the suit, when a decree for partition is silent; *Bhivray v. Sitaram*, 19 B. 532; or when the decree in a suit for possession with future mesne profits is silent; *Mon Mohan v. Secretary of State*, 17 C. 968; *Misa U. v. Nga Meik*, 2 U. B. R. 81; *Girwa Singh v. Ram Piare*, L. R. 5 A. 223.

**No Suit Lies on an Executable Judgment, the Only Remedy being Execution.**—In India it is settled law that no action lies on an executable judgment, the only remedy being execution, and the principle is embodied in s. 47; but where a judgment creates a new obligation without providing for its execution, but indicating a suit as the only method of enforcing it, then the judgment to enforce the obligation is maintained; *Rama Sami v. Muthayya*; 48 M. 482.

**Court Executing the Decree.**—The provisions of this section are applicable alike to the Court which passed the decree and to the Court to which it is sent for execution; *Ghaziuddin v. Fakir Baksh*, 7 A. 78; 4 A. W. N. 226. See also *Oudh Behari v. Nageshar*, 18 A. 278 F. B.; 11 A. W. N. 83.

**Order Staying or Refusing Stay of Execution.**—The expression "an order relating to execution of a decree" is comprehensive enough to include an order relating to the stay of execution thereof; *Srinivas Prosad v. Kesho Prosad*, 14 C. L. J. 489; 38 C. 754. See, however, *Saras Mati v. Golap Das*, 41 C. 160.

The Court executing a decree has power to stay execution thereof under (s. 47) and an appellate Court has also power to stay execution, when an appeal from an order in execution proceedings is pending before that Court. —*Pasupati Nath v. Nanda Lal*, 28 C. 734.

Where the right of a party applying for execution as transferee is *sub-judice*, it is not obligatory on the Court, under the last clause of s. 244, C. P. Code, 1882 (s. 47), to stay execution until the question has been determined by separate suit. The Court may in its discretion either stay execution or dismiss the application. —*Vakulabharana v. Rangaiyan*, 28 M. 357.

The Court can require an appellant from an order made under s. 47 in execution of a decree, to give security for the costs of the appeal and of the original suit. —*Dagdu v. Chandrabhan*, 24 B. 314.

All orders staying or refusing to stay execution of decrees, whether passed by the Court which passed the decree, or by the Court to which it is

section; *Dayamayi v. Ananda Mohan*, 18 C. W. N. 971; 20 C. L. J. 52: 42 C. 170 F. B. See also *Kali Charun v. Gowri Sankar*, 27 I. C. 431.

**Persons Who are Not Representatives of the Judgment-debtor.**—A purchaser from some of the judgment-debtors, of property is not his representative in the sense of s. 244, C. P. Code, 1892 (s. 47) and is therefore not affected by the decree.—*Janki Lal v. Jawahir Singh*, 5 A. 94.

The transferee of a judgment-debtor's property is not a representative of the judgment-debtor for the purpose of executing a simple money decree; *Musst. Bhamphul v. Harbaksh Singh*, 113 P. W. R. 1912: 64 P. R. 1912; 14 I. C. 40.

A purchaser of property not directly mentioned in the decree is not a legal representative of the judgment-debtor and a claim petition filed by such purchaser cannot be treated as a petition under s. 47; *Arasayee Ammal v. Sokhalinga Mudali*, (1916) 1 M. W. N. 287.

The transferee of a party pending suit or appeal is not his representative within the meaning of this section.—*Raynor v. Mussoorie Bank*, 7 A. 681.

A previous purchaser in execution of a mortgage decree is not the representative of the judgment-debtor, and cannot therefore object under this section to the sale of the property in execution of a money decree; *Madho Lal v. Dinkar Prosad*, 15 C. W. N. 542.

When a person purchases from the judgment-debtor certain property on which a charge has been created by a decree and the property is subsequently sold in execution of the decree, the purchaser must bring a separate suit if he wishes to set aside the sale, for he is not a representative of the judgment-debtor; *Balwant v. Umabai*, 45 B. 812: 61 I. C. 287.

An official assignee is not the representative of an insolvent judgment-debtor within the meaning of this section; *Grey v. Hazari Lal*, 80 A. 486; *Kashi Prosad v. Miller*, 7 A. 752; *Sardarmal v. Aranvayal*, 21 B. 205; *Peacock v. Madan Gopal* 29 C. 428 F. B.: 6 C. W. N. 577 (28 C. 415: 5 C. W. N. 761 overruled).

Where property which was subject to an attachment was purchased, but the decree in pursuance of which that attachment was made was subsequently set aside, held that the purchaser cannot be said to be representative of the judgment-debtor within the meaning of this section; *Ghafurddin v. Hamed Husain*, 82 A. 129: 7 A. L. J. 26.

An unrecorded co-sharer in a tenancy is not a representative in interest of the recorded tenant within the meaning of this section; *Jaytara v. Prankrishna*, 15 C. W. N. 512: 13 C. L. J. 260.

A purchaser at an execution sale, is not the representative of the decree-holder, when the question to be decided is the right of such auction-purchaser to possession against the judgment-debtor; *Krishna v. Sarasvatula*, 31 M. 177.

A transferee of a non-transferable occupancy holding is not a representative of the judgment-debtor under this section and cannot therefore apply to set aside a sale; *Prosunno Kumar v. Bamacharan*, 13 C. W. N. 652; *Panchratan v. Ram Sahay*, 3 Pat. L. J. 579.

*Chandra*, 25 C. 718: 2 C. W. N. 247, in *Kamini v. Aghore Nath*, 11 C. L. J. 91: 14 C. W. N. 357: *Monmohan v. Dwarka Nath*, 12 C. L. J. 312; *Bajrang v. Lachmi*, 15 C. L. J. 88; *Biroo Gorain v. Jainmati Koer*, 16 C. L. J. 174: 16 C. W. N. 923, a different view seems to have been taken. Suit for a declaration that a decree obtained against plaintiff and others has been satisfied as regards the plaintiff and hence cannot be executed against him is maintainable; *Jamanram v. Krishnaram*, 234 P. L. R. 1914: 25 I. C. 642. See also *Benode Lal v. Brojendra Kumar*, 29 C. 810: 6 C. W. N. 838. Thus there are conflicting rulings on the point and should be settled by reference to a Full Bench. In the last mentioned case (16 C. L. J. 174: 16 C. W. N. 923), all the rulings of the several High Courts have been reviewed.

Agreement between parties to a suit that one of them should submit to a decree with a private arrangement for the discharge of the decree within a certain date and that the other party should not within that date execute or transfer the decree—Decree passed in the suit—Application for execution within the time fixed in the agreement.—*Held*, that such an agreement can be given effect to in execution proceedings under s. 47 of the Code so as to operate as a stay of execution of the decree; *Chidambaram Chettiar v. Krishna Vathiyar*, 40 M. 233: 32 M. L. J. 18 (F. B.).

A Court executing the decree is not competent to take cognizance of an instalment-bond said to have been executed by the judgment-debtor by way of adjustment of decree, and not certified to the Court in accordance with the provisions of s. 257 A. (omitted in this Code) and 258, C. P. Code, 1882 (Or. XXI, r. 2).—*Ramdayal v. Ram Hari*, 20 C. 32 (11 C. 761 *distd.*).

It is only when the judgment debt is extinguished and a new contract made, that an agreement giving time for the satisfaction of the judgment debt, not sanctioned by the Court can be enforced.—*Gopal Sahu v. Brij Kishore*, 32 C. 917: 9 C. W. N. 1004 (26 M. 19 and 25 A. 317 *folld.*).

Agreement not to execute a decree—Suit to restrain execution.—*Held*, that the words "relating to execution" in s. 244, C. P. Code, 1882 (s. 47) must be restricted, (1) to the contents of the order made, (2) to the jurisdiction to make it, and (3) to how far it has been carried out; and do not, therefore, include an agreement not to execute the decree; and that the satisfaction contemplated by s. 244, C. P. Code, 1882 (s. 47) must have arisen out of some transactions between the parties subsequent to the decree.—*Mukund Harshet v. Haridas*, 17 B. 23. Impliedly overruled by *Laldas v. Kishor Das*, 22 B. 463 F. B.

The question whether there was an agreement between the parties to a suit that no decree should be obtained therein cannot be gone into in execution; *Doraiswami Moopan v. Subbalakshmi*, (1918) M. W. N. 547; *Chidambaram Chettiar v. Krishna Vathiyar*, 40 M. 233 (F. B.); *Subramania Pillai v. Kumaravelu*, 39 M. 541.

When a decree-holder after obtaining a decree for possession of certain lands, executed a *pottah* in favour of the judgment-debtor, who was then in possession, and afterwards took out execution, which was opposed by the judgment-debtor. *Held*, that satisfaction of the decree not been entered upon, the objection could not be dealt with under s.

*Din*, 3 Lah. L. J. 406; 68 I. C. 853; *Nauratan Lal v. Mrs. Margaret Anne Stephen*, 3 Pat. L. T. 618. See, however, *Janginath v. Phundo*, 11 A. 74; *Rani Indomati v. Jogeshar*, 28 A. 644; *Mekarrab Husain v. Hurmatunnissa*, 18 A. 52; *Kettilamma v. Kelappan*, 12 M. 228; *Bahori Lal v. Gauri Sahai*, 8 A. 626; *Ganesh Prosad v. Sakhina Bibee*, 14 I. C. 7; *Subra Manya v. Manika*, 2 I. C. 432.

A question as to whether improvements on land attached in execution on property of the deceased judgment-debtor or of his representatives in their own right, ought to be decided under s. 47, and not by a separate suit—*Vengapayyan v. Mahalinga Bhat*, 26 M. 501.

In execution of a decree obtained against the senior member and manager of a tarwad, the tarwad property was attached, and an objection raised by the defendants that the property was not liable under the decree, was cognizable under this section and a separate suit was barred.—*Kamal Kutti v. Ibrayi*, 24 M. 658. Followed in *Marivittil Mathu v. Pathram Kunnot*, 30 M. 215; 17 M. L. J. 377.

The turning point upon which the application of the rule contained in the section barring adjudication in a regular suit, depends, is whether the judgment-debtor, in raising objection to execution of decree against any property, pleads what may analogically be called a *justerri*, or a right which although he represents it, belongs to a title totally separate from that which he personally holds in such property.—*Raghubar v. Hamid*, 12 A. 78.

This section pre-supposes that the questions with which it deals are such as can be finally determined in the execution proceedings. If they cannot, it has no application. The Court should look to the substance of the objection and not to the accident that it is put forward by one person rather than another.—*Ramanathan Chettiar v. Levvai Marakayar*, 23 M. 195.

In execution of a decree passed against the plaintiff, certain property was attached to which he laid claim on the ground that it was service *vafan*. This claim was rejected, and he then filed a regular suit for declaration that the property was not liable to attachment and sale. Held that the suit was barred by s. 47.—*Trimbak Ramrao v. Gobinda*, 19 B. 328.

The Questions whether the Debts were Contracted Without Legal Necessity or Tainted with Immorality, Illegality or that the Attached Property is Self-acquired or Ancestral, Come under this Section.—S. 53 of the C. P. Code, 1908 gives legislative sanction to the decision in the Full Bench case in 34 C. 642 and provides that a question as to the liability of the ancestral property in the hands of the son governed by the Mitakshara school, is to be determined in execution proceedings and not by a separate suit.—*Luchmi Prosad v. Basanta Lal*, 16 C. L. J. 85.

Where a money decree obtained against the father of an undivided Hindu family is sought to be executed against his son as representative of his father, and the son takes the objection that the debts are tainted with immorality, he can do so under this section.—*Umed Hathi Singh v. Gomain Bhajji*, 20 B. 385. Followed in *Chandra Prosad v. Sham Koei*, 33 C. 676; 3 C. L. J. 131; in *Amar Chandra v. Sebak Chand*, 34 C. 642. F. B.: 11 C. W. N. 593; 5 C. L. J. 491; *Shibram v. Sakharam*, 33 B. 39.

The question whether a judgment-debtor satisfied the decree and was fraudulently kept out of all means of exercising his right to apply in Court comes within s. 47 of the C. P. Code; *Kamini Kumar v. Abdul Rahim*, 30 C. L. J. 248.

When a Court has before it an application by a judgment-debtor to enter up full satisfaction of the decree, it must determine first, whether there has been an adjustment of the decree out of Court by which the decree-holder is bound and secondly, whether under the terms of the adjustment, anything remains to be paid to the decree-holder. An allegation that an adjustment of a decree out of Court is fraudulent must be gone into and decided by the Court of execution; *Syed Muhammad Kazim v. Musst. Rukia*, 41 A. 448.

During the pendency of execution-proceedings the judgment-debtor sold the property to a third party, who satisfied the decree out of Court, but the payment was not certified and the property was sold at auction. *Held*, that the remedy of the private purchaser was by an application under s. 244, C. P. Code, 1882 (s. 47).—*Sadho Chaudhuri v. Abhenandan*, 26 A. 101.

A judgment-debtor, alleging that he had entered into an agreement with the decree-holder in satisfaction of his decree, and that the latter had, in breach of such agreement, procured the issue of a warrant of attachment, now sued for a declaration that the decree had been satisfied. *Held*, with regard to the provisions of s. 244, C. P. Code, 1882 (s. 47), the suit was not maintainable.—*Balragulu v. Bapanna*, 15 M. 802.

S. 258, C. P. Code, 1882 (Or. XXI, r. 2) refers to the execution of decrees under which money is payable, and is not applicable to decrees for possession of immoveable property. But s. 244, C. P. Code, 1882 (s. 47) is applicable to decrees for possession of immoveable property.—*Sankaran Nambiar v. Kanara Kurup*, 22 M. 182. But see *Baba Mahomed v. Webb*, 6 C. 786; 8 C. L. R. 36.

**Separate Suit for Damages for Fraudulent Execution of Decree.**—Separate suit for the recovery of money paid to a judgment-creditor out of Court in satisfaction of a decree, but not certified, is not barred by the provisions of this section.—*Gunamani Dasi v. Prankishori Dasi*, 5 B. L. R. 223, F. B.; 13 W. R. 69, F. B.; *Kunhi Moidin v. Ramen Unui*, 1 M. 203; *Guni Khan v. Koonjo Behary*, 3 C. L. R. 414; *Viraraghava v. Subbakka*, 5 M. 897; *Raghava v. Athanambalam*; (1914) M. W. N. 174; 23 I. C. 405; *Mussutti v. Shekaran*, 6 M. 41; *Shadi v. Ganga Sahai*, 8 A. 538; *Mallama v. Venkappa*, 8 M. 277; *Darlata v. Ganesh*, 4 B. 295; *Periatambi Udayan v. Vellaya Goundan*, 21 M. 409. Followed in *Gendo v. Nihal*, 30 A. 464 and *Hanmant v. Subbabhat*, 23 B. 394, *Contra*: *Patankar v. Devji*, 6 B. 146.

Suit by judgment-debtor for damages against decree-holder for omitting to restore property attached. *Held*, that the suit not having been brought against the decree-holder as such or against a party to the suit but being a suit against a depository who set up no right to the property deposited did not fall within s. 47 and was maintainable; *Sitaram v. Donger Singh*, 59 I. C. 477.

The holder of a money-decree, after accepting, in satisfaction of the amount thereof, a part-payment in cash, and a lease of certain lands for



party in his capacity as a *shebait* but in his own personal capacity and his objection therefore fell under Or. XXI, r. 60. The distinction between the two Full Bench Cases has been fully explained in 20 C. L. J. 485 and 481. The observations of Beacheroff, J. in 20 C. L. J. 485 p. 492, make the distinction much more clear. His Lordship observed: "Can then the two cases be reconciled? One possible view occurs to me: It is this. If the claim of the objector is really in his own interest as representative of the judgment-debtor, the case will come under section 47. If the claim is adverse to his interest as a representative, it will not. If this be a correct test, it will satisfy the conditions in 17 C. 711 F. B. for the widow's claim in her personal right was in her interest as representative of the judgment-debtor. It will satisfy the conditions in 39 C. 298 F. B. for the objector's claim as *shebait* was adverse to his interests as representative of the judgment-debtor. Applied to the present case it provides a feature distinguishing it from the case in 17 C. 711 F. B. and a solution in accord with the principle underlying the case in 39 C. 298 F. B."

**S. 144—Determination of Questions regarding Restitution of Money Realized or Property Taken under Decree Subsequently Reversed, Modified or Amended.**—S. 47 differs from s. 144 in this. The latter section is applicable only where the decree is varied or reversed in appeal. The former section applies where the decree is set aside by the original Court on any other ground: For instance where an *ex parte* decree is set aside under Or. IX, r. 13; or on review, or on the ground of fraud and the like. In such cases, the restitution is to be made under this section. S. 144 only applies to a case where a party is entitled to a benefit by way of restitution or otherwise under a decree passed in an appeal. See the observations in *Girdhari Lal v. Khushali Ram*, 31 A 364.

It is competent to a judgment-debtor, by an application under s. 244, C. P. Code, 1882 (s. 47), to recover excess-money improperly realized by the decree-holder in execution.—*Dhan Kunwar v. Mahtab Singh*, 22 A. 79. Followed in *Saran v. Bhagwan*, 25 A. 441, where the decree in execution of which the money was realized, was afterwards set aside in appeal, and it was held that the defendant's remedy was by an application under this section. See also *Collector of Jaunpur v. Bithal Das*, 24 A. 291; *Ganpatrao v. Anandrao*, 44 B. 97; 22 Bom. L. R. 238; *Abdul Karim v. Islamunnissa*, 38 A. 320. A judgment-debtor can apply for refund of money realized by the a time-barred decree.—*Panna Lal v. Chakkan* W. N. (1907) 65.

Sale in execution was set aside under s. 311, C. P. Code, 1882 (Or. XXI, r. 90), and purchase money returned to the purchaser—On appeal order setting aside the sale reversed and sale confirmed. Held that suit by decree-holder to recover purchase-money is barred by s. 244, C. P. Code, 1882 (s. 47).—*Rahimuddin v. Ram Lal*, 27 A. 155 (26 A. 447 followed).

Allegations of misappropriation of attached moveables by the decree-holder acting in collusion with the Court *Amin* should be enquired into under s. 47 and the party complaining should not be referred to a separate suit; *Gajadhar Prasad v. Arjun Das*, 1 Pat. L. J. 558.

A suit to recover money paid under process of a good decree which is afterwards reversed on appeal is not barred by this section.—*Jogesh*

evade the section by adding an unnecessary party to the suit.—*Kristo Mohini v. Kali Prosonno*, 8 C. 402.

Where a decree for sale was passed against two judgment-debtors one of whom by depositing the decretal amount was put in possession of the mortgaged property by order of the Court. The other judgment-debtor appealed against the order. *Held* that the question between the two judgment-debtors themselves, comes within this section and was therefore appealable.—*Marzuhar Ali v. Hussani Jan*, 18 I. C. 812.

Under the provisions of s. 145 of the Code, a surety is for the purposes of appeal to be deemed a party within the meaning of s. 47: *Adhar Chandra v. Pulin*, 20 C. L. J. 129.

If an objector to the execution of a decree was a party to the decree, the case would be governed by section 47 of the Code, and no separate suit will lie to set aside an order overruling the objection; *Jakaran v. Bundao*, 16 I. C. 255. S. 47 does not require that the objector should be a party to the execution proceedings but requires that he must be a party to the suit in which the decree was passed; *Sheikh Abdul Rahim v. Gujeshar Mahto*, 52 I. C. 514.

Although a Court passed an opinion that A, the widow of a deceased debtor, was not a proper party in a suit by the creditor against the heirs, because she was not one of the heirs, yet she was treated as a proper party by reason of the allegation against her that she was in possession of the immoveable property of the estate. On this basis the suit was tried against her and she succeeded on the merits. *Held* that A was a party to the suit within the meaning of s. 47; *Jamini Bala v. Karali*, 84 C. L. J. 477.

A defendant whose name appears in the decree without having been struck off previously from the record is a party with respect to whom the prohibition of a separate suit enacted in s. 47 applied, notwithstanding that he has been exonerated by the decree passed by the Court without any adjudication on the controversial questions between him and the plaintiff; *Venkataswamy v. Kunchala Chidambaram*, 23 M. L. T. 206 (23 M. 361 *folld.*); *Abdul Karim v. Tambuswami Pillai*, (1917) M. W. N. 93.

A party who has been put upon the record, whether rightly or wrongly, is so far a party to the suit that he has a right of appeal under s. 244, C. P. Code, 1882 (s. 47).—*Bhuggobutty v. Money*, 2 C. L. R. 545.

Where a person impleaded as a party to the suit but against whom no decree is passed objects to the attachment of properties in her hands relying on a conveyance executed by the deceased judgment-debtor in her favour, the objection falls under s. 47 C. P. Code. The decision of such a question operated as a decree under s. 2 of the Code and is appealable; *Jaminibala v. Karali Prasad*, 84 C. L. J. 477.

In a partition suit, a compromise decree was passed against all the parties except S. In execution, S was dispossessed and presented a petition objecting that the decree was not binding on him. The petition was rejected. *Held* that the objection raised by S ought to have been investigated under s. 244, C. P. Code, 1882 (s. 47) and that S was entitled to appeal against the order.—*Sankaravadivammal v. Kumarasamy*, 8 M. 478.

**An Auction Sale When may be Set Aside under this Section on the Ground of Fraud.**—The addition of the word "fraud" in Or. XXI, r. 90 has made a material alteration in the law, and has taken away the application for setting aside a sale on the ground of fraud in publishing and concluding the sale out of the operation of this section.—*Biswanath v. Raja Kamaleswari*, 15 C. W. N. xvi (96 n.); *Bhadreswar v. Bishnu Charan*, 8 I. C. 3; *Bissonath v. Kamalsewari Prasad*, 9 I. C. 135; *Lal Behari v. Nogendra Nath*, 16 I. C. 690; *Palaniappa v. Arumuga*, (1916) 1 M. W. N. 256; *Maula Buz v. Raghubar*, 3 Pat. L. J. 645.

Whether an application to set aside a sale on the ground of fraud, falls under this section or under Or. XXI, r. 90, is to be determined according to the allegations made in the petition; the mere mention of a particular section in the petition cannot bring it within that section. The substance of the ground stated in the petition should be looked to; *Harihar v. Rama Pandu*, 33 B. 698: 11 Bom. L. R. 1113.

It should be noted here that Or., XXI, r. 90 mentions only a particular kind of fraud, that is fraud in conducting and publishing a sale; and such kind of fraud alone has been taken out of the operation of this section; but where the fraud alleged is not a fraud in conducting or publishing the sale, such a fraud comes within the scope of this section. For instance, where an application to set aside a sale was made on the ground of fraud, the fraud being that the decree had been satisfied by payment to the husband of the decree-holder on the day before the sale, but the payment was not certified and the sale was held, the matter did not come within Or. XXI, r. 90, but it came within the scope of s. 47; *Alokeshi Dasi v. Biraj Mohini*, 10 I. C. 625. So where an application is made to set aside a sale on the ground of fraud in not serving notice under Or., XXI, r. 22 such an application comes under this section, as non-service of notice is not an irregularity in publishing and conducting the sale, but is an irregularity in proceedings anterior to sale, see 32 B. 572 and 11 C. L. J. 489: 14 C. W. N. 560 noted below. An application to set aside a sale on the ground that the judgment-debtor had no saleable interest, may come under this section, if there was fraud or misrepresentation by the judgment-debtor or decree-holder; *Makham Chore v. Nishind*, 10 C. L. J. 492. See also *Ramdhani Sha v. Topi Bibi*, 18 C. L. J. 264, where the application to set aside the sale was made on the grounds that the decree had been satisfied before the sale, that the execution of the decree was barred before the sale was held and that the proceedings leading up to the sale had been carried on by fraud and collusion. Such an application was held to fall within the scope of this section. An application by purchaser of a non-transferable occupancy holding from whom rent has been received by the landlord, to set aside an execution sale in favour of the landlord decree-holder held in course of proceedings initiated and carried on against a dead judgment-debtor is governed by this section; *Arjun Das v. Gunendra*, 20 C. L. J. 341: 18 C. W. C. 1266: followed in *Nalin Chandra v. Bepin Chandra*, 22 C. L. J. 244: 19 C. W. N. 953.

Where after payment of money into Court under Or. XXI, r. 55 in full satisfaction of the decree, the Court ordered rateable distribution of the money so paid, and ordered the sale of the attached properties toward further satisfaction of the claims of the judgment-creditors and the properties were accordingly sold. Held, that an application to set aside

In 1876 a decree was passed against N, as representative of L, who died pending the suit, declaring N liable to the extent of the assets of L. In 1879 the decree-holder, in execution put up to sale property belonging to N, who preferred an unsuccessful claim. Subsequently N brought a suit to recover the land sold. *Held*, as N was a party to the suit of 1875 within the meaning of s. 244, C. P. Code, 1882 (s. 47), the suit would not lie.—*Arundadhi v. Natesha*, 5 M. 391.

*Held* that proceedings in execution of a decree taken against the plaintiff's father and elder brother on previous occasions did not bind the plaintiffs under s. 244, C. P. Code, 1882 (s. 47); the plaintiffs not having been parties to them within the meaning of that section.—*Krishnaji v. Vithalrao*, 12 B. 80.

Where the question is between two judgment-debtors *inter se*, and not between the parties arrayed against each other as decree-holders on the one part and judgment-debtors or their representatives on the other, the provisions of s. 244, C. P. Code, 1882 (s. 47) are not applicable.—*Raynor v. The Mussoorie Bank*, 7 A. 681; *Budaraju Hanumantha v. Allamneni*, 70 I. C. 829.

A dispute as to possession between rival auction-purchasers of the same property in execution of different decrees does not fall within s. 47; *Mandavilli Rama Row v. Siva Narayana*, 25 M. L. T. 153.

A decree-holder having assigned a share of her decree, applied several times jointly with such assignee for execution. On a subsequent application by the original decree-holder alone, the Court directed that the moneys realized in execution should only be paid over to the co-decree-holders jointly. *Held* that the question in dispute was one between co-decree-holders and not between the parties to the suit or their representatives as contemplated by s. 244 (c), C. P. Code, 1882 (s. 47).—*Gyamones v. Radha Ramon*, 5 C. 592.

In a suit for a declaration of invalidity of an execution sale, on the ground that the execution-proceedings were not taken out against the plaintiff's father and another who was not the real representative of the deceased that the present plaintiff was a defendant in the suit in which the decree was passed; and although he subsequently withdrew his defence, he remained a party on the record. *Held*, that as the plaintiff was a party to the suit in which the decree was passed, his remedy, if he could object to the sale, was by an application under s. 244, C. P. Code, 1882 (s. 47) and not by a separate suit.—*Ram Chandra v. Ranjit Singh*, 27 C. 242; 4 C. W. N. 405. Distinguished in *Khetrapal v. Shyama Prosad*, 82 C. 265. See also 17 M. 316.

A person who, at the instigation of the judgment-debtor, obstructed the decree-holder in obtaining possession of the property, is not a party to the suit within the meaning of s. 244, C. P. Code, 1882 (s. 47); so orders passed against him under ss. 329 and 332, C. P. Code, 1882 (Or. XXI, r. 93 and rr. 100, 101, 103) do not bar a suit.—*Bishen Dayal v. Sagar Singh*, 2 C. W. N. 311. (17 C. 769 referred to).

A suit for declaration that a decree purchased in the name of the defendant who had wrongfully taken out execution of the same in his own name had been really purchased by the plaintiff for his own benefit and that the defendant was only his *benamidar*, is not barred by s. 244, C. P. Code,

be considered is, whether there is a contest regarding the validity of the sale between the parties to the suit.—*Adhar Mani v. Monmatha Nath*, 5 C. W. N. 279.

S. 244, C. P. Code, 1882 (s. 47) bars a separate suit to set aside a sale on the ground of fraud, and operates not only to prohibit a suit between the parties or their representatives, but also a suit by a party or his representative against an auction-purchaser who is a third party, and was no party to the decree of which the execution is in question—*Prosunno Kumar v. Kali Das*, 19 C. 653, P. C.; 7 M. 255; and 9 E. 465, approved). This decision in effect overrules the Full Bench decision of *Mohendra Narain v. Gopal Mondal*, 17 C. 769; *Sita Pershad v. Nando Lal*, 18 C. 139; and *Jaganmuthi v. Watson & Co.*, 19 C. 341, where it has been held that this section bars a regular suit in those cases only where circumstances affecting the validity of a sale have been brought about by the fraud of one of the parties to the suit, and not by a third party, such as, an auction-purchaser. The Privy Council case in 19 C. 653 has been followed in *Bhubar Mohun v. Nundo Lal*, 20 C. 224; 3 C. W. N. 399; *Moti Lal v. Russi Chunder*, 26 C. 225-6; 3 C. W. N. 395; *Dham Ram v. Chaturbhuj*, 22 A. 26; *Mathura Das v. Lachman Ram*, 24 A. 239; *Jogmaya Dassi v. Thakomoni*, 24 C. 473 (p. 492); *Chand Moner v. Santo Moner*, 24 C. 707; *Amir Baisha v. Venkatachala*, 18 M. 439 (p. 442); *Douamoni v. Sarat Chunder*, 25 C. 175; 1 C. W. N. 650; *Hira Lal v. Chunder Kant*, 3 C. W. N. 403; *Nema Chand v. Dero Nath*, 2 C. W. N. 691; *Adhar Mani v. Monmatha Nath*, 5 C. W. N. 279; and *Rajoni Kant v. Hossainuddin*, 4 C. W. N. 338. This last case has been explained and distinguished in *Umahanta Ray v. Dero Nath*, 28 C. 4; 5 C. W. N. 124, where it has been held that a mere allegation of fraud in a petition to set aside a sale under s. 311, C. P. Code, 1882 (Or. XXI, r. 90) without an attempt to prove it, would not be sufficient to bring the case under s. 244, C. P. Code, 1882 (s. 47). Where an application is made to set aside a sale, the main basis of which is fraud, such an application comes under s. 244, C. P. Code, 1882 (s. 47)—*Kail Singh v. Idal Singh*, 31 C. 285 (26 C. 224 and 399 followed; 28 C. 4 distinguished).

An execution sale may be challenged on the ground of fraud in the execution proceedings; it may also be challenged on the ground that the decree on which the proceedings are founded, is itself tainted with fraud. In the former case, the remedy of the person affected, is by an application under s. 244, C. P. Code, 1882 (s. 47). In the latter case the remedy is by regular suit. If the decree is tainted with fraud, a suit will lie to set aside the execution sale, even though, the decree may have been previously set aside under s. 165, C. P. Code, 1882 (Or. IX, r. 19) and there is no subsisting decree to be set aside in the suit in which the sale is impeached—*Debdendra Nath v. Prasanna Kumar*, 3 C. L. J. 225.

A suit will lie to set aside a decree and a sale held in execution of such decree, when both the sale and the decree are impeached on the ground of fraud—*Anil Marumdar v. Mahomud Gazi*, 21 C. 675. See also *Raila Ramon v. Premnath*, 28 C. 473, P. C.; 3 C. W. N. 707, P. C. (24 C. 346, confirmed); *Moti Lal v. Russi Chunder*, 26 C. 225-6; 3 C. W. N. 395; *Ran. Narain v. Shree Bhunian*, 26 C. 197 (24 C. 346 referred to); *Brojo Gopal v. Baidumissu*, 15 C. 179; and *Idar Nath*

The question as to the status of the decree-holder, namely, whether he can rightfully claim to be the representative of the original decree-holder is a question relating to execution of decree within the meaning of this section; *Waresh Munshi v. Aftabuddi*, 16 C. L. J. 96.

Under this sub-section the Court executing a decree is competent to determine whether an alleged transferee of a decree is or is not the representative of the decree-holder. The term representative also includes subsequent transferees from the transferee of the decree-holder; therefore an order of the executing Court determining whether an alleged transferee from a decree-holder or from his legal representative is or is not the representative of the decree-holder is an order under this section and is appealable as decree; *Ganga Das v. Yakub Ali*, 27 C. 670; *Badri Narain v. Jai Kishen*, 16 A. 488; *Dwar Buksh v. Fatik Jali*, 26 C. 250; 3 C. W. N. 222; *Krishnama v. Appasami*, 25 M. 545; 12 M. L. J. 280; *Raghavachari v. Paramasami Pillai*, 11 L. W. 173.

The question as to the genuineness of the purchase of a decree, arising between the purchaser who applied for execution on the substitution of his name as decree-holder and a judgment-creditor of the decree-holder who having attached the decree opposes the application, comes within the purview of s. 47, C. (3) of the C. P. Code and as such the decision is appealable as a decree, even though the judgment-debtor does not take any part in the dispute; *Mohini Mohan v. Surendra Chandra*, 20 C. W. N. 679 (11 C. W. N. 433 *distd.*).

**Meaning of the Term "Representatives" in the Section.**—The term "representative" as used in this section, means not only the legal representative in the sense of the heirs, executors or administrators, but includes any representative in interest, that is, any transferee of the interest of the decree-holder or judgment-debtor, or who, so far as such interest is concerned is bound by the decree; *Veyendra Muthu Pillai v. Mayanadan*, 43 M. 107 (F. B.). To determine whether a particular person is a representative of a party to a suit, the two tests to be applied are, (1) whether any portion of the interest of the decree-holder or of the judgment-debtor, which was originally vested in one of the parties to the suit, has by act of parties, or by operation of law, vested in the person who is sought to be treated as representative, and (2) if there has been a devolution of interest, whether, so far as such interest is concerned that person is bound by the decree; *Ajodhya v. Hardwar Roy*, 9 C. L. J. 485; 1 I. C. 213; See *Tarapasanna v. Nilmoni*, 41 C. 418.

The word "representative," as used in s. 244 (c), C. P. Code 1882, (S. 47), means any person who succeeds to the right of any of the parties to the suit after the decree is passed. The next heir of a Hindu widow is not her legal representative, as he inherits the property as heir-at-law of her deceased husband.—*Kameshwar Pershad v. Run Bahadur*, 12 C. 458. See also *Jagarnath v. Shiv Ghulam*, 31 A. 45; 5 A. L. J. 745; *Ala Singh v. Wasama*, 14 P. R. 1913; 228 P. L. R. 1912.

The word "representative" s. 244, C. P. Code, 1882 (s. 47) has much wider meaning than the words "legal representatives" in s. 234, C. P. Code, 1882 (s. 50). The provisions of ss. 234 and 244 (c), C. P. Code, 1882 (ss. 50 and 47) are not irreconcilable.—*Swaminatha v. Vaidyanatha* 28 M. 466 F. B.

C. L. J. 542; *Srinath v. Bishan Chandra*, 2 C. L. J. 504; *Elokeshi Dasi v. Abinash Chandra*, 5 C. L. J. 638.

A suit to set aside a certificate sale on the ground or fraud is not barred by s. 244 C. P. Code, 1882 (s. 47)—*Raghubans Sahai v. Fulkumari*, 1 C. L. J. 542 (1 C. L. J. 538 distinguished, and 1 C. L. J. 360 doubted). See also *Srinath v. Bishan Chandra*, 2 C. L. J. 504 (1 C. L. J. 538 distinguished, and 1 C. L. J. 360 doubted). But see *Barhamdeo Narayan v. Bibi Rasul Bandi*, 32 C. 691, where it has been held that s. 244, C. P. Code, 1882 (s. 47) is applicable in its entirety to proceedings in execution of a certificate, and a separate suit to set aside a certificate sale is therefore not maintainable (28 C. 813 referred to). See also *Umed Ali v. Ruj Lakshmi*, 10 C. W. N. 130.

Where by reason of omission to serve a notice under s. 10 of the Public Demands Recovery Act, there is no legal decree and no legal sale, a suit to set aside and to recover possession of the property sold is not barred by s. 244, C. P. Code, 1882 (s. 47).—*Elokeshi Dassi v. Abinash Chandra*, 5 C. L. J. 638.

Under the provisions of section 21 of the Public Demands Recovery Act (I of 1895, B. C.) before its amendment by Act I of 1897, B. C., s. 244, C. P. Code, 1882 (s. 47) is not applicable in its entirety and does not apply so as to bar a separate suit for setting aside a sale for arrears of cesses; it applies only so far as the procedure to be followed in execution-proceedings to enforce the certificate, and to realize the amount thereunder is concerned.—*Janki Das v. Ram Golam*, 28 C. 813.

**Sale Held in Contravention of S. 99 of the Transfer of Property Act.**—A sale held in contravention of the terms of s. 99 of the Transfer of Property Act is not a nullity, but an irregular sale, liable to be avoided merely on proof that the terms of that section have been contravened. The application to set aside such a sale must be made under s. 244, C. P. Code, 1882 (s. 47) and before the confirmation of the sale.—*Ashutosh Sikdar v. Behari Lal*, 35 C. 61, F. B.: 6 C. L. J. 320: 11 C. W. N. 1011 (26 C. 164; 30 C. 463; 33 C. 113 and 283 impliedly overruled; 12 M. 325; 14 M. 74, and 16 M. 436 not followed). A sale in contravention of s. 99 of the T. P. Act, is only voidable and not void.—*Methu v. Karuppan*, 30 M. 313; 17 M. L. J. 163: *Sahadu Manaji v. Devlya*, 14 Bom. L. R. 254; 14 I. C. 780. But see *Sonu Singh v. Behari Singh*, 33 C. 283 and *Mayan Pathuli v. Pankuran*, 22 M. 347, where it has been held that the sale is void and it may be set aside under s. 244, C. P. Code, 1882 (s. 47). See however, *Kishan Lal v. Umro Singh*, 30 A. 146 (33 C. 283 dissented from).

**Suit to Set Aside Sale on the Ground that the Purchase was made Without Leave to Bid.**—A suit to set aside a sale in execution on the ground that the real purchasers are the decree-holders and that they have purchased without permission to bid is barred by s. 244, C. P. Code, 1882 (s. 47). The proper remedy is by an application under that section.—*Durga Kunwar v. Balwant Singh*, 23 A. 478.... See also *Viraraghava v. Venkata*, 16 M. 287; *Chintamanrav v. Vithabai*, 11 B. 588 and *Genu v. Sakharan*, 22 B. 271; *Daulat Ram v. Jugal Kishore*, 22 A. 108; *Kishnan v. Arunachalam*, 16 M. 447 and *Bhubon Mohun v. Nunda Lal*, 26 C. 824; *Sathu v. Kondu*, 32 M. 242; 5 M. L. T. 248; 1 I. C. 221.

purchaser in execution of a mortgage-decree is the representative of the judgment-debtor.—*Narayana Iyengar v. Veera Chundra Pillai*, 34 M. 417: 8 I. C. 429, (referred to in *Balwant v. Ratan Lal*, 1923 Nag. 161). See also *M. Hassain v. Masien V. Bavin*, 5 L. B. R. 85; *Maung Po. Thet v. Anamataw*, 9 I. C. 472. Nor a private purchaser before attachment of the property in execution of a money decree; *Kali Kumar v. Misiri Jan*, 15 C. W. N. 711.

The purchaser from the decree-holder auction-purchaser is not a representative of the decree-holder *qua* decree-holder. His suit is therefore not barred by s. 47 as he is not a representative of the decree-holder and as the question does not relate to execution, discharge and satisfaction of a decree; *Mi Ah Cook v. Mi Hla Mo Way*, (1922) L. B. R. 18: 64 I. C. 68; *Kaniz Mehdi Begam v. Rasul Beg*, 5 O. L. J. 551: 48 I. C. 89.

An auction-purchaser of the judgment-debtor's equity of redemption is his legal representative within the meaning of s. 244, cl. (c) of the C. P. Code, 1882 (s. 47). Therefore a suit at the instance of one decree-holder against another to set aside an order passed under s. 295, C. P. Code, 1882 (s. 78) in favour of the latter and for recovery of the surplus sale proceeds that have been erroneously paid away to him, is not maintainable.—*Hurdwar Singh v. Bhawani Pershad*, 2 C. W. N. 429 (24 C. 62 referred to).

A purchaser from a voluntary seller who has sold with the consent and authority of the Court under Or. XXI, r. 83 is a representative of the judgment-debtor.—*Gobardhan Rai v. Bishan Prasad*, 23 A. 116.

A collusive purchaser of the equity of redemption whose purchase has been declared to be such, has no *locus standi* to maintain an application under s. 47 objecting to the execution of the mortgage decree as a representative of the judgment-debtor; *Tarangini v. Baikuntha Nath*, 42 I. C. 1.

An auction-purchaser at a Court sale is a representative of the decree-holder within the meaning of s. 244, C. P. Code, 1882 (s. 47). A transferee acquiring an interest in the property of the judgment-debtor after such property had been sold in execution, has a right to apply under s. 10A of the C. P. Code, 1882 (Or. XXI, r. 89).—*Manikka Odayan v. Rajagopala*, 30 M. 507: 17 M. L. J. 291. (28 M. 87, followed, 19 A. 140; 20 M. 487, not followed 1 C. W. N. 279, *dissented from*); *Arthanari Chettiar v. Nagoji Rao*, (1912) M. W. N. 518.

The application of the purchaser at a Court sale for delivery of possession against a purchaser of attached property after attachment comes under this section, as the purchaser of the attached property is the representative of the judgment-debtor within the meaning of this section; *Kuppuna v. Kumara*, 34 M. 450: 20 M. L. J. 961.—*See*, 20 M. 278; 21 A. 20; 19 A. 382; 28 C. 492.

Purchaser of the interest of a tenure from the judgment-debtor who was the recorded-tenant prior to the decree obtained for arrears of rent, is not the representative of the judgment-debtor within the meaning of s. 244 (c) of the C. P. Code, 1882 (s. 47) and has no *locus standi* to apply to set aside the sale.—*Kala Shaha v. Bhagahati Debya*, 6 C. W. N. 127 (12 C. 458; and 24 C. 62 F. B.: 1 C. W. N. 36 *relied upon*). A purchaser at a revenue sale of the interest of the judgment-debtor after a decree for sale on a mortgage had been passed against him, is a representative of the judgment-debtor and as such entitled to apply to set aside the sale



*Lalman v. Jagannath*, 22 A. 376; *Sadho v. Abhenandan*, 26 A. 101; *Sheodihal v. Bhawani*, 29 A. 348; 4 A. L. J. 188; *Biru Mahata v. Shyama Churn*, 22 C. 483; *Mayan Pathuri v. Pakuran*, 22 M. 347; *Pashupathy Ayyar v. Kothanda*, 28 M. 64; *Jotindra Mohan v. Mahomed Basir*, 32 C. 832; *Collector of Meerut v. Kalka Prosad*, 28 A. 665; 3 A. L. J. 556; and *Debendra Nath v. Prasanna Kumar*, 5 C. L. J. 328; *Shib Lakshman v. Tarangini*, 8 C. L. R. 20; 8 O. C. 327; 40 P. W. R. 1907; 5 P. R. 1907; 5 B. L. R. 1036, (p. 1041); *Chintaman Singh v. Ghunisahu*, 1 Pat. L. J. 43; 3 Pat. L. W. 95; *Nazir Husain v. Kanhaiya Lal*, 35 I. C. 473; *Sharfu v. Mirkhan*, 1 Lah. L. J. 230. In *Thathu v. Kondu*, 32 M. 242; 5 M. L. J. 248, it has been further held that a written statement, containing an answer to the plaintiff's claim may be treated as an application under this section. This proposition has been approved in *Khoda Bux v. Sadu*, 14 C. L. J. 620, (p. 625).

In the face of s. 47 (2) C. P. Code, it is not permissible to a Court to dismiss a suit on the ground that the remedy of the plaintiff was by way of execution. The mere fact that the Court which decided the suit would have had no jurisdiction to determine the matter in execution is not a sound reason for not treating the suit as an application in execution; *Lakshmana Chetty v. Muttiah Chetty*, 18 M. L. T. 247; 30 I. C. 785.

A decree was passed against a minor treating him as a major. In execution, the judgment-debtor filed an objection that the decree was not binding on him. Held that the objection can be treated as a suit under s. 47, cl. (2) subject to any objection as to limitation or jurisdiction.—*Daulat Singh v. Maharaj Raja Ramji*, 48 A. 362; 24 A. L. J. 379; A. I. R. 1926 ALL. 387.

Where a suit is brought for restitution in spite of the provision in s. 144 of the C. P. Code, it is open to the Court to treat the suits as a proceeding in execution in the exercise of its powers under s. 47, cl. (2), C. P. Code; *Jaman Lal v. Ragho*, (1922) Nag. 198; 67 I. C. 319.

Where the decree-holder's petitions purported to be petitions for review under Or. XLVII, r. 1, it was held that they could be treated as application under s. 47; *Jagannath Mandal v. Jaladhar Mandal*, 26 C. L. J. 317; 40 I. C. 839.

If the execution proceedings are still going on, it is not material whether the dissatisfied party applies expressly under s. 47 or purports to bring regular suit, provided the Court is the same. Clause (2) now makes express provision for mistakes of this kind; *Nago Po Tun v. Mi Thet Pon*, U. B. R. (1910), 4th qr., p. 66; 10 I. C. 991.

When there was no question of limitation or court fees, a revision petition may be treated as a memorandum of appeal; *Arjun Das v. Gunendra*, 20 C. L. J. 341; 18 C. W. N. 1266.

Where no specific amount is stated in a petition of objection the High Court declined to treat such a petition as a plaint; *Mohun Lal v. Jagannath*, 35 A. 243; 11 A. L. J. 282; see also *Nasiruddin v. Bhagwana*, 12 A. L. J. 31; I. C. 663.

Section 47 (2) was intended to obviate the injustice caused to parties by a mistake in the initiation of proceedings and enables a Court to treat a suit as an application and *vice versa*. It does not enable one proceeding

A mortgagee by conditional sale is a representative of the mortgagor; *Janki Prasad v. Uljat Ali*, 16 A. 284.

A person to whom a transferable occupancy-holding was mortgaged before its sale in execution of a rent decree, is a representative of the judgment-debtor and may apply to set aside the sale.—*Nisa Bibi v. Radha Kishore*, 11 C. W. N. 312. But not a transferee of a not-transferable occupancy holding; *Prosunno v Bama Charan*, 13 C. W. N. 652.

**Transferee of a Decree.**—The assignee of a decree-holder is his representative within the meaning of s. 244, C. P. Code, 1882 (s. 47).—*Jamini Nath v Debi Prasad*, 33 C. 857; 4 C. L. J. 192. A transferee of a decree by operation of law is to be regarded as the representative of the original decree-holder.—*Paramananda Das v. Vallab Das*, 11 B. 506. See also *Subbutnayammal v. Chidambaram*, 25 M. 383.

**Attaching Creditor.**—A person attaching a decree is a representative of the decree-holder within the meaning of s. 244, C. P. Code, 1882 (s. 47) and in every case is entitled to enforce execution of the decree which he has attached.—*Peary Mohan v. Romesh Chunder*, 15 C. 371; *Sah Man Mull v. Kanagasabapathi*, 16 M. 20. Followed in *Krishnan v. Venkatapati*, 29 M. 318. *Mohini Mohan v. Surendar Chunder*, 20 C. W. N. 679 (11 C. W. N. 433 distd.). But see *Ram Chunder v. Hamiran*, 11 C. W. N. 493: 6 C. L. J. 437 and *Rangasami Chetti v. Periasami Mudali*, 17 M. 58.

**Transferee of a Tenure or Occupancy Holding.**—Where the landlord of an occupancy-tenant obtains a decree for rent against his registered tenant, an unregistered transferee of the tenant of a portion of the holding is bound by the decree, and is therefore a representative of the judgment-debtor under s. 244, C. P. Code, 1882 (s. 47).—*Azgar Ali v. Asaboddin*, 9 C. W. N. 184. Followed in *Gopinath v. Sajani Kanta*, 10 C. W. N. 240 and in *Upendranath v. Bhupendra* 3 I. C. 39.

A person who acquired a *putni* tenure at a sale in execution of a decree for money against the *putnidar*, but who did not get his name registered in the landlord's office is bound by the decree for rent against the recorded tenant and is therefore a representative of the judgment-debtor within the meaning of s. 244, C. P. Code, 1882 (s. 47).—*Surendra Narayan v. Gopi Sundari*, 9 C. W. N. 824: 32 C. 1031 (24 C. 62 and 9 C. W. N. 184, followed. 6 C. W. N. 128 and 12 C. 458 not followed).

Where the landlord has accepted rent for a long period from the purchaser of a non-transferable occupancy holding as *marfatdar* he has a *locus standi* under s. 47 to object to execution proceedings against the original tenant in respect of his holding; *Gagan Chunder v. Nasar Chunder*, 64 I. C. 124.

The purchaser at an execution sale held in execution of a decree against the unregistered transferee of an occupancy holding is a representative of the recorded tenant and is therefore entitled to apply for setting aside a sale in execution of a rent decree against the recorded tenant on the ground of fraud; *Haradhan v. Grish Chunder*, 8 C. L. J. 327: 13 C. W. N. 98.

A person who without the landlord's consent purchases a portion of non-transferable occupancy holding, is a person whose immoveable property has been sold, and is a representative of the judgment-debtor under this

When a party to a decree and subsequent proceedings in execution thereof has suffered execution to proceed and property to be sold without appealing, he cannot sue to recover the property so sold on the grounds which might have been taken in appeal from the decree or from orders in execution.—*Beni Prasad v. Lukhna Kunwar*, 21 A. 323.

Where a prior suit brought by the father as trustee to recover certain property was dismissed as barred by this section, a subsequent suit brought by the sons after the death of the father, was concluded by that decision; *Ramapayya v. Aitha Melanta*, 8 M. L. T. 221.

If an application has been made under s. 47 and disposed of, the decision is *res judicata* and on that ground a subsequent regular suit will be barred; *Naga Po Tun v. Mi Thet Pon*, U. B. R. (1910) 4th qr., p. 66: 10 I. C. 991.

**This Section is Not Applicable to Cases under Act X of 1859.**—This section and the sections which deal with proceedings after sale have no application to cases arising under Act X of 1859, the only remedy open to the judgment-debtor under that Act, whose property has been illegally sold, is by a separate suit; *Damodar Misra v. Iswar Chandra*, 15 C. W. N. 78: 7 I. C. 387.

**Explanation.**—This explanation is new and has been added to put an end to a conflict of judicial decisions. Where a party has been properly impleaded as one of the defendants in a suit and the case against him would have proceeded to judgment but for the fact that the plaintiff elected to abandon part of his case and the suit was in consequence dismissed against this defendant. He is a "defendant against whom a suit has been dismissed" within the meaning of the explanation to s. 47, C. P. Code; *Sannama v. Radhabhai*, 41 M. 418 (F. B.): 34 M. L. J. 17. In *Ramasami v. Kameswaramma*, 23 M. 361: 10 M. L. J. 123 F. B. and in *Bibhudapriya v. Vidianidhi*, 22 M. 181, it was held that where a party in a suit is exonerated from such suit being dismissed as against him and a decree is passed against a co-defendant in the suit, and in execution of that decree, property belonging to and in the possession of the defendant who was so exonerated from the suit, is attached and sold, the latter is not entitled to maintain a suit for recovery possession of the property, the question of his claim to, and to recover possession of the property being one under this section so as to debar him from maintaining such a suit. This case has been followed in 15 C. P. L. R. 106, see also *Gowri v. Vigneshawar*, 17 B. 49; 15 M. H. C. R. 247 p. 250; *Abdul Karim v. Tambuswami Pillai*, (1917) M. W. N. 93; *Krishnappa Muddaly v. Periasami*, 40 M. 964 (F. B.): 32 M. L. J. 532: (33 C. 425, 20 C. W. N. 1279, 23 M. 361, 29 M. L. J. 629, 21 M. 45, referred to); *Data Din v. Nanku*, 16 A. L. J. 752; *Jamna Pershad v. Ram Dulare Lal*, 52 I. C. 187.

On the other hand the Allahabad High Court in *Kalka Prasad v. Basant Ram*, 23 A. 346 and in *Sheo Parkash v. Nawab Singh*, 32 A. 321: 7 A. L. J. 204 and the Calcutta High Court in *Rahimulla v. Lal Meah*, 20 C. 696: 6 C. W. N. 272 and in *Ram Pershad v. Jagannath*, 30 C. 184: 6 C. W. N. 10 took contrary views. It was to reconcile these conflicting decisions that the explanation has been added, which gives effect to the Madras Full Bench Case.

A decree obtained against the sons of the defendant as his ostensible representatives cannot be executed against the estate at the hands of the executrix. The proper remedy pointed out; *Kali Charan v. Sukhada*, 22 C. L. J. 272; 20 C. W. N. 58; 30 I. C. 824.

An auction-purchaser who was not a party to the original suit is not a representative either of the judgment-debtor or the decree-holder.—*Itrajakuar v. Raja Ram*, 27 I. C. 570 (19 C. 683 *expld.*; 28 M. 87; 30 M. 507, *dissented*; 30 A. 379; 25 B. 631 *resd.*); *Balwant v. Rattan Lal*, 68 I. C. 429; *Narsimbhat v. Bandu*, 42 B. 411, *Hukamchand v. Gongaram*, 12 P. R. 1919

**Objection by the Representative of a Deceased Judgment-debtor that the Property Attached does Not Belong to the Judgment-debtor but to Himself—When Comes under this Section.**—When a decree against a person in a representative capacity has been properly passed, and proceedings have been taken under it to obtain execution against the party in his representative character, he is a party to the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree within the meaning of the section.—*Chowdry Wahed Ali v. Jummal*, 11 B. L. R. 149, P. C.: 18 W. R. 185, P. C.

Where a judgment-debtor claims attached property either on his own account as his own property or as the representative of third parties, in which capacity he has been sued, the question between him and the attaching creditor is one between the parties to the suit under s. 47. But where he raises the objection on behalf of third parties who are not represented before the Court, the order passed thereon must be regarded as an order under (Or. XXI, r. 60).—*Roop Lall v. Bekam Meah*, 15 C. 437. Referred to in *Ramanathan Chettiar v. Leuvia Marakayar*, 23 M. 195; *Petti Kayilakaath v. Alam Ibram Haji*, 31 I. C. 893.

If the property claimed by A in his personal capacity was sold in execution of a decree passed in a suit in which he was sued in a representative character as the property of B, it was open to A to apply under s. 47 of the C. P. Code, to have the sale set aside. A separate suit was not maintainable; *Khitish Chunder v. Thakamani*, 27 C. L. J. 572 (17 C. 711 *folld.*).

An objection by the representative of the deceased judgment-debtor, in the course of the execution of a decree to the effect that the property attached in satisfaction thereof is his own property, and not held by him as such representative, is a matter cognizable only under s. 47.—*Punchanun v. Rabia Bibi*, 17 C. 711, F. B. Followed in *Kali Charan v. Jewat Dube*, 28 A. 51: See also *Ajokoer v. Gorak Nath*, 20 C. L. J. 48; 19 C. W. N. 517; *Upendra Nath v. Kusum Kumari*, 20 C. L. J. 485; 19 C. W. N. 520; *Upendra Bhatta v. Ranganath*, 17 M. 800; *Fakir Chandra v. Giribala*, 22 C. L. J. 304. *Seth Chand Mal v. Durga Dei*, 12 A. 818, F. B. (4 A. 190; 6 A. 105, *overruled*). *Rajrup Singh v. Ram Golaum Ray*, 16 C. 1; *Murigeya v. Heyat Saheb*, 23 B. 237; *Beni Prasad Kunwar v. Lakhna Kunwar*, 21 A. 823. *Madhusudan Dass v. Gobinda Pria*, 27 C. 34; *Umed Hathi Singh v. Goman Bhaiji*, 20 B. 885; *Krishnan v. Arunachalam*, 16 M. 447; *Ram Ghulam v. Hazaru Koer*, 7 A. 547. (6 C. 777, *dissented from*); *Sita Ram v. Bhagwan Das* 7 A. 783; *Mulmantri v. Ashfaq Ahmad*, 9 A. 805; *Ravunni Menon v. Kunju Nayar*, 10 M. 117; and *Nimba Harishet v. Sitaram Parji*, 9 B. 458. *Bhagat Ram v.*

to the relief granted by the decree; not when it determines merely, an *incidental question* as to whether the proceedings are to be conducted in a certain way. The language of s. 47 clearly indicates that the questions contemplated by the section must be of a nature such that it is possible to suppose that but for the section, they could have formed the subject of determination by a separate suit. But a question of an incidental character can never come under that description, and an order determining such a question can not therefore, be a decree as defined in s. 2.—*per* Banerji, J. in *Jogodishury v. Kailash*, 24 C. 725, 739, *Deoki v. Bansi*, 16 C. W. N. 124; *Mukhtar v. Muqarrab*, 34 A. 530; *Saraswati v. Golapdas*, 41 C. 160; *Saurendra v. Mirtunjoy*, 5 Pat. L. J. 270; *Sardarni v. Ramratan*, 2 L. L. J. 398; *Panch v. Mani*, 16 C. W. N. 970.

### LIMIT OF TIME FOR EXECUTION.

48. (1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from—

Execution barred  
in certain cases.

- (a) the date of the decree sought to be executed, or,
- (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

(2) Nothing in this section shall be deemed—

- (a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application; or [Paras. 3 & 4, s. 230.]
- (b) to limit or otherwise affect the operation of article 180 of the second schedule to the Indian Limitation Act, 1877. [New.]

### COMMENTARY.

**Alterations made in the Section.**—This section corresponds with paras 3 and 4 of section 230 of the C. P. Code of 1882, with several modifications and changes. Cl. (b) of sub-section (2) is new.

In view of the important changes introduced, the old section is reproduced below, to enable the readers to make a comparison. The words in italics have been omitted from the present section:—

10 Bom. L. R. 939; *Ratishwar v. Gulab Chand*, 6 I. C. 528; *Peary Lal v. Chandi Charan*, 11 C. W. N. 163; 5 C. L. J. 163; *Chhakaure Mahtan v. Ganga*, 39 C. 862; *Ram Krishna v. Narayan*, 40 B. 126. But see *Ariabudra v. Dorasami*, 11 M. 413; *Lachmi Narain v. Kunji Lal*, 16 A. 449; and *Ramayya v. Venkataratnam*, 17 M. 122; 6 O. C. 271; 1 N. L. R. 173; *Juga Lal v. Audh Behari*, 6 C. W. N. 223; *Tota Singh v. Partap Singh*, 243 P. W. R. (1912): 18 I. C. 670; *Karoo v. Rameshwar*, 6 Pat. L. J. 451.

The question whether the property is ancestral or self-acquired, liable or not in the hands of the sons to satisfy their father's debt under the Hindu Law, is one relating to the execution of decree, and cannot be raised in a separate suit.—*Kashinath v. Baji Pandurang*, 11 Bom. L. R. 699. See also *Jagadip Singh v. Narain Singh*, 4 P. R. 1913 F. B. 173: P. L. R. 1912.

The question whether a Hindu widow incurred debts for legal necessities or not and whether the debts were her personal debts, come within this section—*Gujadhur Prosad v. Bindubasini*, 19 C. W. N. 95.

**Objection by Trustee or Shebait When Falls within this Section.**—If A in execution of a decree for money against B personally, attaches and proceeds to sell properties of which B alleges that he in possession not in his own right but as *shebait* of a deity to whom the properties have been dedicated, the question does not fall within the scope of section 47 but within Or. XXI, r. 58; *Kartick Chandra v. Ashutosh*, 39 C. 298 F. B.: 16 C. W. N. 28; 14 C. L. J. 425 (followed in *Upendra v. Kusum Kumari*, 42 C. 442; 20 C. L. J. 485; 19 C. W. N. 520; dissented from in *Shah Naim v. Girdhari Lal*, 4 O. W. N. 102; A. I. R. 1927 Oudh 120); *Kaliprosanna v. Golam Rahaman*, 18 C. W. N. 910; 20 I. C. 790; *Bhajahari Pal v. Ram Lal Das*, 6 C. W. N. 63; *Amar Chand v. Nani Gopal*, 12 C. W. N. 308, and *Ali Sajjad v. Bhajan Singh*, 3 A. L. J. 370; *Nath Mal v. Tajamal Hossain*, 7 A. 36, where the judgment-debtor claimed the property as *wakf* of which he was *Muttawali*. In *Murigeya v. Hayet Saheb*, 23 B. 237 the claim by a trustee was held to come under Or. XXI, r. 58. See also *Rani Indumati v. Jageshwar*, 28 A. 644: A. W. N. (1906) 158; 3 A. L. J. 565 and *Budrudeen Sahib v. Abdul Rahim*, 31 M. 125; *Sajidali v. Ali Mahmmed*, 12 I. C. 411. But see *Shah Naim v. Girdhari Lal*, 4 O. W. N. 102; A. I. R. 1927 Oudh 120, where it was held that an objection by a manager of endowed property to the attachment of certain property in his possession, on the ground that such property is not in his possession in his personal capacity but as such manager, is a question which falls under s. 47 and not under Or. XXXI, r. 58.

The above Full Bench case has impliedly overruled 8 C. W. N. 353, 12 C. W. N. 310, 35 C. 364, 7 C. L. J. 537, where contrary views were taken, and it has explained the Full Bench case in 17 C. 711. It should be noted here that at first sight it may appear that the rules laid down in the two Full Bench cases are conflicting, but they are not really so. In the Full Bench Case in 17 C. 711, the objector was brought upon the record, as representative of the judgment-debtor, who was a party to the suit; whereas in the Full Bench Case in 39 C. 298, although the *shebait* was a party to the suit in his personal capacity, he was not a party in his capacity as a trustee of the endowment. Hence in the former case the question arose between the parties or their representatives and relating to execution of decree, etc.; but in the latter case the objector was not a

Under the old section it was necessary for the application of the rule of limitation contained in the section that the application for execution should have been made under the section and granted; but the words "under this section" and "and granted" have been omitted in the present section, and the result is, that the rule of limitation contained in this section applies whether the application is granted or not or whether the application was made under this section or not. The word "granted" in the old section was held to be equivalent to the word "admitted". By the omission of the word "granted", the following cases have been rendered obsolete. (8 A. 301 and 536; 8 C. 297; 10 C. L. R. 111; and 18 A. 482).

Clause (b) of sub-section (2) is new. It has given legislative sanction to the following cases (6 B. 258, 7 M. 540, 20 C. 551 and 24 C. 244) in which it has been held that the rule of limitation contained in the old s. (230) did not apply to decrees of Chartered High Courts. In other words, the rule of 12 years limitation contained in this section does not affect the operation of article 180 of the Limitation Act, 1877 (now Art 183 of the Limitation Act, 1908). The object and effect of the addition of the new clause has been fully explained in *Jogendra Chandra v. Shyam Das*, 36 C. 543; 9 C. L. J. 271.

"Any fresh application presented."—These words have been substituted for the word "subsequent application" which occurred in the old section, probably because they express more clearly the object for which the alteration has been made. The words "subsequent application" in the old section were rather vague, as they mean an initial application in the form prescribed by Or. XXI, r. 11, or they may mean an application merely ancillary or incidental to an application already made for executions as under the above Order. Thus, any subsequent application ancillary to previous substantive application in furtherance of the substantive application is not within the prohibition. See *Rahim Ali v. Phul Chand*, 18 A. 482 F. B.: 16 A. W. N. 142, where it has been held that "an application for execution referred to in s. 230 (now s. 48), is an initial application of the nature provided for in s. 235 now Or. XXI, r. 11) upon which an order has to be made by the Court for granting or refusing execution. An application merely ancillary or incidental to an application already made for execution as under s. 235, cannot be regarded as "the application to execute," contemplated by s. 230, but only as an application to proceed with the previous application for execution. Where the decree-holder has put in a regular application for execution, in accordance with s. 235, within 12 years from the date of the decree and in sufficient time, to get an order of the Court to the effect that he may enforce it in terms of the application, it cannot be presumed that the Legislature intended him to suffer because, owing to causes for which the decree-holder is not responsible, the final completion of the proceedings under the prior application had not been obtained within the period prescribed by s. 230. This case has been followed in *Moinuddin v. Chajju Singh*, 2 A. L. J. 276; in *Mujibullah v. Umed Bibi*, 30 A. 499; 5 A. L. J. 616; in 27 P. R. (1905): 79 P. L. R. (1905), and in *Ram Sarup v. Dasrath*, 33 A. 517 F. B.: 8 A. L. J. 412, in which it has been held that where an application for execution in accordance with s. 235 has been made within the period of limitation prescribed by s. 230 and execution has been ordered in accordance with the prayer in the decree-holder's application, the right of the decree-

*Chunder v. Kali Churn*, 3 C. 80; 1 C. L. R. 5. A suit for the value of crops carried away by the defendant while in possession under a decrees which was afterwards set aside in appeal, is not barred by this section.—*Shurnomoyee v. Patarrir Sirkar*, 4 C. 625.

Where a decree-holder-purchaser is placed in possession, and the sale in subsequently set aside and the properties are again proclaimed for sale, the right of the judgment-debtor to have the mesne-profits for the period of the decree-holder's occupation of the property is a matter to be decided in execution proceedings under s. 47.—*Maung Maung v. Wightman & Co.*, 7 Bur. L. T. 64; 24 I. C. 468.

**Damages Resulting from Acts done under Cover of Execution Proceedings or for Trespass.**—Under s. 244, C. P. Code, 1882 (s. 47), the Court executing the decree can only restore to the rightful owner, land of which he has been deprived in the execution proceedings in excess of that decreed, and that where damages have resulted from acts done under cover of the execution proceedings either by the decree-holder or at his instigation or suggestion, a separate suit for the recovery of such damages lies against the decree-holder.—*Deno Nath v. Ram Kumar*, 6 C. L. J. 527. (11 W. R. 516; 12 W. R. 85, and 12 B. L. R. 201, followed).

Claim for damages by auction-purchaser against judgment-debtors and others not parties to the decree, for injury done to property purchased after confirmation of sale is not a question relating to execution within the meaning of s. 244, C. P. Code, 1882 (s. 47).—*Kalintavita Mama v. Kalintavita Haji*, 31 M. 37; 17 M. L. J. 543; *Abinash Chandra v. Bhuban Chandra*, 25 C. W. N. 750.

A claim for damages for injury to certain goods belonging to plaintiff, but attached by the defendant in execution of a decree held by him against the plaintiff, is a matter which should be determined by a separate suit and not by the Court executing the decree.—*Luchman Dass v. Heera Lal*, 3 N. W. P. 187. See also *Wright v. Seeta Ram*, 2 Agra 105, and *Kasheo Kishore v. Noor Khan*, 7 W. R. 45.

**Objection by Judgment-debtor that the Property Delivered to the Auction-purchaser is Not Included in his Sale-certificate.**—An objection by the judgment-debtor that the auction-purchaser had taken possession of property to which his sale-certificate gave no title does not fall within s. 47.—*Ram Adhar v. Ram Narain Das*, 24 A. 519, (20 M. 487 and 13 C. 326, referred to); *Maharaj Singh v. Jagan Nath*, 14 O. C. 70. But see *Kathirayawami v. Ramabhadra*, 45 I. C. 608.

**Fraud.**—The word *fraud* has not been defined in the C. P. Code. The only definition of the word "fraud" is to be found in s. 17 of the Indian Contract Act, but that definition seems to be incomplete. There are and may be innumerable and inconceivable kinds of fraud. It is difficult, if not impossible to give any exact definition of the word. I have therefore quoted the definition of fraud from Kerr on Fraud and Mistake (see notes under Or. XXI, r. 90). Collusion is considered as fraud. By the addition of the word "fraud" in Or. XXI, r. 90, only one particular kind of fraud has been taken out of the operation of this section, but where execution sale is tainted with other kinds of fraud, besides the one mentioned in r. 90, they must come under this section, as will appear from the cases noted below.



Where a decree is amended, the date of the amendment is the date of the decree within the meaning of s. 48; *Baladeo v. Syed Yusuf*, 60 I. C. 318.

A decree was obtained against several defendants; only some of them appealed and in the appeal the other defendants were not made parties. The appeal was dismissed. *Held*, that the 12 years' period of limitation under s. 48 commenced to run from the date of the first Court's decree and not from the date of the appellate decree; *Amir Ali v. Harish Chandra*, 30 C. W. N. 306: A. I. R. 1926 Cal. 664.

Where a person prefers an appeal where no appeal lies, the order disposing of the so-called appeal does not amount to a "decree" within the meaning of s. 48 (a) and limitation therefore runs from the date of the original decree; *Sahu Nand Lal v. Sahu Dharam*, 48 A. 377: 24 A. L. J. 465: A. I. R. 1926 All. 440: 94 I. C. 961.

In the case of a decree for payment of money or delivery of property the period of limitation for application to execute portion of decree not appealed against runs, from the date of the decree on appeal.—*Krishnama Chariar v. Managammal*, 26 M. 91. F. B. (12 M. 497 dissented from).

*Held*, that the order of an Appellate Court abating, because no representative of the appellant was on the record, was not the "final order or decree of the Appellate Court" within the meaning of art. 182 (2) of the Limitation Act, but that limitation would run from the date of the original decree.—*Fazal Husen v. Raj Bahadur*, 20 A. 124. Distinguished in *Fazlur Rahman v. Shah Muhammad*, 30 A. 385.

- In cases where the original decree has either been set aside or modified, that decree ceases to exist, and limitation begins to run from the date of the decree in appeal. The same rule applies where the original decree is affirmed in appeal; and limitation begins to run from the date of affirming the original decree.—*Mahomed Medi v. Mohini Kanta Shaha*, 7 C. L. J. 305; 34 C. 874. Followed in  *Md. Razi v. Karbalar Bibi*, 32 A. 136; 7 A. L. J. 58; see, *Narasaya v. Vitla*, 21 M. L. J. 1020; 10 M. L. T. 281; (1911) 2 M. W. N. 239.

Where the parties to the decree come into Court with an agreement to alter its terms, and the Court passes an order modifying the terms of the decree in accordance therewith, the period of 12 years prescribed by this section begins to run from such date and not from the date of the original decree: *Bunwari Lal v. Abdul Gafur*, 5 P. L. R. 1109: 1 I. C. 48.

Where there are two decrees in a suit, a preliminary decree and a final decree or a decree absolute, the final decree is the complement of the preliminary decree and for the purposes of cl. (a) of sub-section (1) of s. 48, the two together must be taken to be a single and indivisible decree, the date of which is the date of the final decree or decree absolute. This is so even if the preliminary decree was one based on a compromise; *Shib Durga v. Gopi Mohan*, 23 C. L. J. 573.

A mortgagee decree-holder will have 12 years under this section to perfect the preliminary decree and another 12 years under the same section, if he gets the order absolute within the first 12 years; *Mohomed Husain v. Abdul Kareem*, 17 M. L. T. 424: 29 I. C. 237.

such a sale falls within section 47 and does not fall under Or. XXI, r. 90, which applies when the sale is sought to be set aside on the ground of fraud and material irregularity, and not when the sale is bad as being without jurisdiction and absolutely void; *Sorabji v. Kala Raghunath*, 86 B. 156: 13 Bom. L. R. 1193.

An application to set aside a sale held without service of notice under Or. XXI, r. 22 comes within the provisions of this section; it does not come within Or. XXI, r. 90, which refers to the publication and conduct of the sale by the officer by whom the sale is held; *Levina Ashton v. Madhabmoni*, 11 C. L. J. 489: 14 C. W. N. 560; *Kumed Bewa v. Prasanna Kumar*, 40 C. 45; *Parashram v. Balmukand*, 32 B. 572; *Lakshmi Charan v. Srish Chandra*, 18 C. L. J. 162.

Although a suit to set aside a sale on the ground of fraud and irregularity is barred by Or. XXI, r. 90 of the C. P. Code, but a suit for declaration of invalidity of the sale on the ground that the minor was not properly represented in the execution proceeding, and that the legal representatives of the judgment-debtor were not brought on the record is not barred. Further, the judgment-debtor is also entitled to bring a suit for other appropriate reliefs on the ground of fraud against the decree-holder and the auction purchaser, such as for damages or for injunction, subject to the limitation prescribed in art. 95 of the Limitation Act; *Pasumurti Payidanna v. Dadi Lakshminarasamma*, 88 M. 1076; 28 M. L. J. 525.

In an application to set aside a sale, a compromise petition purporting to have been signed by all the parties was presented. Subsequently one of the applicants presented an application to set aside the sale, on the ground that the compromise was obtained behind her back and in fraud of her rights. Held, that the question can be determined under this section.—*Asaban Banu v. Ananda Chandra*, 14 C. W. N. 823; 3 I. C. 116.

An application to set aside a sale on the ground that it had been brought about by the fraud of the residents of the village where lands are situate and where the decree-holder resided may be made under this section and not under Or. XXI, r. 90.—*Harihar v. Rama Pandu*, 33 B. 698: 11 Bom. L. R. 1113.

In the absence of fraud and misrepresentation an auction sale cannot be set aside on the ground that the judgment-debtor had no saleable interest (Or. XXI, r. 91); *Makhamchore v. Nishind Gonai*, 10 C. L. J. 492.

Under the C. P. Code of 1882, applications to set aside sales on the ground of fraud in publishing and conducting the sale came within the purview of this section; but under the present Code, by Or. XXI, r. 90, such applications have been taken away from the operation of this section. Therefore, the following cases, decided under the old code, have been overridden, so far as they decided that such applications came under this section, but other questions decided in those cases are still good law, and hence they have been inserted below:—

In determining whether an application to set aside a sale comes within the scope of s. 244, C. P. Code, 1882 (s. 47) or not, the point to

money is payable within 6 months of the decree occurs from the date when default in making the payment occurs; *Surajman v. Anjore Shukul*, 21 A. L. J. 861.

Where the Appellate Court simply confirms the decree of the lower Court, it does not enlarge the time fixed by the decree of the original Court for the performance of the conditions precedent.—*Ramaswami v. Sundara*, 31 M. 28; *Amir Ali v. Gopaldas*, 54 I. C. 924.

Deposit of decretal amount—Time fixed in the decree ending on holiday—Payment on opening day is good and valid payment.—*Surendra v. Sauravini*, 10 C. W. N. 535; 3 C. L. J. 399.

A decree-holder, cannot by any agreement with the judgment-debtor, extend the period which the law allows him under this section; *Raghunath v. Kashi*, 15 C. L. J. 678.

To render s. 48 (1) (b) of the C. P. Code applicable there must be an order of Court directing the payment of money on a certain date. Where there was a decree for money in a lump sum, the fact that the parties came to some arrangement out of Court for payment in instalments would not attract the operation of this clause or prolong the period of limitation; *Banarsi Das v. Ramzan Raj Bibi*, 72 I. C. 477.

An instalment decree made the payment of the whole decretal sum compulsorily payable on default of any one instalment. *Held*, that the time for recovery of the whole amount begins to run from the date of the first default so that if execution in respect of one instalment is allowed to become barred by time, the whole decree becomes barred; *Bama Sundari v. Kiran*, 49 I. C. 497.

An order under s. 48 (1) (b) must be made by the Court which made the decree and not by a Court executing the decree. Where a Court executing the decree records a compromise, the original decree is not altered and limitation for purposes of execution is still calculated from the date of the decree; *Jivan Baksh v. Mubnial Huq*, A. I. R. 1923 Lah, 678 73 I. C. 794.

**Where Payment is Directed to be Made on the Happening of a Specified Event.**—Where a decree directs payment to be made on the happening of a specified event, the period of limitation provided by s. 48 is to be computed from the date on which the event happens and not from the date of the decree; *Narhar v. Krishnaji*, 36 B. 368; 15 I. C. 822. This decision of the Bombay High Court was followed by the Madras High Court in *Aiyasamiar v. Venkatachela*, 40 M. 989; 37 I. C. 741, where it was held that the 12 years for enforcing the personal remedy against the mortgagor runs from the date of the sale of the mortgaged property. The Calcutta High Court in *Jnanendra Nath v. Khulna Loan Co., Ltd.*, 18 C. W. N. 492 (affirmed in appeal in *Khulna Loan Co., Ltd. v. Jnanendra Nath*, 22 C. W. N. 145 P. C.) held that the 12 years is to be computed from the date of the decree. The Madras High Court in *Shuja-ul-mulk v. Umir-ul-Umra*, 48 M. 846; A. I. R. 1926 Mad. 20 has held (following 22 C. W. N. 145 P. C.) that where a decree directs that money is recoverable from a party only on failure to recover from another party, the execution of the decree becomes barred against the former after 12 years from the date of the decree.

*Prosonno Kumar*, 5 C. W. N. 559 (21 C. 605; 24 C. 540, and 3 C. W. N. 670 followed).

A judgment-debtor is entitled by an application under this section to set aside a sale, if he alleges and proves fraud on the part of the decree-holder, though no fraud is alleged or proved against the auction-purchaser. If during the pendency of an application to set aside a sale, the sale is confirmed, such confirmation is no bar to the maintenance of the application.—*Khiroda Sundari v. Jnanendra*, 6 C. W. N. 283 (19 C. 683; 4 C. W. N. 541 and 3 C. W. N. 399 *folld.*). 19 C. 683, P. C., must be taken to have overruled 17 C. 769, (F. B.). On the latter point, *see also Golam Ahmed v. Judhistir*, 30 C. 142; 7 C. W. N. 305.

An application to have a sale set aside on the ground of fraud can be made under this section even after the confirmation of the sale.—*Wahid-un-nissa v. Girdhari*, 27 A. 702; 2 A. L. J. 469; A. W. N. (1905), 162.

Section 244 (c) of the C. P. Code, 1882 (s. 47) governs a case in which a person seeks to set aside an auction sale on the ground of fraud and on the ground that the decree-holder himself held a mortgage on the property brought to sale.—*Gaya Prasad v. Randhir Singh*, 28 A. 31; 3 A. L. J. 456; A. W. N. (1906) 206.

A purchaser at an execution sale cannot maintain his purchase if the execution proceedings are shown to have been fraudulent, and the sale should be set aside although the purchaser is not shown to have been implicated in the fraud.—*Hungsha Majililya v. Tincouri Das*, 8 C. W. N. 230. It is competent to the Court to set aside the sale finally and conclusively as against the beneficial owner, although his *benamidar* only, and not he, is made a party to the proceeding.—*Baroda Kanta v. Bhunder Kanta*, 29 C. 682; 6 C. W. N. 706.

The purchase of property at an execution sale by the decree-holder, in the name of another person, at a price less than that at which the decree-holder obtained permission to bid constitutes a fraud which brings the case within s. 244, C. P. Code, 1882 (s. 47) and vitiates the sale.—*Primati Sarat Kumari v. Nimai Charan*, 5 C. W. N. 265.

Applicability of this Section to Public Demands Recovery Act.—Sections 244 and 312, C. P. Code, 1882 (s. 47 and Or. XXI, r. 92) apply to execution proceedings under the Public Demands Recovery Act; *Hari Charan v. Chandra Kumar*, 34 C. 787; 11 C. W. N. 745.

An execution Court can not try the validity of a certificate under the Public Demands Recovery Act, by the Revenue authority on the ground of its being made without jurisdiction. *Nagendrabala v. Secretary of State*, 14 C. L. J. 83.

A suit to set aside a sale held in execution of a certificate under the Public Demands Recovery Act, I of 1895, as amended by Act I of 1897, B. C. is barred by s. 244, C. P. Code, 1882 (s. 47).—*Barhamdeo Narayan v. Bibi Rasul Bandi*, 1 C. L. J. 860; 32 C. 691; *Umed Ali v. Rajlakshmi*, 1 C. L. J. 538; 33 C. 84; 10 C. W. N. 130; *Purna Chandra v. Dinabandhu*, 34 C. 811, F. B.; 5 C. L. J. 696; 11 C. W. N. 756; *Jivanram v. Hari Charan*, 5 C. L. J. 240, F. B. *Jogeswar Sahu v. Debi Prasad*, 5 C. L. J. 555. But *see Raghubans Sahai v. Fulkumari*, 32 C. 1180; 1

until January 1881, and therefore an application for execution of the decree with regard to mesne-profits, filed on the 14th March 1881, was not barred.—*Baroda Sundari v. Fergusson*, 11 C. L. R. 17. See also, *Harmonoje v. Ram Prasad*, 6 C. L. J. 462 (10 C. 132 and 24 C. 173 *folld.*); See also, *Midnapore Zamindari & Co. v. Naresh Narain*, 16 C. W. N. 109.

An application for execution which was made within 12 years was struck off, and after 12 years the proceedings were restored. *Held*, that the application was not barred, as the striking off of execution cases is a continuous proceeding throughout, and there was no unreasonable delay in the prosecution of the execution proceedings. There is no provision in the Code to strike off cases, the proper order is to dismiss.—*Biswasanan v. Binanda*, 10 C. 416.

An application for execution of a money-decree obtained on the 24th February 1881, was made on the 2nd May 1892, after several previous unsuccessful applications, and in consequence certain property of the judgment-debtors were attached. That application was subsequently struck off by the Court, the attachment being maintained. On the 7th March 1893, a further application for execution was made. *Held*, whether the application of the 7th March 1893 was or was not a continuation of the application of the 2nd May 1892, the execution was barred by s. 48—*Ram Newaz v. Ram Charan*, 18 A. 49.

An application was made in 1886 for execution of a decree dated 1873. In the interval, *viz.*, in October 1879 the judgment-debtor was arrested on an application in execution by the decree-holder, but execution was not proceeded with further. *Held*, that an application made in 1886, was barred under s. 48.—*Patumma v. Muse Beari*, 11 M. 132.

An application for execution of a mortgage-decree was made in October 1874, and thereupon the mortgaged property was attached and placed under the management of the Collector, who paid the proceeds from time to time into Court and the property remained under his management till February 1892, when the application of 1874 was withdrawn and a fresh application was made in June 1892. *Held*, that the application of 1892 was not barred, as the execution proceedings under the application of 1874, were continuously going on during the whole period that the Collector's management lasted, and that the payment received from the Collector was also a step-in-aid of execution.—*Keshavlal Bechar v. Pitamber Das*, 19 B. 261.

A compromise decree payable by instalments was passed on the 9th July 1884. Default was made in 1892 and judgment creditor applied for execution for recovery of possession in terms of the decree. He died in 1898 and the execution proceedings were carried on by his brother as legal representative who also died in March 1902. His minor sons applied on the 7th June 1902 to be brought on the record and the application was rejected in September 1902 and the original application for execution was also struck off. On the 1st September 1900, one of the minors after attaining majority applied to execute the original decree contending that there was a step-in-aid of execution which gave a fresh starting point to limitation. *Held*, overruling the contention that the fresh periods which could be obtained under art. 182, Limitation Act did not escape the provisions of s. 48 and that the fresh application was time barred as it was made more than twelve years from the date of the default.—*Balaram Vithal Chand v. Maruti Deb*, 30 B. 256; 17 Bom. L. R. 178.

**Suit to Set Aside a Sale in Contravention of the Provisions of the Bengal Tenancy Act.**—A sale of a non-transferable occupancy holding held in execution of rent decree of a co-sharer landlord is voidable and such a sale can be set aside under this section; *Khoda Buz v. Sadu*, 14 C. L. J. 620. See however, *Prosunna v. Bama Charan*, 13 C. W. N. 652.

**Effect of Reversal of Decree upon Sale in Execution.**—Where a property was sold in execution of an *ex parte* decree, and purchased by the decree holder, and the decree was subsequently set aside under s. 108 C. P. Code, 1882 (Or. IX, r. 13). Held that it is competent to a Court under s. 244, C. P. Code, 1882 (s. 47) to go into the question, and to set aside the sale as bad.—*Sri Maharani Beni Persad v. Lokhi Rai*, 3 C. W. N. 6 (19 C. 683, P. C., and 17 769, F. B. relied on). See also *Debendra Nath v. Prasanna Kumar*, 5 C. L. J. 328.

A sale in execution of a mortgage-decree, where the decree-holder is the auction-purchaser, must be set aside when the decree itself is set aside under s. 108, C. P. Code, 1882 (Or. IX, r. 13), even though the sale had been duly confirmed. An application to set aside the sale under the above circumstances falls within s. 244, C. P. Code, 1882 (s. 47).—*Set Umed Mul v. Srinath Roy*, 27 C. 810; 4 C. W. N. 692 (25 C. 175; 3 C. W. N. 6 and 586 referred to). See also *Wahedunnissa v. Giridhari*, 27 A. 702; 2 A. L. J. 469; A. W. N. (1905) 162. The same principle applies where the decree is set aside or modified in appeal.—*Ohandan Singh v. Ramdevi Singh*, 31 C. 499 (10 A. 166, P. C. and 27 C. 810 referred to).

After a decree in a redemption suit, the plaintiffs took possession. The decree was reversed on appeal. Held that suit by defendant to recover possession was barred by ss. 244 (s. 47) and 583 (cf. s. 144), C. P. Code, 1882.—*Sheodihal v. Bhawani*, 29 A. 348; 4 A. L. J. 188; A. W. N. (1907) 90.

Cl. 2 —“Treat a proceeding under this section as a suit or a suit as a proceeding.”—Clause (2) of this section has been framed in accordance with the principles laid down in the following rulings. It gives legislative sanction to the practice hitherto followed by the Courts under the old code. It empowers the Court to treat an application under the section, as a suit, or a plaint in a suit as an application. So also a written statement, containing an answer to the plaintiff's claim may be treated as an application under this section. The reason for this is, that where matter which ought to have been decided under this section is tried in a separate suit by the Court executing the decree, such Court does not act without jurisdiction, as the section does not affect the jurisdiction of the Court, but merely prescribes the form of procedure. Where a separate suit is brought in the same court, which has also jurisdiction to execute the decree, there is merely a wrong form of procedure, but there is not want of jurisdiction.—*Purmessuree Pershad v. Jankee Koor*, 19 W. R. 90; followed in *Azizuddin v. Ramanugra*, 14 C. 605 p. 608 in *Venkata Krishnama v. Krishnarao*, 32 M. 425; and in *Monmohan v. Dwarakanath*, 12 C. L. J. 312 (p. 320), where all the cases on the point have been referred to. See also *Shankar Das v. Dulo Mal*, 22 P. W. R. 1913; 40 P. L. R. 1913; *Jogeshwar Narain v. Radha Raman*, 16 I. C. 543; *Poonthotalk v. Othalakattil*, 7 M. L. J. 428; 6 I. C. 776; *Subaraya Aiyar v. Ramasamy*, 22 M. L. J. 166; 11 M. L. T. 18; *Gonesh v. Tulaja*, 26 M. L. J. 460; 24 I. C. 696; *Jhaman Lal v. Kewal Ram*, 22 A. 121;

when a decree of Baroda Court is transmitted to British Court for execution, see, *Jivandas Dhanji v. Ranchodas*, 12 Bom. L. R. 844.

An application for execution of a decree of 6th September 1876 was made on the 6th July 1888 without any list of property as prescribed by law and decree-holder did not produce the same till the 11th September 1888. The application having been made and admitted any further application would be barred after 6th September 1888. *Held*, that the application of the 6th July 1888 was one within the meaning of s. 48.—*Asgar Ali v. Troilucco*, 17 C. 631, F. B. (14 C. 124 overruled).

The presentation of a defective application within 12 years, but its amendment after the expiry of the period of limitation will not save limitation.—*Raghunatha v. Venkatesa*, 26 M. 101. But see, *Vadivelu v. Maruda*, 26 I. C. 415.

The holder of a money-decree, dated 2nd December 1885, after various infructuous applications for execution, applied on the 4th August 1897, for a warrant for the arrest of the judgment-debtor. The serving officer reported that the judgment-debtor had concealed himself and the application for execution was struck off without the arrest having been made. On the 29th November 1897, the decree-holder again applied for arrest, but the application was struck off. Against the order of striking off this latter application, the decree-holder appealed to the High Court, where it was contended that the decree could no longer be executed. *Held*, that the warrant of arrest on the 4th August 1897 still subsisted and ought to be executed.—*Jitmal v. Jwala Prasad*, 21 A. 155.

Where an application for execution of a decree of more than 12 years old was made and granted and was afterwards struck off, *held*, that further application was barred, the decree being more than 12 years old.—*Panaul Hug v. Kishen Mun Dabee*, 9 C. L. R. 297.

The right to execute decree having been curtailed by s. 48, the provisions of the Limitation Act should be construed, as far as possible, so as to prevent the defeat of *bona fide* endeavours to secure the fruits of a decree once obtained.—*Kunki v. Seshagiri*, 5 M. 141.

The law of Limitation requires that a decree-holder should make a direct and independent application for execution on his own account; resistance to another person's decree is not a step in aid of execution.—*Shib Lal v. Radha Kishen*, 7 A. 898. Nor is opposing an application to set aside a sale in execution.—*Umesh Chunder v. Sooner Narain*, 16 C. 747.

An application for execution of a decree by the heirs of a decree-holder without a certificate under Act VII of 1889 and without substitution of their names on the record is an application in accordance with law and keeps the decree alive.—*Hafizuddin v. Abdool Aziz*, 20 C. 755.

Where the decree-holder was prevented from making the application for execution within 12 years on account of the Court being closed, *held*, that the application having been made on the day the Court re-opened was not barred.—*Peary Mohun v. Anunda Churn*, 18 C. 631 (18 C. 231 applied). See 22 M. 179 and also *Surendra v. Sauravini*, 10 C. W. N. 535: 3 C. L. J. 839.

to be treated as both suit and application; *Venkata Kumara v. Subbayamma*, 24 I. C. 484: 1 L. W. 448.

“Subject to any objection as to limitation or jurisdiction.”—Where the remedy is barred by lapse of time, the Court cannot treat a plaint as an application under this section; *Arjun Singh v. Machchal*, 3 A. 601: A. W. N. (1906), 233. See also *Sadashiv v. Narayan*, 35 B. 452 p. 461; *Lalman v. Jagannath*, 22 A. 376; *Khoda Buz v. Sadu*, 14 C. L. J. 620 pp. 625-626; *Gopisetty v. Kunaparaju China*, 4 L. W. 400. So also where the Court executing the decree has no jurisdiction to try the suit, on account of its nature and want of pecuniary jurisdiction, an application under this section cannot be treated as a suit; see *Shekambari v. Ram-Kumar*, 23 I. C. 240.

A suit cannot be treated as an execution application where the effect of doing so would be to prejudice the defendant in his plea of limitation; *Kathiayasami Naicker v. Ramabhadra*, 45 I. C. 608.

In all cases where an application under this section is converted into a suit, the Court must direct to pay additional Court fee prescribed for the plaint, if necessary. See *Tarapada v. Jagadamba*, 5 Pat. L. J. 235.

**Principle of Res Judicata Applies to Questions Determined under S. 47.**—In the absence of fraud or collusion, a decree obtained by an administrator and the sale thereunder, cannot be set aside by the subsequent administrator; and according to ss. 13 and 244, C. P. Code, 1882 (ss. 11 and 47) the execution of the decree binds the parties and all persons claiming through them.—*Bai Meherbai v. Moganchand*, 29 B. 96.

Where a Court executing a decree makes an order under s. 244, C. P. Code, 1882 (s. 47) in the exercise of its jurisdiction, and that order becomes final by reason of its not being appealed against, such order, whether right or wrong operates as *res judicata*, and the question disposed of by it cannot be re-opened between the decree-holder and the judgment-debtor.—*Basudeo Narain v. Seelojy Singh*, 14 C. 640, F. B. The same principle seems to have been laid down in 8 C. 51, P. C.: 6 A. 269, P. C.; 7 A. 102, P. C.: 19 M. 54; in *Narendra Nath v. Bhupendra Narain*, 23 C. 374 (p. 392). and in *Umesh Chandra v. Madhu Sudan*, 9 C. L. J. 356. See, however, *Bhola Nath v. Profulla Nath*, 5 C. W. N. 80.

When an issue arising out of the execution of a decree has not been raised and determined under s. 244, C. P. Code, 1882 (s. 47), there is nothing in that section to prevent a defendant, in a separate suit subsequently brought, from raising that issue in that suit.—*Nil Kamal v. Jahanabi Chowdhurani*, 26 C. 946. See also *Bhiram Ali v. Gopi Kanth*, 24 C. 355 (8 A. 146 distinguished); *Munshi China Dandusi v. Munshi Pedda*, 41 M. L. J. 261.

Property sold as non-ancestral after enquiry by Court and notice to judgment-debtor, who stood by and neglected to supply any information to the Court as to the nature of the property. Held that the judgment-debtor was not competent subsequently to seek to have the sale set aside upon the ground that the property was ancestral and ought not to have been sold.—*Behari Singh v. Mukut Singh*, 28 A. 273: 3 A. L. J. 140: A. W. N. (1906) 8.



The term "fraud" in this section should be interpreted in a wider sense than that in which it is generally used in English law; facts which could not be treated as constituting "fraud" are mentioned in this case. The parties cannot extend the period of limitation prescribed by the section by any agreement; *Raghunath v. Kashi*, 15 C. L. J. 678. The word "fraud" has been interpreted by the Madras High Court in a very liberal sense. Any improper means resorted to in order to prevent execution would amount to fraud under s. 48; *Nathuram Sivaji v. Krishna*, 24 M. L. J. 270; 13 M. L. T. 226; 18 I. C. 1008; *Mumtazunnissa v. Amarchand*, 8 O. L. J. 706.

S. 48 C. P. Code, does not contemplate a deduction of any particular period from the prescribed period of 12 years. Where, however, force or fraud is proved, that gives a fresh starting point of limitation under s. 48 (2) (a) of the section; *Govinda v. Umrao Singh*, 54 I. C. 279.

"Fraud" in s. 48 should be understood in a large and liberal sense. The delaying of execution by frivolous, futile and dishonest objections on the part of the judgment-debtors amounts to fraud; *Lalla Prasad v. Suraj Kumar*, 44 A. 319; 20 A. L. J. 185.

The expression "fraud" should be construed in a broad sense and a deliberate evasion of the process of the Court with the intention to defeat the execution of the decree would amount to "fraud." In order to obtain the benefit of the proviso, it is not necessary to prove that the fraud of the judgment-debtor continued so as to prevent the execution of the decree at anytime. "Fraud" or "force" on the part of the judgment-debtors gives a new starting point for the period of limitation, and an application for execution may be granted at any time within 12 years after the date on which a judgment-debtor has by "fraud" or "force" prevented execution of a decree.—*Venkayya v. Raghava Charlu*, 22 M. 320. See, *Nathuram v. Krishna*, 24 M. L. J. 270; *Meesla Ramanna v. Akkalabota*, 9 M. L. T. 162; 8 I. C. 805; *Moshin Ali v. Masoom Ali*, 8 A. L. J. 1020; 34 A. 20.

Obstruction to execution of decree by judgment-debtor by making fictitious and fraudulent alienations of property which are subsequently set aside in a regular suit, amounts to "fraud" within the meaning of this section.—*Visalatchi Ammal v. Siva Sankara*, 4 M. 292.

A judgment-debtor who, though able to pay his debt, dishonestly evades payment for more than 12 years, by eluding service of warrants and making applications to the Courts (which had the effect for the time being of staying execution), is guilty of fraud within the meaning of s. 48.—*Pattakara Annamalai v. Rangasami Chetti*, 6 M. 365; see, *Beni Prasad v. Kashi-nath*, 6 A. L. J. 401; *Mewa Lal v. Ahmed Ali*, 9 A. L. J. 17.

Where, pending execution of a money-decree, the judgment-debtor made a frivolous application to set aside under s. 108, C. P. Code, 1882, (Or. IX, r. 18), with a view to delay the execution proceedings, held, that the conduct of the judgment-debtor was fraudulent within the meaning of this section. The executing Court should exercise a sound discretion in deciding whether the execution should proceed or not. If the Court should find, on evidence, that the decree-holder had been all along diligent and that the judgment-debtor's conduct was such that it caused unnecessary delay in levying execution, he or she having acted fraudulently,

This explanation, in addition to the Calcutta and the Allahabad Cases above referred to, overrides in effect 10 W. R. 191; 11 A. 74; 18 A. 52; 15 M. 226; 19 M. 331; 21 M. 45, so far they decide contrary to the Madras Full bench Case above referred to. But in *Muhammad v. Ram Dial*, 25 P. L. R. 1915, Shah Din, J. of the Punjab Chief Court followed, 10 W. R. 191.

When the plaintiff in a suit abandoned his claim against the defendant, not being able to serve him with notice—*held* that the defendant was not a party to the suit, notwithstanding the fact that the defendant's name was not removed from the suit.—*Venkatapathi Naidu v. Subraya Mudali*, 17 M. L. J. 416.

Defendants who have not joined in a compromise on which decree is passed are not judgment-debtors and any disputes arising in execution of the decree between the plaintiff and such defendants must be decided under s. 331, C. P. Code, 1882 (Or. XXI, r. 99) and not under s. 244, C. P. Code, 1882 (s. 47)—*Jathamdan v. Kunchu Achan*, 30 M. 72; 16 M. L. J. 433: (28 M. 131 *doubted*).

**Limitation.**—An application under this section to set aside an execution sale is governed by the 30 days' period of limitation provided by Art. 166 of the Limitation Act, 1908; so also an application by a representative of the judgment-debtor to set aside a sale on the ground that the property sold belongs to him and not to the deceased judgment-debtor; *Satish v. Nishi*, 46 C. 975: 54 I. C. 431. But when the sale is void, and consequently no application to set aside the sale is necessary, Art 181 applies and the period of limitation is three years from the date when the right to apply accrues; *Rajagopala v. Ramanuja Chariar*, 46 M. 288: 80 I. C. 92: A. I. R. 1924 M. 431 F. B. Similarly an application under s. 47 to recover property wrongly sold in execution must be made under Art 181 within 3 years from the date of sale, i.e., when the right to apply accrues, *Umapati v. Sheik Soleman*, 54 C. 419.

**Appeal.**—The definition of the word "decree" given in s. 2 includes "the determination of any question under s. 47." It is clear therefore that an appeal lies from all orders passed under this section. It should be noted, however, that all orders made in the course of execution proceedings are not appealable. Only those orders in execution proceedings are appealable which are either orders under s. 47 or are orders which have been declared appealable under s. 104.

**Interlocutory Orders in Execution Proceedings.**—An appeal need not be preferred against every order in execution proceedings. It is open to the party *aggrieved* to challenge by an appeal against the final order which determines the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings; *Chandrabala v. Prabodh*, 36 C. 422; *Nathu Mal v. Mohan Singh*, A. I. R. 1927 L. 232: 100 I. C. 653. It is not every order made in execution of a decree that comes within this section; if that were so, every interlocutory order in an execution proceeding, such as an order granting or refusing process for the examination of witnesses, would be appealable; and far greater latitude would be given of appealing against orders in such proceedings than is allowed as against orders made in suits before decree. An order in execution proceedings can come under s. 47 only when it determines questions relating to the rights and liabilities of parties with ref.

ferred. *Held*, that the execution was not barred, as the order of the 19th December 1893 was a revivor of the decree within the meaning of Art. 180 of the Limitation Act.—*Suja Hossein v. Monohur Das*, 24 C. 244 (6 C. 504, and 20 C. 551, followed: 22 C. 921, reversed on review). Discussed in *Monohur Das v. Fattah Chand*, 30 C. 979: 7 C. W. N. 793.

### TRANSFEREES AND LEGAL REPRESENTATIVES.

**49.** Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder. [S. 233.]

Transferee.

### COMMENTARY.

This section corresponds with s. 233 of the C. P. Code of 1882 and it should be read with Or. XXI, r. 16. This section lays down that the transferee of a decree, holds the same subject to the equities, if any, which the judgment-debtor might have enforced against the original decree-holder. In substance, the assignee stands in no better position than the assignor, as regards equities existing between the original parties to the judgment, and takes it subject to all the equities and defences subsisting at the time of the assignment, which the judgment-debtor could have asserted against it in the hand of the judgment-creditor, notwithstanding that the assignee may have had no notice thereof. Hence, if the assignor has no title to the decree, he can convey none to the assignee, and, where a judgment, once paid, though not satisfied of record is assigned by the decree-holder, the assignee takes it subject to all defences and equities which were available to the judgment-debtor against the assignor (*Black on Judgments*, Vol. II, s. 923; *Freeman on Judgments*, Vol. II, s. 427). If again it is proved that the decree has been formally satisfied, but that the assignee is the *benamidar* for the judgment-debtor, he ought not to be allowed to execute the decree against the representative of the latter, because the assignment in substance operates merely as a satisfaction of the decree. Hence, finally, if it is found as a fact that the decree has been satisfied and the judgment-debtor has obtained in collusion with the decree-holder an assignment thereof with a view to defraud his creditors, it is manifest that the decree cannot be executed, because, the payment of a judgment by one primarily liable to pay the same, is an absolute satisfaction and the assignment of the judgment to him or to another for him, will not represent its execution; *Mon Mohan v. Dwarkanath*, 12 C. L. J. 312, pp. 321-322.

“Shall hold the same subject to the equities.”—Under this section the assignee of a decree is subject to equities, which the judgment-debtor might have enforced against the original decree-holder.—*Sinnu Pandaram v. Santhaji Row*, 26 M. 428: 12 M. L. J. 398; *Girdhar Lal v. Mulla Mahomed*, 12 I. C. 205; *Mokham Chand v. Ganga Ram*, 15 P. R. 1917: 39 I. C. 654.

The purchaser of a decree held by A, against whom B holds a cross decree, takes it subject to a set-off on account of B's decree.—*Kiam Ali v. Lakhikant*, 1 B. L. R. 23, F. B.: 10 W. R. 32, F. B.; *Doorga Charan v. Debnath*, 18 W. R. 442; *Oopendra v. Poorno*, 19 W. R. 85; *Ram Chunder v. Mohendra*, 21 W. R. 141.

"Where an application to execute a decree for the payment of money or delivery of other property has been made under this section and granted, no subsequent application to execute the same decree shall be granted after the expiration of twelve years from any of the following dates (namely):—

- (a) the date of the decree sought to be enforced, or of the decree (if any) on appeal affirming the same, or
- (b) where the decree or any subsequent order directs any payment of money, or the delivery of any property to be made at a certain date, the date of the default in making the payment or delivering the property in respect of which the applicant seeks to enforce the decree.

Nothing in the section shall prevent the Court from granting an application for execution of a decree after the expiration of the said term of twelve years where the judgment-debtor has "by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application."

**Scope and object of Section.**—This section has been so worded as to include and govern applications for execution of all kinds of decrees (either money or mortgage), save and except decrees for injunctions. The corresponding section of the old Code (s. 230) applied only to decrees "for the payment of money or delivery of other property." Section 48, however, is wider in scope than s. 230 of the old Code for it applies to all decrees except decrees granting injunction. It therefore applies to mortgage decrees and also to compromise decrees; *Balaram v. Maruti*, 39 B. 256: 17 Bom. L. R. 178.

This section deals with the maximum limit of time for execution; it does not prescribe the period within which each application for execution is to be made, *Surajman v. Anjore*, 48 A. 73: A. I. R. 1924 All. 263. The period within which each application for execution is to be made is specified in Art 182 of the Limitation Act. The object of this section is to curtail the time allowed for the execution of decrees and to set aside a time after which decrees which fall within its provisions shall not be executed, *Kunhi v. Seshagiri*, 5 M. 141.

The expression "*an application to execute a decree*," means an application in the form prescribed by Or. XXI, r. 11; and where such an application has once been made and either granted or refused, no fresh application in the prescribed form as given in Appendix E, No. 6, for the execution of the same decree shall be made after the expiration of 12 years from the dates given in clauses (a) and (b). The section does not prevent the decree-holder after 12 years to present any application in furtherance of the application for execution already made before the expiration of 12 years. The Court may grant an application for execution if it is made in the prescribed form, and not barred by limitation under art. 182 of the Limitation Act, or by the principles of *res judicata*, or it may reject it if it is not in accordance with the prescribed form, or barred by art. 182 of the Limitation Act or by the principles of *res judicata*. An execution of a decree may be barred under this section though the application for execution may not be barred by *res judicata* or by art. 182 of the Limitation Act.

against such legal representative " in the beginning of clause (2) has been added.

**" Where a Judgment-debtor dies."**—The wording of this section shows that where the judgment-debtor dies after the passing of the decree against him; in other words, it contemplates that the judgment-debtor was alive when the decree was passed against him but dies subsequently to the passing of the decree. In such a case, the procedure laid down in this section is to be followed. But where a judgment-debtor dies before the passing of the decree, i.e., during the pendency of the suit, then this section has no application, and the procedure laid down in Or. XXII is to be followed.

**Distinction between Sections 50 and 52.**—This section is applicable to a case, where the judgment-debtor dies after the decree and before the decree is fully satisfied. In such a case the decree may be executed against the legal representative of the deceased. See, *Purushotam v. Rajbai*, 34 B.142 p. 151.

S. 52 is applicable to a case, where during the pendency of the suit, the defendant dies and his legal representatives are brought upon the record, and a decree is passed against them in their representative capacity, and the decree is for payment of money out of the property of the deceased. Such a decree may be executed against the property left by the deceased.

An application for execution of decree against the legal representatives of a person against whom the decree purports to have been passed, but who died not only before the decree, but also before the hearing, cannot be entertained under this section; *Narendra v. Gopal*, 17 C. L. J. 634.

**" Before the decree has been fully satisfied."**—The Madras High Court in *Ramasami v. Bhagirath*, 6 M. 180, held, that a sale held, in pursuance of an attachment effected during the lifetime of the judgment-debtor, and after his death, without bringing his legal representatives on the record, is illegal and must be set aside. This case was followed in *Krishnayya v. Unnissa*, 15 M. 399 and in *Groves v. Administrator-Gl. of Madras*, 22 M. 119: 8 M. L. J. 288, where it has been further held that the only thing sold was the right of the dead man, which passes no property as the dead man had no right at the time of the sale, his rights being then in his legal representatives and their rights were not sold or in any way affected, because they were not on the record at the time of the sale, which could be set aside without recourse to a separate suit. On the other hand, the Allahabad High Court in *Sheoprosad v. Hira Lal*, 12 A. 440 F. B.: 10 A. W. N. 103, held that sale of property attached during the lifetime of the judgment-debtor, held after his death, without bringing in his legal representatives as parties to the sale proceedings, is neither irregular nor void.—This case was followed in *Abdur Rahman v. Shankar*, 17 A. 162. See also, *Aba v. Dhondubai*, 19 B. 276; *Net Lal v. Shaik Karim*, 23 C. 686; *Peary Lal v. Chandi Charan*, 11 C. W. N. 163: 5 C. L. J. 80. It was for the purpose of removing this conflict of authorities that the word "satisfied" has been substituted for the word "executed" in the present section. Since mere attachment of the property of a judgment-debtor does not amount to satisfaction of the decree, the Allahabad decisions are no longer good law. If the execution sale takes place after the death of the judgment-debtor without bringing his legal representatives on record, the

holder to obtain execution will not necessarily be defeated, if, by reason of objections on the part of the judgment-debtor or action taken by the Court or other cause for which the decree-holder is not responsible, final completion of the proceedings in execution initiated by the application under s. 235 cannot be obtained within the period limited by s. 230. Further application of the decree-holder to the Court executing the decree to go on from the point where the execution proceedings had been arrested and complete execution of his decree, would be applications merely ancillary to the substantive application under s. 235 and would not be obnoxious to the bar of s. 230. On this point see, *Virarama v. Annasami*, 6 M. 359; *Sree Nath v. Yusoof Khan*, 7 C. 590; 9 C. L. R. 834.

In order to entitle a decree-holder to claim that an application should be regarded as a continuation of the previous application, two conditions must be satisfied, first, that the previous application was dismissed for no fault or default on his part and secondly, that the present application is similar in scope and character to the previous application. If these conditions are satisfied, there is no reason why the Court should not regard the present application as a continuation of the previous one; *Dharohar Singh v. Ram Prasad Narayan*, 1 Pat. L. R. 189.

**Whether this Section is Retrospective in Its Operation.**—On this point there seems to be divergence of judicial opinion, but the authorities preponderate in favour of the proposition that the section is retrospective in its operation, as will appear from the following cases—

A mortgage decree passed under the old C. P. Code cannot be executed after 12 years from the date of the decree, if the last application for execution is made after the new Code of 1908, has come into operation; *Bissesswar v. Jasoda*, 40 C. 704; 17 C. W. N. 622; 17 C. L. J. 316; Followed in *Md. Nabi Reza v. W. A. Thomas*, 21 I. C. 923; *Sadashiv v. Rakhnabai*, 11 N. L. R. 25; 27 I. A. 969, where it has been laid down that s. 48 has retrospective effect and limits the period for execution of even mortgage decrees passed before the new Code of 1908 came into force; see also, *Jaimangalbat v. Badan Chand*, 19 I. C. 899; *Gopaladas Ganpatdas v. Tribhovan Jethiram*, 45 B. 365; *Mahant Krishna Dayal v. Musst. Sakina Bibi*, 20 C. W. N. 952; *Mt. Begam Sultan v. Sarvi Begam*, A. I. R. 1926 A. 93. But see, *Kaunsilla v. Isri Singh*, 32 A. 490; 7 A. L. J. 420.

**Not Being a Decree for Injunction.**—The period of 12 years limitation prescribed by this section is applicable to all kind of decrees, except decrees granting an injunction. As to the mode of execution of decree granting injunction and the period of limitation, see the cases noted under Or. XXI, r. 52.

**"Twelve years from the date of the decree sought to be executed."**—**Commencement of Period of Limitation.**—Execution and application contemplated by this section relate to a decree which is executable at the date in respect of the application made and execution sought, and the "order for execution contemplated by the provisions of the section, refers to an order which the Court could have made and enforced in obedience to the terms of the decree; *Narahar v. Krishnaji*, 36 B. 368; 14 Bom. L. R. 381; see also, *Venkattamma v. Manikyam*, 16 M. L. T. 399; 26 I. C. 244 where the meaning of the expression "from the date of the decree sought to be executed" has been discussed.

So an Administrator *pendente lite*, who intermeddles with the estate of a deceased person after he ceases to be administrator, can be sued as a quasi-executor *de son tort*.—*Khitish Chander v. Radhica Mohun*, 35 C. 276: 12 C. W. N. 237, on appeal from 10 C. W. N. 566 [2 Ind. Jur. (N. S.) 234: 3 M. 35 *folld.*].

A money-decree obtained against a certain limited company, who had sold all their properties to a third person, who again sold his rights to another limited company, cannot be executed against the latter company, as such company is not the legal representative of the former company within the meaning of s. 50.—*Harrish Chundra v. Chandpore Company, Limited*, 30 C. 961; *folld.* in *Arbuthnots Industrials Ltd. v. Muthu Chettiar*, 81 M. 464.

The nephews of a deceased judgment-debtor are not the representatives of deceased judgment-debtor in a Mitakshara family with regard to the self-acquired property of the deceased, in preference to his widow; *Jnanendra Nath v. Rani Neholo*, 7 A. L. J. 512: 32 A. 404.

A decree against a father can, when the father dies before the decree is fully executed, be executed against the son as representative by attaching any separate property of the father inherited by the son. The joint family property in the hands of the son cannot however be attached and sold. The owner of an impartible estate is the exclusive owner for the time being; such estate devolves upon the son not by survivorship, but as separate property of the father. When such property devolves on a son from his father and the son as representative is proceeded against under this section, in execution of a decree obtained against his father, the inherited estate will be assets for the purposes of the section.—*Zemindar of Karvetinagar v. Trustee of Tirumalai*, 82 M. 429.

**Extent of Liability of Legal Representative of Deceased person.**—Where property of a deceased remains in the hands of the legal representative, it does not necessarily follow that a creditor is entitled to proceed against it as assets in the hands of the legal representative. Where payments have been made by legal representative to the extent of the full value of the property of the deceased which has come to his hands, a decree cannot be executed even though he may still have in his possession property which originally belonged to the deceased.—*Veerasokka Raju v. Papiiah*, 26 M. 792.

Where a decree to render accounts within a specified period, was passed against a defendant, who survived the period without any proceeding being taken against him: *Held* that the decree was personal, and could not, after his death, be executed against his representative.—*Bidhoo Mookhee v. Beejoy Keshub*, 12 W. R. 495.

Under s. 50, a representative of a deceased judgment-debtor, who has failed purposely or negligently to recover some debts due to the estate of the deceased, or some property belonging to it, is not liable in the same way as for property of the deceased which has come to his hands. The representative is answerable for property which has actually come to his hands, and not for what with diligence on his part would have come to his hands.—*Kushro Bhai v. Hormazsha*, 11 B. 277. Followed in *Saratmoni v. Batta Krishna*, 12 C. W. N. 614: 35 C. 1100.

Where a mortgage decree directed that the mortgaged property should be sold, and if the sale proceeds be insufficient, the unrealised balance should be realized from the mortgagor personally or from his other properties.—*Held*, that an application made after 12 years from the date of the decree for execution by attachment and sale of mortgagor's other properties is barred by the section.—*Jnanendra Nath v. Khulna Loan Co.*, 18 C. W. N. 492 (31 C. 792 dist.) Followed in *Venkata Perumal v. Prayag*, 29 I. C. 556, where it has been held that the period of twelve years must be calculated from the date of the decree and not from the date when the sale proceeds of the mortgaged property prove insufficient to satisfy the decree and the balance is ascertained. 29 I. C. was overruled in 31 M. L. J. 513 F. B. (*Aiyasamier v. Venkatachala Mudali*) where it was held that the period of limitation begins to run not from the date of the decree but only from the date when the mortgaged properties are sold and the sale proceeds are found insufficient to satisfy the decree. See also, *Maharaja of Benaras v. Lalji Singh*, 84 A. 630: 10 A. I. J. 256; *Baranashi Koer v. Bhabadeb*, 84 C. I. J. 167; *Khulna Loan Co. v. Jnanendra Nath*, 22 C. W. N. 145 (P. C.).

Where a decree is passed under the Dekhan Agriculturists' Relief Act, there is no necessity to apply to the Court to make it absolute. On default of payment if any instalment, execution can be applied for and an application to have the decree made absolute would at best be considered as a step-in-aid of execution. Hence, when the application for execution is put in more than 12 years from the date when the decree could have been executed, though within 12 years from the date of decree absolute, it is barred under s. 48; *Hira Chand Khem Chand, v. Aba Lala Patil*, 46 B. 761: 26 Bom. L. R. 269.

**Limitation Where Decree Directs Mesne Profits to be Ascertained in Execution.**—S. 48 means that no execution petition can be put in after 12 years from the date of the decree, the date being the date prescribed under Or. XX, r. 7. Where, therefore, the decree directs that mesne profits should be ascertained in execution, limitation runs from the date of the decree and not from the date when mesne profits are ascertained—*Dakshinamurthy v. Vedamurthy*, 103 I. C. 311: A. I. R. 1927 M. 842 (*Khulna Loan Co. v. Jnanendra*, 22 C. W. N. 145 P. C. followed). An order for mesne profits is not an order for the payment of money on a certain date within the meaning of s. 48 (1) (b).—*Dakshinamurthy v. Vedamurthy*, A. I. R. 1927 Mad. 842.

**S. 48 (1) (b)—Where Decree or Order Directs Payment of Money or Delivery of Property at a Certain Date or at Recurring Periods.**—A judgment-debtor on being arrested, presented a petition with the consent of the decree-holder asking 15 days' time to pay the decretal amount, and the Court ordered "let the petition be filed." *Held*, that the order did not amount to one directing payment of money to be made at a certain date within the meaning of this section—*Jugobundhoo v. Hori Rawoot*, 16 C. 16 (11 C. 143 followed). See also, *Balchand v. Raahunath Das*, 4 A. 155; *Kanji Mal v. Kanhia Lal*, 7 A. 373, and *Sabhanatha v. Subha Lakshmi*, 7 M. 80, and *Yusuf Khan v. Sirdar Khan*, 7 M. 83.

S. 48 deals with the maximum limit of time prescribed for execution and does not prescribe the period within which each application for execution is to be made. The right to apply for execution in a case where



ment-debtor left no self-acquired property.—*Amar Chandra v. Sebak Chand*, 34 C. 642 F. B.: 5 C. L. J. 491: 11 C. W. N. 593. S. 53 has superseded 16 A. 249; 13 M. 265; 6 C. W. N. 223; 11 M. 418; 31 C. 224. See notes under section 53.

A Hindu judgment-debtor died leaving a widow and two minor sons. His widow was placed on the record as his heir, and not his sons; and certain property of the deceased was sold in execution. *Held*, that although the minors were not formally made a party to the execution proceedings, still the widow, who was in possession of the property as their natural guardian, was upon the record.—*Achut Ram Chandra v. Manjunath*, 21 B. 539. See also, *Hari Saran v. Bhubaneswari*, 16 C. 40, P. C.

A decree for maintenance obtained against the father can be executed after the death of the father against his sons to the extent of the assets of the deceased taken by them, but such assets do not include the share of the father in the family property.—*Karpa Kambal v. Subrayyan*, 5 M. 234. Approved and followed in *Mutia v. Veerammal*, 10 M. 283. Followed in *Subhanna Bhatta v. Subhanna*, 30 M. 324: 17 M. L. J. 180.

A consent-decree was passed against the holder of an impartible zemindari whereby certain land was directed to be sold in the event of the debt not being paid in a certain way. After the death of the Zemindar, execution proceedings were taken against his son to obtain sale of the said land. *Held*, that the decree could be executed against the son.—*Zemindar of Sivagiri v. Tiruvengada*, 7 M. 339.

After the death of the judgment-debtor and his legal representative, the decree-holder is entitled to execute his decree against the legal representative of the legal representative to the extent of any assets of the original judgment-debtor which may come into his possession.—*Jofri Begam v. Saira Bibi*, 22 A. 307.

See also notes under section 52.

**Extent of Liability of Persons in Possession of the Judgment-debtor's Property.**—The creditor of the ancestor or testator may follow his lands into the possession of a purchaser from the heir or devisee, if it can be proved that such purchaser knew (1) that there were debts of the ancestor or testator left unsatisfied, and also (2) that the heir or devisee to whom he paid his purchase-money intended to apply it otherwise than in the payment of such debts.—*Greender Chunder v. Mackintosh*, 4 C. 897: 4 C. L. R. 193.

An order was made making the legal representatives of a deceased judgment-debtor parties to the execution of a decree obtained against the deceased in his life time. Subsequently the decree-holder applied to have the name of a third party put upon the record. *Held*, that the Court had no power to put the name of the third party on the record.—*Nadir Hossein v. Bissen Chand*, 2 C. L. R. 437.

The purchaser of the property of the deceased judgment-debtor was held not liable to pay the amount of a decree which was passed against him on account of certain malicious and wrongful conduct towards the plaintiff, as the debt was purely a personal one.—*Macleod v. Kunhoje Sahoo*, 9 W. R. 271.

**Decree Directing Payment of Maintenance—Limitation.**—Where a decree is for periodical payments, if it can be gathered from the decree that payments are directed to be made on dates or periods which are sufficiently indicated by the terms of the decree, the requirements of the Limitation Act, art. 182, are satisfied.—*Kaveri v. Venkama*, 14 M. 396.

A decree directing payment of future maintenance from the date of plaint, till death of recipient at a certain date, is a decree for payment on that date in every subsequent year and the period of limitation for the execution of such decree is that prescribed by art. 182 of the Limitation Act.—*Aitamma v. Naraina*, 30 M. 504: 17 M. L. J. 402 (14 M. 396 followed).

Future maintenance awarded by a decree when falling due can be recovered in execution of that decree without further suit under s. 48, cl. (1) b.—*Ashutosh v. Lukhimoni*, 19 C. 139, F. B., and *Asad Ali v. Haider Ali*, 38 C. 13. See, however, *Ram Dial v. Indar Kuar*, 16 A. 179; *Matangini v. Chooneymoney*, 22 C. 903, and *Hemangini v. Kumode Chunder*, 3 C. W. N. 139: 26 C. 441.

The period of limitation for execution of a decree directing payment of maintenance on a specified date commences each year from the date specified in the decree.—*Kuppu Ammal v. Saminatha*, 18 M. 482.

"Any subsequent order."—The subsequent order, directing payment in s. 48 (1) (b) means a subsequent order made by the Court which passed the decree acting as that Court and not as an executing Court; *Gobardhan Prasad v. Bishunath*, 2 Pat. L. T. 80; 1920 Pat. 229; *Jurawan v. Mahabir Dube*, 40 A. 198.

The subsequent order referred to in s. 48 may be passed by a Court to which the decree has been transferred; *Fielding v. Firm of Janki Das*, A. I. R. 1926 Lah. 465: 95 I. C. 243.

**Minority.**—Limitation is the result of statute law and no exception from it can be recognised except what the statute itself provides; sections 6 and 7 of the Limitation Act are only confined to the periods of limitation mentioned in the Limitation Act, and do not apply to s. 48 of the C. P. Code; *Rebala Ramana v. Bebala*, 24 M. L. J. 96: 13 M. L. T. 79: 37 M. 186: followed in *Premnath v. Chatarpal*, 37 A. 638: 13 A. L. J. 166, and 13 A. L. J. 826. Similar view has also been taken in *Bhagwant v. Kaji Mahamad*, 36 B. 498: 14 Bom. L. R. 387 (29 B. 68 foll.). This was a case under s. 9 of the Limitation Act. *Balaram v. Maruti*, 17 Bom. L. R. 178: 39 B. 256. But see, *Kumar Venkata v. Velauda*, 27 M. L. J. 25: 24 I. C. 195.

**Bar of Limitation—Continuation of Application—Step in Aid of Execution.**—S. 48 of the C. P. Code has no application to the case of a revival of an antecedent application for execution which has been in suspense by reason of some bar or which has been stayed pending the determination of a subsequent litigation. The period of limitation in such cases is that provided by Art. 181 of the Limitation Act, viz., 3 years from the date of removal of the bar; *Sakina Bibi v. Ganesh Prasad*, 3 Pat. L. J. 103.

The mesne-profits under a decree of 1854 was ascertained in January 1881. Held, that the decree of 1854, so far as mesne-profits were might be taken to be a mere interlocutory decree and did not become "

died leaving several heirs. Her judgment-creditor, after making some of her representatives as parties to the execution proceedings, caused certain land to be sold, *held* that the sale was valid.—*Kunhammad v. Kutti*, 12 M. 90. *See also*, *Khurshet Bibi v. Keso Vinayek*, 12 B. 101; *Hari Vithal v. Jairam Vithal*, 14 B. 597; *Daulat Ram v. Mehrchand*, 15 C. 70, P. C. (11 B. 700, and 6 B. 564 overruled); *Daralava v. Bhimaji Dhondo*, 20 B. 338 and *Devji v. Sambhu*, 24 B. 135, in which all the cases on the subject have been referred to and discussed. *See also*, *Kadir Mohideen v. Muthu Krishna*, 26 M. 230.

Under the Mahomedan Law a decree against one heir of a deceased debtor, cannot bind the other heirs.—*Sitanath v. Luchmiput*, 11 C. L. R. 288.

**Execution Proceedings Not Against the True Legal Representative or Against some One of Several Representatives—Validity of Such Proceedings.**—Where execution proceedings were taken, not against the plaintiff, who was the legal representative of the deceased, but against a person alleging that he was the legal representative, although he was not—*held*, that the execution proceedings were ineffectual against the plaintiff who was the true legal representative.—*Ram Chandra v. Raja Ranjit Singh*, 4 C. W. N. 465; 27 C. 242; *see also*, 4 C. W. N. 415. *See, however*, *Malkarjun v. Narhari*, 25 B. 337; 5 C. W. N. 10 P. C. (21 B. 424 reversed). Both these cases have been referred to and explained in *Golam Ahmad v. Judhistir*, 30 C. 145; 7 C. W. N. 305 and distinguished in *Jwala Sahai v. Masiat Khan*, 26 A. 346 and in *Khiraajmal v. Diam*, 9 C. W. N. 201, P. C.: 32 C. 296; 1 C. L. J. 584: explained in *Ramaswami v. Oppilamani*, 33 M. 6.

The estate of a deceased debtor can be represented by one member of the family and judicial sales cannot be disturbed on the mere ground, that some members of the family who were minors were not made parties to the proceedings, if it appears that there was a debt justly due by the deceased, and no prejudice is shown to absent minors.—*Ram Taran v. Rameswar Malia*, 6 C. L. J. 719; 11 C. W. N. 1078 (32 C. 296, P. C.: 9 C. W. N. 201; 1 C. L. J. 584 followed).

Plaintiff obtained a decree on a bond executed by S against the mother of S, whom he believed to be the heiress of S. In attempting to execute his decree against the estate of S, plaintiff was obstructed by the defendant, the adopted son of S. The plaintiff sued the defendant for a declaration that he was entitled to execute his decree against the estate of S in the hands of the defendant. *Held*, that the suit must fail, inasmuch as the estate of S was not properly represented in the former suit.—*Subbana v. Venkata Krishna*, 11 M. 408 (11 C. 45 distinguished). Followed in *Kaliappan v. Varadarajulu*, 33 M. 75.

After re-marriage of a Hindu widow, she forfeits her deceased husband's estate, and does not represent his estate. Therefore, any decree passed against the widow after her re-marriage as representative of her deceased husband, is not binding upon his true legal representative.—*Chouri Churn v. Sita Patni*, 14 C. W. N. 346.

**Execution of Injunction-decree Against Legal Representatives of Deceased Defendant.**—A decree for injunction against a defendant, who died subsequent to the decree, may be enforced against him as his legal re-

An application for execution of a decree of 1870 was presented on the 26th January 1885, several previous applications had been made, and the last two, viz., on the 29th July 1881 and 29th June 1882 had been granted. *Held*, that the application in question was barred.—*Motichand v. Krishnam*, 11 B. 524.

An order by a Court passing a decree for the transmission of a decree for execution to another Court is not an order for the execution of the decree nor is an application for the transmission, an application for execution; *Jeevandas v. Ranchoddas*, 85 B. 103. See, *Nilmoney Singh v. Bireswar*, 16 C. 744. See, however, *Suja Hossein v. Monohar Das*, 24 C. 244.

If the last application for execution was made within 12 years, the order on the application may be made after expiry of 12 years; *Sivaswami v. Sivalingam*, 7 M. L. T. 353; 5 I. C. 474.

An application for sale is a continuation of a former application for attachment. This section only bars fresh application after 12 years; *Suraja Venkata v. Nanduri*, 8 M. L. T. 367.

An application for execution can in no sense of the word be regarded as an application in continuation of an application for transfer of a decree from one Court to another; *Khetpal v. Tikam Singh*, 34 A. 396; 9 A. L. J. 365 (20 A. 78 dissented from).

An application for execution was made within 12 years from the date of the decree. During the pendency of the application, the judgment-debtor applied to be declared insolvent, and the execution was stayed at his instance. After removal of the bar, the decree-holder applied for execution. *Held*, that the latter application was in continuation of the application previously made, and *held*, that the execution was not barred; *Chattrapat Singh v. Joy Mongola*, 16 I. C. 541.

Where an application for execution of an *ex parte* decree, was stayed at the instance of the judgment-debtor, who obtained an injunction in suit to set aside the *ex parte* decree: *held*, that the decree-holder's application for execution after the injunction was dissolved, was a continuation of the former application; *Tilakdhari v. Bikram Singh*, 20 I. C. 244; *Sant Lal v. Sri Newas*, 32 I. C. 1005.

Section 48 contains an unqualified prohibition against execution of decrees more than 12 years old and the section is not controlled by s. 15 of the Limitation Act. Consequently in computing the period of 12 years under s. 48 it is not open to the decree-holder to deduct the time during which execution was stayed; *Minor Subbarayan v. Minor Natarajan*, 45 M. 78.

An application for execution, otherwise time barred, may, if the decree-holder has not been remiss and a proper case is made out, be treated as one for the revival and continuation of earlier proceedings in execution, even if fraud on the part of the judgment-debtor is not established; *Rameshwar Singh v. Rateshwar Singh*, 17 C. L. J. 125.

The question whether an application for execution is only ancillary to the previous application or is a fresh application is to be decided according to the circumstances of every case.—Twelve years' rule in execution proceeding to be strictly observed.—*Mahadeo Prasad v. Hyder Mehdi*, 8 I. C. 727. As to substantive application which saves limitation under this section

Where a judgment-debtor dies the decree-holder should get at least six months within which to make an application to bring his legal representative on the record on the analogy of art. 177 of the Limitation Act; *Rameshwar v. Mathu Misser*, 62 I. C. 52.

An application by the decree-holder for substitution of the heir of the deceased judgment-debtor, though disallowed, is a step-in-aid of execution within the meaning of art. 182 of the Limitation Act.—*Adhar Chandra v. Lal Mohan*, 24 C. 778.

Application for execution of decree made after the death of the judgment-debtor and without any representatives of the deceased debtor being brought on the record is not a good application for the purpose of saving limitation.—*Madho Prasad v. Kesho Prashad*, 19 A. 337.

The Code of Civil Procedure does not prescribe any substantive application for substitution of the legal representatives of a deceased judgment-debtor and an application made for substitution is in substance an application for execution within the meaning of s. 234, C. P. Code, 1882 (s. 50), and art. 182 of the Limitation Act.—*Jogendra Nath v. Rasick Chandra*, 2 C. L. J. 644.

**Other Cases.**—The right of a decree-holder under s. 234, C. P. Code, 1882 (s. 50), to have his decree executed against the legal representative of a deceased judgment-debtor, is not affected by s. 104 of the Probate and Administration Act (V of 1882), which directs debts to be paid equally and rateably out of the assets.—*Venkatarangayan v. Krishnasami*, 22 M. 194.

A plaintiff who has obtained a decree having died, and the defendant in the suit being one of his representatives, and as such entitled to succeed to a share in his estate, *held*, that the mere fact of the defendant being one of the representatives of the deceased did not bar the other representatives from executing the decree according to their rights.—*Wise v. Abdool Ali*, 7 W. R. 136.

Persons interested in the estate of a testator, not being the legal personal representatives of the testator, will not be allowed to sue persons possessed of assets belonging to the testator, unless it is satisfactorily made out that there exist assets which might be recovered, and which, but for such suit would probably be lost to the estate.—*Oriental Bank Corporation v. Gobis Lall*, 10 C. 713.

Where a party is sued for money as the heir and possessor of the estate of the deceased debtor, and it is proved that he has received sufficient assets to meet the debt, a personal decree, therefore, can be passed against him.—*Nathuram Sivaji v. Kutti Haji*, 20 M. 446.

In a suit by a creditor against the estate of a deceased debtor, who has died leaving a will, his heirs on intestacy do not represent his estate, and the suit is bad unless the estate is represented.—*Matangini v. Chooney Money*, 22 C. 903.

Where a defendant dies, after a decree *ex parte* has been passed against him, his representatives cannot apply to set aside the *ex parte* decree unless the plaintiff has brought them on the record as representatives under s. 234, C. P. Code, 1882 (s. 50).—*Sambasiva v. Veera Perumal*, 28 M. 861.

The limitation for execution of a decree is to be calculated from the date of the decree and not from the date when it is actually prepared and signed by the Court.—*Ajizul Hossain v. Mussammatt Umda Bibi*, 1 C. W. N. 93; *Narsing Rao v. Bandu*, 42 B. 309.

Where the decree of a mufasil Court is transferred to the High Court for execution, the decree does not, by transfer, become the decree of the High Court so as to make the provisions of art. 183 of the Limitation Act applicable to it; but the terms of s. 48 would expressly prevent a fresh application for the execution of this decree after the lapse of 12 years.—*Jogemaya Dassi v. Thackomoni*, 24 C. 473.

*Held*, that an application made before the passing of Act VI of 1892 by a decree-holder to the Court executing the decree to strike off a pending application for execution, with liberty to make a fresh application for execution of the same decree, was an application to take a step in aid of execution within the meaning of art. 182 (5) of the Limitation Act.—*Ram Narain v. Bakhtu Kuar*, 16 A. 75.

At XV of 1877 operates from the date on which it came into force as regards all applications made under it. *Bona fide* proceedings in resistance of a claim to attach properties are proceedings to enforce a decree within the meaning of s. 20 of Act XIV of 1859.—*Becharam v. Abdul Wahed*, 11 C. 55. (9 C. 446, dissented from).

An application for partial execution of a decree is a step in aid of execution within the meaning of art. 182 (5) of the Limitation Act, XV of 1877. *Nepal Chunder v. Amritalal*, 26 C. 888. (15 B. 242, followed).

Where a party whose claim was decreed in full by the Court of first instance filed an appeal by reason of certain remarks in the body of the judgment and the appellate Court dismissed the appeal holding that under the circumstances there was no right of appeal. *Held*, that the period of twelve years began to run from the date of the appellate decree and not of the Court of first instance; *Rup Narain v. Sheo Prakash*, 43 A. 405: 19 A. L. J. 159.

*As to the mode of enforcing a mortgage decree and the commencement of the period of limitation for execution of such decree, see notes under Or. XXI, r. 10 (2).*

*As to the effect of acknowledgment in execution proceedings, see notes under Or. XXI, r. 11 (2).*

Where the Judgment-debtor has by Fraud or Force Prevented Execution.—Evasion of process of arrest is fraud within the meaning of the section. The fraud of one of several judgment-debtors keeps the decree alive against all the judgment-debtors. Fraud at sometime within 12 years prior to the date of application is sufficient under this section to entitle the decree-holder to apply for execution and it is not incumbent on the decree-holder to prove continuous diligence prior to such date or that, but for the fraud or force complained of, he would have realised the fruits of the decree.—*Per Sundara Ayyar, J.* The fraud of one of several judgment-debtors will keep the decree alive only against such judgment-debtor; *Abdul Khadir v. Ajiyar Ahammad*, 35 M. 670: 22 M. L. J. 35: 10 M. L. T. 413. (6 M. 365; 8 M. L. J. 203; 22 M. 320; 8 A. L. J. 1020, referred to; 11 C. W. N. 440, commented on).

In all these cases it was pointed out that a receiver may be appointed by the Court to realize a decree or a debt attached in execution proceedings.

Under this section, a Court may execute a decree by appointing a receiver and shall be guided by the provisions of Or. XL, r. 1, which limits the power of a Court to appoint a receiver to cases, where it appears to be both just and convenient.—*Mirza Md. Hussain v. Amar-Chand*, 16 O. C. 283; 21 I. C. 283; *Munshi Lal v. Mahomed Amir Mirza Beg*, 22 O. C. 194; 52 I. C. 305.

This section is to be read with Or. XXI, r. 2 and Or. XL, r. 1. When a Court appoints a receiver for purposes of execution of decree, the order is one under Or. XL, r. 1, read with s. 51; *Srinivas Prosad v. Kesho Prosad*, 14 C. L. J. 489; 38 C. 754.

Though a right to future maintenance cannot be attached under s. 60 (1) (n), the Court may in a proper case, e.g., where provision is made for maintenance out of the income of several villages, appoint a receiver for realizing rents and paying out of the same, a sufficient sum for maintenance and the balance to the decree-holder; *Rajendra Narain v. Sundara Bibi*, 52 I. A. 262; 47 A. 384; A. I. R. 1925 P. C. 176; *Palikandy v. Krishnan*, 40 M. 302; 34 I. C. 381. Where immoveable properties are attached in execution of a decree, the Court may appoint a receiver to collect the rents of the properties; *Maung Thin Zan, v. S. A. S. Firm*; 8 Rang. 235; A. I. R. 1925 Rang. 318.

It would be stretching too far the discretion of the Court under Or. XL, r. 1 in the matter of appointment of receivers, if it thereby deprives the decree-holder of his right to sell the mortgaged property under the decree. S. 51 does not apply to the case; for it merely prescribes the mode in which the decree-holder may execute his decree, one of them being by the appointment of a receiver. It does not give any right to the judgment-debtor to apply for the appointment of a receiver; *Malik Mokhtar Ahmed v. Musst. Bibi Rahimunnissa*, 67 I. C. 606.

Clause (e). "In such other manner as the nature of the relief granted may require."—Cl. (e) of s. 51 cannot be taken as authorizing a Court to read into a decree a supplementary or alternative relief which is not there; *Marath v. Seshu Pattar*, 42 M. L. J. 356; A. I. R. 1922 M. 299.

**52.** (1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally. [S. 252.]

and used force, the Court ought to allow execution.—*Rai Sham Kissen v. Damar Kumar*, 11 C. W. N. 440, followed in *Jogindra v. Mirza Moham-mad*, 14 O. C. 238, See, however, *Niru v. Garcharn*, 17 P. R. 1910: 10 P. L. R. 10: 5 I. C. 815.

A judgment-debtor, on seeing the Court's bailiff to approach his house to attach his property, left the verandah, went inside the house, chained the door, and refused to open it when called on to do so by the bailiff. Held, that the conduct of the judgment-debtor amounted to a prevention, by fraud, of the execution of the decree, within the meaning of s. 48—*Bhagu Jetha v. Malek Bawasaheb*, 9 B. 318.

Wilful evasion by a judgment-debtor to arrest under a warrant taken out by the decree-holder to avoid payment of the decretal amount amounts to fraud within s. 48 and gives a fresh starting point of limitation; *Ayyabu v. Soma Sundaram*, (1920) M. W. N. 788.

The mere fact that a judgment-debtor who is a *purdanashin* lady, keeps her door closed is not evidence by itself of fraudulent conduct on her part, unless there is anything to show that she deliberately does so or attempts to do so against the executing officer; *Begum v. Lachmi Narain*, 4 O. L. J. 345; 40 I. C. 899.

To entitle a decree-holder to the benefit of this section it is not enough to prove fraud at sometime during the 12 years' period, if, he had, at a later period, facility for executing the decree, *Rai Chand v. Jhande*, 75 P. L. R. 1909.

A decree-holder is not disentitled to the benefit of s. 48 cl. (2) (a) C. P. Code by reason of the fraud being long anterior to the date of the last application; *Moydeen Rowther v. Meera Rowther*, 10 L. W. 566: 53 I. C. 862 (22 M. 320, 22 M. L. J. 35 & 34 A. 20 *refd. to*).

The word "judgment-debtor" in this section means that judgment-debtor who has by fraud or force prevented the execution of the decree; therefore fraud or force of one of several judgment-debtors, entitles the decree-holder to get extension against that judgment-debtor alone but not as against his other co-judgment-debtors who have not been guilty of such conduct, *Abdul Khadir v. Ahammad*, 38 M. 410: 30 I. C. 423.

**To Limit or Otherwise Affect the Operation of Article 180 of the Limitation Act 1877 (now 183 of the Limitation Act, 1908).**—This proviso has been added to give legislative sanction to the following cases, viz. :—

*Mayablu v. Tribhubandas*, 6 B. 258; *Ganapathi v. Balasundara*, 7 M. 540; *Futteh Narain v. Chandrabati*, 20 C. 551. Followed in *Suja Hossein v. Manohur Das*, 24 C. 244 (reversing on review, 22 C. 921), and *Jogendra Chandra v. Shayamdas*, 36 C. 543: 9 C. L. J. 271, where it has been held that s. 48 of the C. P. Code does not apply to a decree or order of a High Court on its original side or to an order of His Majesty in Council (21 C. 551). Therefore the decree of a High Court may be kept alive for any number of years by successive applications for execution.

Decree obtained in the High Court on the 19th December 1881—Application for transfer was made on the 11th December 1893—Order of transfer passed on the 19th December 1893—Application for execution filed on the 1st March 1894 in the Court to which the decree was trans-



75: 19 M. L. J. 651: 6 M. L. T. 109. See also, *Subbanna v. Venkata Krishnan*, 11 M. 408.

See also the rulings under Section 50, ante.

**"Out of the property of the deceased."**—The expression "property" includes the income of immovable property though it cannot be both attached and sold; *Kadirvelusami v. The Eastern Development Corporation*, 47 M. 411: A. I. R. 1924 M. 530 F. B.: 80 I. C. 163. Where, after the death of the defendants in a suit, his sons were made parties, and a decree was passed against them, and in execution the sons objected that the property attached was their self-acquired property, held, that the proper questions to be determined were: (1) whether the attached property formed part of the deceased's estate, and, if not, (2) whether if it was separate property of the sons, and whether the sons misapplied any property received by them from their father, and, if so, to what extent.—*Mooraree Singh v. Parayag Singh*, 2 C. L. R. 189.

Ancestral property in the hands of sons is liable for a father's debt incurred as a surety.—*Tukaram Bhat v. Gangaram*, 23 B. 454. See also, *Sitaramayya v. Venkataraman*, 11 M. 373.

**"Where no such property remains."**—Where a decree-holder wishes to execute his decree against the heirs of his judgment-debtor to the extent of property inherited by him, he must satisfy the Court, before he can put this section in force, that no such property of the deceased can be found as he can sell in execution.—*Indro Narain v. Kristo Chunder*, 14 W. R. 362 The decree-holder must satisfy that the assets of the deceased passed into the hands of the legal representative.—*Parsotam v. Kesho Saran*, 24 I. C. 206.

**"If he fails to satisfy that he has duly applied the assets."**—The liability of a legal representative under s. 52, C. P. Code is not discharged until he accounts not only for the property that has come into his possession but also for the profit from the same. Once it is proved or admitted that the legal representative sought to be made liable has come into possession of assets belonging to the estate of the deceased, it is for him to satisfy the Courts as to the extent of the assets received and to account for them.—*Rajah of Kalahasti v. Sree Mahant Prayag Dassjee*, 30 M. L. J. 391.

When the representatives of a deceased debtor claim exemption on the ground that what they have received has been paid in satisfaction of their ancestor's debts, they should prove and file an inventory of the whole estate descended to them, and prove how it has been applied. In a claim of this kind, the *onus* of proof is on the judgment-debtor.—*Joogul Kishore v. Kalee Churn*, 25 W. R. 224.

When a defendant, against whom a decree is passed in his representative capacity, makes payments in satisfaction of the decree to the full value of the property of the deceased, which has come or which might have come to his hands, the decree can no longer be executed even though the defendant has still in possession property which originally belonged to the deceased.—*Veerasokkaraju v. Papiiah*, 26 M. 792. See also, *Ramgolam v. Ayma Begum*, 12 W. R. 177.

A decree being assigned, the judgment-debtor deposited the money in Court and in execution of a decree he had against the assignee attached the sum in Court.—*Held*, he was entitled to do so; *Chunni Lal v. Gulzari Lal*, 19 N. L. R. 164.

A had obtained a decree against K and T. After partial satisfaction of the decree, A assigned it to D. Prior to the date of assignment, K and T had instituted a suit against A and D, and ultimately obtained a decree against both of them. *Held*, that K and T were entitled to set-off their decree against the unexecuted portion of the decree which had been assigned to D.—*Kristo Ramani v. Kedar*, 16 C. 619; *Grish Chunder v. Obhoy Churn*, 6 C. L. R. 498.

Under this section the transferee of a decree-holder holds the decree subject to any equities which the judgment-debtor might have enforced against the original decree-holder. A transferee decree-holder cannot in execution bring to sale property, which the original decree-holder is prohibited from bringing to sale by s. 99 of the Transfer of Property Act.—*Jivarathanam Mudaliar v. Srinivasa Mudaliar*, 31 M. 33: 17 M. L. J. 503 (9 B. L. R. 728, 22 C. 813, approved; 27 A. 450, dissented from).

H, the holder of an usufructuary mortgage over the property of B, obtained against B a simple money decree, which had nothing whatever to do with the mortgage or the debt secured thereby. H transferred this simple money decree to M. *Held*, that there was nothing to prevent M from bringing to sale in execution of this decree the property mortgaged by B to H.—*Banh Bal v. Manni Lal*, 27 A. 450: 2 A. L. J. 121: A. W. N. (1905) 42. Dissented from in 31 M. 33: 17 M. L. J. 503 where it has been held that the transferee takes the decree subject to the conditions prescribed in section 99, T. P. Act (now Or. XXXIV, r. 4).

*See notes and cases noted under Or. XXI, r. 16.*

**50.** (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

Legal Representative.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit. [S. 234.]

## COMMENTARY.

**Alterations Made in the Section.**—This section corresponds with s. 234, C. P. Code of 1882, with some modifications. The word “where” has been substituted for the word “if” in the beginning, and the word “satisfied” has been substituted for the word “executed” after the word “fully” in clause (1); and the sentence “where the decree is executed

16 C. 86; 6 C. L. R. 429. See also *Regella Jogayya v. Nimu Shakavi*, 83 M. 492. But see, *Ramasami Mudali v. Sellattammal*, 4 M. 375.

The mortgagee from a Hindu of the joint ancestral property of the latter can enforce his mortgage against the grandson of the mortgagor for the realization of the interest secured by the mortgage in addition to the principal amount of the mortgage.—*Lachman Das v. Khunnu Lal*, 19 A. 26. See also, *Pran Krishna v. Jadu Nath*, 2 C. W. N. 603.

A decree was obtained against a Hindu daughter in possession of property inherited from her father for arrears of rent which had accrued during her lifetime. On the death of the daughter, her sons were substituted as Judgment-debtors, *Held*, that the debt was a personal debt, payment of which could be enforced only against the property left by the daughter.—*Kristo Gobind v. Hem Chunder*, 16 C. 511 (1 C. 183 *folld.* and 10 C. 823 *distd.*).

When one member of a Mitakshara family contracts a debt which is binding, not only on the persons executing the contract, but on other members of the joint family to which he belongs, the creditor has two courses open to him: (1) he may elect to treat the debt as a personal debt, and confine his suit to the person who actually contracted it, or (2) he may treat the borrower as acting for the family, and sue him as representing the joint family.—*Jumoon Pershad v. Diganarain*, 10 C. 1: 18 C. L. R. 74.

Arrears of maintenance due to a Hindu widow should be regarded as assets of the widow after her death, and, as such, are liable to be taken in execution of a decree against her.—*Rajcrav Chandrarao v. Nararav*, 11 B. 528.

A decree was passed against a widow in her representative capacity. The advertisement of sale in one place stated that the property to be sold was the property of the widow, and in another place, rights and interests of the debtor. *Held*, that the property intended to be sold was the rights and interests of the widow as representative of her deceased husband, and not of the widow personally.—*Buksh Ali v. Eshan Chunder*, W. R. F. B., 119; Marsh, 614; *Court of Words v. Kumar Ramaput*, 10 B. L. R. 294, P. C.; 17 W. R. 459. See also, *Lala Seeta Ram v. Ram Buksh*, 24 W. R. 883 and *Devji v. Sambhu*, 24 B. 135, in which all the cases on the subject have been referred to and discussed at length. In *Satish Chunder v. Nilcomul*, 11 C. 45, it has been held that the decree, having been obtained on account of the debt of the deceased person, the estate would be answerable, whether the widow or the adopted son of the deceased debtor represented the estate. See, however, *Subbanna v. Venkata Krishnan*, 11 M. 408.

Where the sons of a deceased judgment-debtor are admitted on the record as his representative, they are not entitled in the execution stage to re-open the whole case, and to ask for a decision as to whether the debt incurred by the father was not for the benefit of the joint family.—*Sheo Sahoy v. Ram Bhunjan*, 23 W. R. 127; *Ramanugra v. Kishen Kishore*, 23 W. R. 265; and *Burtoo Singh v. Ram Purmessur*, 24 W. R. 364.

**Liability of Representatives of a Deceased Mahomedan.**—When the creditor of a deceased Mahomedan sues the heir in possession, and obtains a decree against the assets of the deceased, such a suit is to be looked

sale is a nullity; *Raghunathasami v. Gopaul Row*, 41 M. L. J. 547: 68 I. C. 667: A. I. R. 1922 Mad. 807; *Karipineni Rajayya v. Annapurnama*, 50 M. L. J. 662: A. I. R. 1926 Mad. 188: 92 I. C. 808; *Raghu Nath v. Sundar Das*, 41 I. A. 251: 42 C. 72: 18 C. W. N. 1058: 20 C. L. J. 555.

Where a judgment-debtor dies during the pendency of execution proceedings, it is not compulsory upon the decree-holder to have the heirs brought upon the record on penalty of the decree abating. It is open to him to apply under s. 50, C. P. Code, for execution of his decree as against the heirs. But there is nothing in the Code of Civil Procedure which lays it down that the Court cannot on the decree-holders' application bring the heirs of a judgment-debtor upon the record in execution proceedings and continue the same against them; nor is there anything in the law which lays it down that on the death of the judgment-debtor any pending execution proceedings shall abate; *Bhagwan Das v. Jugul Kishore*, 42 A. 570.

**Scope of the Section.**—There is no machinery under the execution chapter of the Code which enables the Court, in executing the decree, to go into the question of whether or not the executor has been guilty of mal-administration of the estate. S. 234, C. P. Code, 1882 (s. 50) no doubt enables the Court to call for an account of the property of the deceased, which has come to the hands of the executor, but that section only applies to an account of the property which has actually come to the hands of the executor. If there has been mal-administration on the part of the executor, he cannot be held liable in execution proceedings under this section, but a regular suit must be brought.—*Saratmoni Debi v. Batta Krishna*, 12 C. W. N. 614, p. 616: 35 C. 1100 (11 B. 727 approved).

A person who dies *pendente lite* before a decree is passed against him is not a judgment-debtor and consequently the decree cannot be enforced against his legal representatives under s. 50, C. P. Code, as that section applies only where a judgment-debtor dies subsequently to the passing of the decree; *Bhanji Singh v. Bhagwati Prasad*, 16 N. L. R. 188: 55 I. C. 449.

**Legal Representative.**—The term "legal representative" is not limited to administrators, executors and heirs and must be held to include any person who in law represents the estate of a deceased judgment-debtor.—*Dinamoni v. Elahadut Khan*, 8 C. W. N. 843. See also, *Amar Chand v. Sebak Chand*, 34 C. 642 F. B.: 11 C. W. N. 593: 5 C. L. J. 491. It does not include any person who does not in law represent the estate of the deceased. Consequently, a stranger in possession of property of a deceased who was not a party to a decree against such person, cannot be proceeded against in execution otherwise than by a regular suit.—*Chathakalan v. Gobinda*, 17 M. 186.

A person taking possession of the estate of a deceased Hindu who has left a "will of which no probate has been granted," must be treated for some purposes as his representative until some claimant comes forward.—*Prosunno Chunder v. Kristo Chytunno*, 4 C. 342; 3 C. L. R. 154. See also, *Janaki v. Dhannu Lal*, 14 M. 454, and *Chuni Lal v. Osmond Beeby*, 30 C. 1044; *Basanta-Kumar v. Gopal*, 18 C. W. N. 1186; but see, *Harish Chandra v. Puri Das*, 14 C. W. N. 1041.

Under the Hindu Law, as in English Law, any one taking charge of property belonging to a deceased person renders himself liable for his debts.

**Decree Against Wrong Person as Representative.**—A decree was obtained against a wrong person as representative of a deceased debtor, and in execution the property was sold. Subsequently, the proper representative filed a suit to set aside the sale and recover the property. *Held*, that the plaintiff was entitled to set aside the sale and to recover the property.—*Baswantappa v. Ranu*, 9 B. 86.

Where a creditor obtained a decree against persons who did not legally represent the estate of the deceased judgment-debtor, *held*, that the proceedings taken against such persons in execution of the decree were invalid, and were not binding upon the proper representatives of the deceased.—*Sukh Nandan v. Rennick*, 4 A. 193.

A decree obtained by a creditor of a deceased Hindu against a wrong person as his heir, cannot be executed against the rightful heir who is in possession of the property. The creditor must obtain a fresh decree against the rightful heir; *Kaliappan v. Varadarajulu*, 33 M. 75: 3 I. C. 737.

A decree obtained against wrong legal representative cannot be executed against the estate in the hands of the true one; *Kaliappan v. Varadarajulu*, 33 M. 75: 19 M. L. J. 651: 6 M. L. J. 199.

**Decree Against Executors under a Will afterwards Set Aside as Invalid.**—A decree against executors for debts incurred while acting under a will which was afterwards set aside as invalid was held not binding on the estate of the deceased in the hands of his heirs; but in order to make the estate liable for the debt, the proper course for the decree-holder was to bring a regular suit against the heirs.—*Fanindra Deb v. Jugudishwari*, 14 C. 316.

**53.** For the purposes of section 50 and section 52, property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative. [New]

Liability of ancestral property.

## COMMENTARY.

**Object and Scope of Section.**—This section is new. It has been added to settle a question of procedure, on which the High Courts were divided in opinion (*see* 34 C. 642 F. B.: 11 C. W. N. 593: 5 C. L. J. 491). The following Report of the Select Committee will clearly explain the object of the section:—

“Section 53 has been introduced to settle a long mooted point upon which there is much diversity of judicial opinion, as to whether or not question as to the liability of ancestral property in the hands of a son or other descendant to whom it has come otherwise than by descent for the payment of the debt for which the decree was passed, can be determined under section 47 of the present Code, corresponding with section 244 of the old Code.”—*See the Report of the Special Committee.*

“Clause 53 has been added by the Committee in order to set at rest a question on which the High Courts are divided in opinion. It is true that

The share of a deceased father in an undivided Hindu family passes by survivorship to the sons, and is not assets in their hands to satisfy a decree against a father under s. 50.—*Revi Varma v. Koman*, 5 M. 223.

Held that in a joint Mitakshara family, a nephew, having taken by survivorship the undivided share of an uncle, deceased, was not liable for the personal debts and obligations of his uncle.—*Madho Parshad v. Meherban Singh*, 18 C. 157.

Although a son is bound under the Hindu law to pay his father's just debts from any property he may possess, yet when he is made a party to a decree as representative of his deceased father for the purpose of executing it, his liability is limited to the amount of assets of the deceased which may have come to his hands and have not been duly disposed of.—*Zemindar of Sivagiri v. Alwar Ayyangar*, 3 M. 42. Followed in *Hanumantha v. Hanumayya*, 5 M. 232.

Personal decree by one partner against another for dissolution and for a definite sum of money cannot, after his death, be executed against a surviving member of the family by attaching and bringing to sale joint family property which has come to him by survivorship.—*Veerappa Chettiar v. Ramaswami Aiyar*, 27 M. 106 (5 M. 232 and 234 and 13 M. 283 referred to).

A Hindu widow sued for possession of certain property belonging to her husband, and the suit was dismissed with costs. After the widow's death execution for costs was taken out against the next heirs of her husband. Held that as the widow did not seek to recover any personal interest herself, but attempted to recover a portion of her husband's estate, the decree-holder was entitled to satisfy his decree out of the whole estate in the hands of the legal representatives of her deceased husband.—*Ram Kishori v. Kally Kanto*, 6 C. 479; 8 C. L. R. 1. Applied in *Prem-moyi v. Preonath*, 23 C. 636. See also, *Chinta Money v. Mohesh Chunder*, 23 C. 454. But see, *Kameswar Pershad v. Rumbahadur*, 12 C. 458; see, *Regella v. Nimushakavi*, 33 M. 492.

A money decree obtained against a father of a Mitakshara family, can be executed after his death against his sons to the extent of the ancestral property that has come to their hands provided the debt is not tainted with immorality or illegality; *Shivram v. Sakharam*, 33 B. 39; *Kasturi Ranga v. Venkataram*, (1914) M. W. N. 354; 24 I. C. 280.

The decree-holder has to prove that the assets of the deceased person passed into the hands of the legal representative against whom the decree is sought to be executed; *Parsotam. Das v. Kesho Saran*, 24 I. C. 206.

Where a decree for money against a member of Mitakshara joint family was sought to be executed after his death, against his son and heir, who took ancestral property by survivorship as his legal representative. Held, on the construction of ss. 234 and 244, C. P. Code, 1882 (ss. 30 and 47) the liability of the ancestral property or of a share of it for the debt covered by the decree might be determined in the execution proceedings, if the representative had been properly brought on the record under s. 234, C. P. Code, 1882 (s. 50). Held also, that the son being the legal representative of the deceased judgment-debtors is, *prima facie*, liable to be brought upon the record under s. 50 unless he can show that the ujd-

creditor must adopt for the realization of his decree when the original debtor is dead leaving ancestral property. There is no substantial difference as regards the *rights* of the creditor; the doubt is as to the *procedure*." It was held under the old Code in *Umed v. Goman Bhaiji*, 20 B. 385; *Shivram v. Sakharam*, 33 B. 39: 1 I. C. 459; *Amar Chandra v. Sebak Chand*, 34 C. 642 F. B., and under the new Code in *Ramanand v. Chhoty Lal*, 20 A. L. J. 969: A. I. R. 1923 A. 124: 71 I. C. 417, that a separate suit by the decree-holder against the sons or grandsons is unnecessary and inappropriate in such cases and that s. 47 is wide enough and empowers the Court executing the decree to decide any question which the sons or grandsons may raise as regards the nature of the debt. The Madras and Allahabad decisions under the old Code that a decree against a Hindu father could not be executed against ancestral property in the hands of his sons or grandsons not even to the extent of the father's interest in the property and that the only remedy of the decree-holder was to institute a separate suit against them are no longer good law; *Jagannath v. Sitaram*, 11 A. 302; *Lachmi Narain v. Kunji Lal*, 16 A. 449; *Ariabudra v. Dorasami*, 11 M. 418; *Ravi Varma v. Koman*, 5 M. 223.

Where a money decree has been passed against the father, and the father dies after attachment but before sale of the ancestral property, the proceedings in execution can be continued against the sons, a separate suit against them being barred under s. 47; *Peary Lal v. Chandi Charan*, 11 C. W. N. 163; *Sivagiri Zemindar v. Teruvengada*, 7 M. 339; *Lachmi Narain v. Kunji Lal*, 16 A. 449.

Where a mortgage-decree is obtained against the father for sale of ancestral property mortgaged by him and he dies before the sale, the execution proceedings may be continued against the sons. But in such a case, the sons not being parties to the suit, they are entitled to raise such questions in execution proceedings as they could have raised if they had been made parties. They can raise questions regarding the *factum* of the debt or that it was incurred by the father for immoral purposes; *Umamaheswara v. Singaperumal*, 8 M. 876; *Hira Lal v. Parmeshar*, 21 A. 356; *Chander Pershad v. Sham Koer*, 33 C. 676; *Ram Krishna v. Vinayak*, 34 B. 354; *Indar Pal v. Imperial Bank*, 37 A. 214: 28 I. C. 593.

Where a decree has been passed against the sons, in respect of their father's debt, for payment of the debt out of the ancestral property, the decree-holder may proceed to execute the decree by attachment and sale of the ancestral property in the hands of the sons.

Where a decree under s. 90 of the T. P. Act against the legal representative of a deceased person directs that the amount thereof be realized from such property only as belonged to the deceased personally, the decree-holder cannot take advantage of s. 53, C. P. Code and attach ancestral property which passed by right of survivorship to the son of the deceased; *Kalian Das v. Bhawani Shankar*, 9 I. C. 631.

Appellate Court cannot reverse an order of the lower Court passed under an old Code, on the ground that, since then, a different rule has been enacted by the new Code. S. 53 provides the course to be followed in such cases; *Salem Town Bank v. Varadappa Cetti*, (1011) 2 M. W. N. 386.

Section 53 of the C. P. Code merely provides that a question of the liability of the property in the hands of the son governed by the Mitakshara school, is to be determined in execution proceedings and not by a separate

Where during execution proceedings, the judgment-debtor dies the transferee of his property should be put on the record in the place of the deceased, or a regular suit should be brought against him.—*Shurfun Bibee v. Collector of Saran*, 12 B. L. R. 66, note, 10 W. R. 199

On this point, see also notes under section 52.

**Legal Representatives Not Brought upon Record—Validity of Execution Proceedings.**—S 50 applies only to cases where, after the death of the judgment-debtor, the decree-holder seeks to bring to sale property which was of the judgment-debtor in his lifetime, and which was not at the time of his death under attachment. It does not apply to cases where the judgment-debtor dies after attachment and before sale. An attachment would not abate on the death of the judgment-debtor, and the omission to bring the representative of the deceased judgment-debtor on to the record does not vitiate the sale.—*Sheo Prasad v. Hira Lal*, 12 A. 440, F. B.; *Aba Bin v. Dhondubai*, 19 B 276; *Net Lal v. Kureem Buz*, 23 C. 686; *Abdur Rahaman v. Sankar Dat*, 17 A. 162; *Stowell v. Ajudhia Nath*, 6 A 255. But see, *Ramasami Aiyangar v. Bhagirath*, 6 M. 180; *Krishnayya v. Unnessa Begam*, 15 M. 399; and *Groves v. Administrator-General of Madras*, 22 M. 119.

If the judgment-debtor dies pending the execution proceedings, and if the execution proceedings have gone so far as to constitute in favour of the judgment-creditor a valid charge upon the joint estate, to the extent of the undivided interest of the deceased, the rights of the creditor cannot be defeated by the death of the judgment-debtor before the actual sale, and the creditor will be entitled to continue the execution in respect of the share which has been already attached and ordered to be sold, although it has passed to the other members of the family by survivorship.—*Peari Lal v. Chandi Charan*, 5 C L. J. 80. 11 C W. N. 163. Attachment would not abate on the death of the judgment-debtor; *Sheo Prasad v. Hira Lal*, 12 A. 440.

When an order for delivery of possession was passed prior to the death of the judgment-debtor, and possession was given after his death, held that there was no necessity to bring the representative of the deceased judgment-debtor on the record between the date of that order and the date on which the order was executed.—*Biyyakka v. Fakira*, 12 M. 211.

Where the judgment-debtor dies after the appellate decree, the course open to the judgment-creditor is by way of an application to execute the decree against the legal representative of the deceased as provided by s. 234, C. P. Code, 1882 (s. 50).—*Hira Chand v. Kastur Chand*, 18 B. 224.

Where a party to a suit died after argument and before delivery of judgment, the decree passed in the suit or appeal is a valid decree, and can be executed against the heirs of the deceased defendant under s. 234, C. P. Code, 1882 (s. 50).—*Ramacharya v. Anantacharya*, 21 B. 314. See also, *Narua v. Anant*, 19 B 807 and *Raghunatha v. Venkatesa*, 26 M. 101. But where he died before hearing, the decree is a nullity.—*Janardhan v. Ram Chandya*, 26 B 317. See also, *Narendra v. Gopal*, 17 C. L. J. 634.

**Validity of Execution Proceedings in which Some Only of the Representatives of the Deceased are Made Parties.**—A Mahomedan woman



a preliminary decree is only made under cl. (2) of Or. XX, r. 18 when the property to be partitioned is not property assessed to Government Revenue. Under this section a Civil Court has no power to effect partition of lands paying revenue to Government or to deliver possession of the share; the collector alone is competent to do so; *Dattatraya v. Mahadaji*, 16 B. 528. In cases where the execution is to be worked out by the Collector, the Court makes the final decree and the rest of the proceedings is worked out by the Collector in execution as under the procedure of the old Code; *Harun v. Tejmal*, 29 I. C. 58: 8 S. L. R. 335.

**Meaning of the Word "Partition."**—The term "partition" in this section is not confined to the mere division of the lands into the requisite parts, but includes the delivery of the shares to their respective allottees. This section contemplates the "partition" being completely carried out by the Collector; *Parbhudas v. Shankarhai*, 11 B. 662.

**"Estate."**—The word "estate" as used in this section must not be construed in the same limited and defective sense in which it is used in the Bengal Act (VIII of 1876), but must be taken to be there used in its ordinary signification.—*Secretary of State v. Nundun Lal*, 10 C. 435, (7 C. 153, approved.) It includes *sheri* lands leased by Government for a certain number of years; *Dattatraya v. Mahadaji*, 16 B. 528. It has been held not to be an "estate" within *Muthuvayyengar v. Kudalalagayyengar*, 6 M. K. 382.

**Finality of Decree.**—The decree of a Court is final, and a final decree in a partition suit cannot be reopened unless by way of review. The effect of the final decree of Civil Court for partition is to put an end to co-tenancy and to vest in each person or group, a sole estate in a specific property or allotment; *Debi Saran v. Rajram Nath*, 5 Pat. L. W. 9: (1918) Pat. 134.

**Applicability of this Section and Civil Court's Jurisdiction under this Section.**—This section does not apply to a suit for partition of a revenue-paying estate where no separate allotment of revenue is asked for; *Jagodishury v. Kailash*, 24 C. 725 F. B.: 1 C. W. N. 374.

S. 54 is meant to be applied in the case of estates assessed to revenue in one lump sum for the whole estate and not to estates like the ordinary paddy holdings in Burma which are assessed at acre rates; *Mg. Po Nyun v. Mg. Saw Tin*, 4 Bur. L. J. 260: A. I. R. 1926 R. 80: 95 I. C. 39.

Section 54 does not prevent a Civil Court from decreeing partition of a revenue-paying estate where separate allotment of the revenue is not asked for; *Asman Singh v. Tulsi Singh*, 1 Pat. L. W. 335: 2 Pat. L. J. 221.

A Civil Court is not competent to make a division of revenue-paying land even with the consent of the parties; 2 O. L. J. 321: 80 I. C. 209.

A Civil Court has jurisdiction to entertain a suit for partition of a specific piece of land appertaining to an estate. The expression "imperfect partition" in the Assam Land Revenue Regulation (I of 1886), explained.—*Gouri Krishna v. Indramani*, 1 C. L. J. 421: 32 C. 1036.

A Civil Court is not debarred from decreeing partition of a revenue-paying estate at the instance of a Hindu widow, if a proper case for passing such a decree be made out by her. Principles, on which Courts should

presentative under this section.—*Sakarl Jaswantraï v. Bai Parvatibai*, 26 B. 283 (26 B. 140 distinguished).

**Jurisdiction of the Court to which a Decree is Transferred for Execution, to Execute it Against Representatives.**—An application under s. 50 to execute decree against representatives is to be made to the Court which passed the decree and not to the Court to which it is transferred for execution (18 B. 224: 17 A. 431 approved; 22 C. 558 not followed). The provisions of s.s. 234, 244 (c), and 248, C. P. Code, 1882 (s. 50, s. 47 and Or. XXI, r. 22) are not irreconcilable.—*Swaminatha v. Vidyanatha*, 28 M. 466, F. B.: 15 M. L. J. 116 But see, *Sham Lal v. Modhu Sudan*, 22 C. 558.

It is for the Court which passed the decree to decide whether the person against whom execution is sought is or is not such representative; but the Court executing the decree is competent to decide to what extent such person is liable as such representative.—*Seth Shapurji v. Shankar Dat*, 17 A. 481.

**Right of Representative to Object to Execution, or to Dispute Validity of Decree.**—The representative of a judgment-debtor does not stand in a better position than the deceased debtor himself; therefore he cannot resist execution of a decree on such ground on which the judgment-debtor could not have resisted had he been alive.—*Mul Chand v. Chhagan Naran*, 10 B. 74.

On this subject, see the rulings under section 52.

**Execution of Decree, Passed Against a Deceased Person.**—See notes to section 52, under the heading "EFFECT OF A DECREE PASSED AGAINST A DEAD PERSON."

**Determination of Claims or Objections Preferred by Representatives of Deceased Person.**—See notes under section 47, ante.

**Burden of Proof.**—Where in execution of a decree against the representatives of a deceased debtor, specific property was seized as the property of the deceased debtor as being in possession of his representatives, and they (representatives) claimed the property as their own, held, that the burden of proof lay on the decree-holder, who asserted that the property seized in execution of his decree was the property of the deceased debtor.—*Abdul Rahaman v. Mahomed Azim*, 4 C. W. N. 151.

**Appeal Against Orders under this Section.**—No appeal lies against an order placing on record the legal representative of a deceased judgment-debtor.—*Raygo v. Pogose and Pogose Catchik*, 3 C. 708; 2 C. L. R. 278. (2 C. 827: 3 C. 709-note, referred to).

A party improperly brought on the record as representative of a deceased judgment-debtor can appeal on the question of costs alone.—*Bishen Dayal v. Bank of Upper India*, 13 A. 290

**Limitation and Step in Aid of Execution.**—An appeal for execution against one of the representatives of a sole judgment-debtor saves limitation against another representative.—*Krishnaji Janardan v. Murarran*, 12 B. 48. Distinguished in *Jnanendra Nath v. Rani Nehalo*, 7 A. L. J. 512 (27 M. 106 referred to): 32 A. 404.

prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the Local Government may appoint for the detention of persons ordered by the Courts of such district to be detained :

Provided, firstly; that, for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise :

Provided, secondly, that no outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found :

Provided, thirdly, that, if the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest :

Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him. [S. 336.]

(2) The Local Government may, by notification in the local official Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the Local Government in this behalf. [New.]

(3) Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he may be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

(4) Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the

## PROCEDURE IN EXECUTION.

**51.** Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree—

Powers of Court to enforce execution.

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale or by sale without attachment of any property;
- (c) by arrest and detention in prison;
- (d) by appointing a receiver; or
- (e) in such other manner as the nature of the relief granted may require. [New.]

## COMMENTARY.

**Scope and Object of Section.**—This clause states generally the powers of the Court in regard to execution, leaving the details to be determined by rules. It will be observed that the power to direct immediate execution is no longer restricted to one class of suits, but that it is now general in terms. Any limitation that may be found necessary will be imposed by rules.—*Notes on Clauses.*

“We have added a power to execute a decree by appointing a receiver, on the suggestion of the Advocate-General of Madras.”—*Select Committee's Report.*—

“On the application of the decree-holder.”—S. 51 and Or. XXI, r. 10, C. P. Code, lay down that an application for execution can only be made by the holder of a decree. A stranger who was no party to a suit but who got certain rights under a compromise decree has no right to apply for execution though he is entitled to bring a suit based on the portion of the compromise relating to him; *Dil Afza Begam v. Deputy Commissioner, Bahraich*, 3 O. L. J. 570 37 I. C. 133.

**Clause (b).**—The latter part of this clause refers to sale of mortgaged properties, which may be sold without attachment.

**Clause (c).** “By arrest and detention in prison.”—Every personal decree does not carry with it a right to arrest the judgment-debtor in execution. There are exceptions as in the case of minors, legal representatives against whom a decree has been passed or is sought to be executed; *Jiwan Das v. Janki*, 18 N. L. R. 145.

**C.** “By delivery of any property specifically decreed.”—Clause (d) of this section only applies to cases decided under the old Codes. See, *Bank, Ltd.*, 30 A. 393: 5 A. L. J. 583: *Toolsa v. Antone*, 11 B. 448, *Dinabundhoo v. Macnaghten*, 2 C. L. R. 185; *Maung Thein v. S. A. S. Firm*, 3 R. 235. A. I. R. 1925 R. 818: 89 I. C. 794, and several other cases noted under Or. XL, rr. 1-4.

furnishes security for his appearance when called upon, or the Court can also act under Or. XXI, r. 38.—*Ganpat v. Mahadev*, 22 B. 731.

**"Any day."**—An arrest under civil process of Mofussil Court on a Sunday in this country is perfectly illegal; 4 M. H. C. R. LXII.

**Clause (1). Second Proviso.**—Under the Code of 1882, the breaking open of any outer door of a dwelling house was strictly prohibited. But under the second proviso to clause (1) of the new Code, this prohibition has now been removed to this extent that where a dwelling house is in the occupancy of the judgment-debtor, and he refuses or prevents access thereto, the officer authorized to make the arrest may break open any outer door of such dwelling house. "The object of this proviso is to prevent vexatious forms of resistance to execution which constantly obstruct decree-holders in the execution of their decree."—*Report of the Select Committee—Notes on Clauses.*

**Clause (2).**—This clause is intended to cover the cases of certain persons or classes of persons whose summary arrest might, as in the case of Railway Servants, be attended with danger or inconvenience to the public.—*Notes on Clauses.*

**Clause (3).**—A Court executing a decree for money is bound to inform the judgment-debtor, when he is brought under arrest before it, that he may apply to be declared an insolvent and that he might be discharged on complying with the requirements of law; *Ram Lal v. Mackenzie*, 16 P. R. 1909: 50 P. L. R. 1909: 1 I. C. 402; but when failing in insolvency proceedings, the judgment-debtor is re-arrested, it is not the duty of the Court to inform him that he may apply to be declared an insolvent or take the other steps indicated in the section; *Arjan Singh v. Gaman*, 75 P. R. 1905.

If a judgment-debtor who has been arrested in execution of a decree and released on furnishing security that he will, within one month, apply to be declared an insolvent, fails to put in the application within the time agreed upon, and is not arrested again, it is still open to him to apply, at a subsequent date, to be declared an insolvent on the strength of the permission previously given; *Alagappa v. Sarathambal*, 25 M. 724.

**"May apply to be declared an insolvent."**—On this point, see s. 13 (1) of the Provincial Insolvency Act (III of 1907) and also Or. XXI, r. 40 (3).

A person arrested and brought up before the Court might be discharged on giving security and stating his intention to apply to be declared an insolvent; *Pinsent, Ex parte*, 8 M. 276; *Hastie, In re*, 11 C. 451; *Daulat Ram v. Ruplal*, 59 P. R. 1898; but if he has been sent to prison, he can only be released under s. 58; *Quarrime, In re*, 8 M. 503.

Where after dismissal of judgment-debtor's insolvency petition he is re-arrested, he is not entitled to be released under clauses (3) and (4) on expressing his willingness to apply again to be declared an insolvent; *Abdul Jahar v. Sheikh Karim*, 9 I. C. 121.

This section does not show that the mere fact of arrest in execution of decree entitles a debtor to an adjudication in insolvency, whether he is in reality able to bring himself within the provisions of 11 of the Prov. Insol-

## COMMENTARY.

This section corresponds with section 252 of the C. P. Code, 1882. No material change has been made in this section except the alteration of a few words. The words "*in respect of which he has failed so to satisfy the Court*" have been substituted for the words "*not duly applied by him*" in the old Code.

**Object and Scope of Section.**—This section provides that where a decree for payment of money is passed against a party as the legal representative of a deceased person, that is, where a party dies during the pendency of a suit for recovery of money, and his legal representative is brought upon the record and a decree is passed against him in his representative capacity, directing the realization of the money out of the property left by the deceased, then such decree may be executed by the attachment and sale of the property, if any, left by the deceased. And if the decree-holder can show that the assets of the deceased came into the hands of such debtor's legal representative and if such legal representative fails to satisfy the Court by evidence that he has duly applied the assets of the deceased that came into his hands, that is, if it is shown that he has misapplied or himself misappropriated the assets, then the decree can be executed against him personally, to the extent of the profits misapplied by him, as if the decree had been passed against him in his personal capacity.

Questions arising in an enquiry under section 52 (2) are questions arising between the parties to the suit and relating to execution, and as such, must be decided by the executing Court under s. 47; *Daw Toke v. Manug Ba Han*, A. I. R. 1927 Rang. 127.

**"Legal representative."**—For the meaning of the word "legal representative," see s. 2, cl. (11).

**Decree and Its Execution Against Legal Representatives of a Deceased Person.**—In a suit against the legal representative of a debtor, the plaintiff is entitled to a decree if he proves that any assets belonging to the deceased debtor exist. He is not bound to prove the extent of such assets; *Seth Sheolal v. Chindhu*, 56 I. C. 962.

A plaintiff is entitled to sue the legal representatives of his deceased debtor, and to obtain a decree against him, without proving that assets have come into his hands. It is sufficient that there are assets of which he may become possessed. The decree should mention that it is against the defendant in that character, and should be executed as directed by s. 252, C. P. Code, 1882 (s. 52).—*Girdhar Lal v. Bai Shiv*, 8 B. 309. See also, *Chandmall v. Ranee Soondery*, 22 C. 259, where it has been held that the widow of an insolvent debtor is his legal representative within the meaning of s. 252, C. P. Code, 1882 (s. 52) and not the Official Assignee in whom the estate of the insolvent vested during his lifetime.

Where the plaintiff sued the widow on a pro-note executed by her husband and obtained a decree against the assets in her hands but subsequently a will by the deceased was established, bequeathing the estate to her daughter's son. Held, that as the daughter's son is not the representative of the widow, the decree obtained against her cannot be executed against him (daughter's son) *Kaliappan v. Varadarajulu*, 83 M.

Where a judgment-debtor is arrested in execution of a money decree and a person stands surety for him under s. 55, cl. (4) of the C. P. Code, but omits to produce the judgment-debtor before the Court as undertaken by him, the amount realised from the surety must be credited towards the decree. The decree-holder cannot claim to have this amount over and above the decretal amount; *Surendranath v. Keshab Lal*, 25 C. W. N. 86.

*As to mode of enforcement of surety bonds, see notes and cases under section 145.*

**Insolvency After Order for Arrest.**—Where a judgment-debtor is adjudicated an insolvent after an order for his arrest has been made but no protection order has not been made, it is the duty of the executing Court to require him, under the latter part of s. 55, cl. (4), to give security that he will appear, when called upon, in any proceeding in insolvency or upon the decree in execution of which he was arrested; *Viswanathan v. Abdul Majid*, 3 R. 187.

**"That he will within one month so apply."**—Where a judgment-debtor is released from arrest under s. 55 (4), but fails to apply to be declared an insolvent within 30 days of the order of the Court so releasing him, the Court has no jurisdiction to extend the period of one month fixed by the section. The period being one fixed by law, s. 148 has no application; *Narasimha Aiyar v. Rangachari*, 50 M. L. J. 477: A. I. R. 1926 M. 689: 95 I. C. 444.

**Damages for Arrest.**—A suit to recover damages on account of injuries caused by an arrest in accordance with a decree of a competent Court can only be maintained under special circumstances, viz., the plaintiff must show (i) that the original action, out of which the alleged injury arose, was decided in his favour, (ii) that the arrest was procured maliciously and without reasonable and probable cause, and (iii) that he has suffered "some collateral wrong."—*Raj Chunder v. Shama Soondari*, 4 C. 583. Referred to in 19 B. 717, and 6 Bom. L. R. 704.

**Warrant of arrest of judgment-debtor.**—Escape of debtor from Nazir's custody.—Liability of Nazir for damages.—*Kastur Chand v. Ravji*, 4 Bom. 65. *Quære*—Whether the Nazir is liable for negligence in not taking a proper surety from an insolvent debtor?—*Nago Mahadev v. Narayan Ram Chandra*, 4 Bom. 405.

**Small Cause Court Debtors.**—Clause 5 of s. 386, C. P. Code, 1882 (s. 55), applies to Small Cause Court debtors; such persons can obtain the benefit of Chapter XX of the C. P. Code, 1882 (repealed by the Provincial Insolvency Act, 1907) by applying to a Court which has jurisdiction under that chapter.—*Moidin v. Sundaramurthia*, 2 M. 9.

**Appeal from Orders.**—An order refusing to discharge a surety, under s. 386, C. P. Code, 1882 (s. 55), for an insolvent judgment-debtor filing his petition, where the surety was entitled to his discharge, is not an appealable order, and is, therefore, subject to revision under s. 622, C. P. Code, 1882 (s. 115).—*Baima Mal v. Jamna Das*, 15 A. 183.

An order made under s. 55 (4) rejecting an application for forfeiture of security bond is appealable and therefore no revision lies (15 A. 183 *distd.*).—*Nga Kye v. Nga Kyn*, 10 Bur. L. T. 15.

"As if the decree had been against him personally."—Where a party is sued for money as the heir and possessor of the assets of a deceased debtor, and it is proved that he has received sufficient assets to meet the debt, a personal decree can be passed against him.—*Nathuram Sivaji v. Kutti Haji*, 20 446.

Where the defendant along with another person took possession of the assets of the deceased and disposed of a portion thereof without any right and where the property disposed of was sufficient to exceed the debts, a personal decree can be passed against the defendant; *Mihilal v. Babu Lal*, A. I. R. 1922 Oudh 200 (20 M. 446, *folld.*).

A Hindu son sued for his father's debts is liable duly to the extent of the co-parcenary property in his lands and a decree though passed as a personal decree against him could not in view of s. 52 of the Code, be executed against the separate property of the son; *Ram Bujhawan Prasad v. Ram Narayan*, 2 Pat. L. T. 396.

**Liability of Representatives of a Deceased Hindu.**—Where on the death of a Hindu father his sons are brought on the record as his *legal representatives* in a suit pending against him at the time of his death, the decree should be against them in their representative capacity, and not against them personally. It is clear that where the decree is against the sons in their representative character, it can only be executed against the estate of the father in the hands of the sons, as provided by this section; *Narayana Swami v. Seshama Raju*, 18 M. L. J. 36.

Though a son is bound, by Hindu law, to pay his father's just debts from any property he may possess, yet when he is made a party to a decree as representative of his deceased father for the purpose of executing it, his liability is limited to the amount of the assets which may have come to his hands and has not been duly disposed of.—*Sangili Virapandia v. Alwar*, 3 M. 42.

Where a Hindu dies intestate, his son is liable to his father's creditors to the extent of the value of the property, although the property may not come into the son's possession, but remains in the hands of third persons, and the son may recover it, if it has been taken against his assent.—*Keval Shagvan v. Ganpati*, 8 B. 220. But see, *Khushrobbhai v. Harmazsha*, 11 B. 727, where it has been held that a legal representative is not liable in respect of property which with due diligence on his part, would have come to his hands.

A Hindu father executed a promissory note in consideration of his barred debt.—*Held*, that the son was bound to pay the debt from any assets of his father received by him.—*Narayanamasami v. Samidas*, 6 M. 293.

Under the Hindu law, the property of a deceased Hindu is not so hypothecated for his debts as to prevent his heir from disposing of it to a third party, or to allow a creditor to follow it into the hands of a person who had purchased it from the heirs of the deceased in good faith and for valuable consideration.—*Jamiyatram v. Parbhudas*, 9 B. H. C 116.

A Hindu widow borrowed a sum of money for the purpose of defraying the marriage expenses of a grand-daughter. *Held*, that such a sum was legally recoverable from the heirs who, on the death of the widow, succeeded to the possession of such estate.—*Ram Coomar v. Ichamo*



Provided, also, that he shall not be released from such detention under clause (ii) or clause (iii) without the order of the Court.

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison. [S. 341.]

The provisions of sections 341 and 342 of the C. P. Code of 1822, have been summarised in this section with some additions and alterations.

**Period of Detention in Jail.**—The Court cannot fix any term of imprisonment for a debt when committing a debtor to jail.—*Sujan Bibee v. Sagar Mandal*, 5 C. W. N. 145; and *Subudhi v. Singi*, 13 M. 141.

Imprisonment before judgment under Or. XXXVIII, r. 4, becomes, after decree imprisonment in execution of the decree, and the imprisonment suffered after that date must be taken into consideration in calculating the period of six months which by s. 58, is the limit allowed for an imprisonment in execution of a decree.—*Ghanasham Das v. Joharimull*, 7 B. 481.

This section does not apply to a case where a person is imprisoned for disobedience to the Court's order to pay over a sum of money as directed by a decree.—*Martin v. Lawrence*, 4 C. 655.

**Subsistence Allowance.**—Cost of clothing is not subsistence allowance, *Durairaja Mudaliar v. Vadivelu*, 6 L. B. R. 61; 17 I. C. 911; 5 Bur. L. T. 169.

**Re-arrest of Judgment-debtor.**—The Code of Civil Procedure expressly preserves a distinction between arrest and imprisonment, and the immunity from further process is only generated by actual confinement. A second arrest, therefore, is held to be legal.—*Chingalraya Chetty v. Subbiah*, 6 M. H. C. 84.

The immunity of judgment-debtor from a second arrest depends not only upon his being arrested, but upon his being detained in jail under the arrest. Where a judgment-debtor, while acting as pleader in Court, was arrested and discharged under s. 135, it was held that he was liable to be re-arrested in execution of the same decree against him; *Rajendra v. Chunder Mohun*, 23 C. 128. So also where a judgment-debtor was arrested but was liberated owing to non-payment of the subsistence money, it was held that he was liable to be re-arrested in execution of the same decree; *Habibul-Rahman, v. Ram Sahai*, 26 A. 817.

**Effect of Interim Protection Order.**—Where a judgment-debtor is arrested and committed to jail in execution of decree against him, but is released on his filing a petition for insolvency and obtaining an interim protection order for a week. He then applies for a further protection order, but his application is refused. The Calcutta High Court has held that, in such a case, the judgment-debtor is not liable to be re-arrested in execution of the same decree, on the ground that a judgment-debtor once discharged from jail cannot be re-arrested a second time in execution of the same decree; *Bolye Chand, In the matter of*, 20 C. 874; *Secy. of State v. Judah*,

upon as an administration suit; and those heirs of the deceased who have not been made parties cannot, in the absence of fraud, claim anything but what remains after the debts of the deceased debtor have been paid.—*Mutty Jan v. Ahmed Ally*, 8 C. 370; 10 C. L. R. 346 (2 W. R. 3; 4 C. 142 referred to). Followed in *Amir Dulhin v. Baijnath*, 21 C. 811. See also, *Khurset Bibi v. Keso*, 12 B. 101; *Debalava v. Bhimaji*, 20 B. 338; *Hari v. Jairam*, 14 B. 597; and *Kunhammad v. Kutti*, 12 M. 90. See, however, *Jafri Begum v. Amir Mohammad*, 7 A. 822; *Muhammad Awais v. Har Sahai*, 7 A. 716; *Hamir Singh v. Lakia*, 1 A. 57; *Hendary v. Mutty Lal*, 2 C. 395; *Sitanath v. Roy Luchmiput*, 11 C. L. R. 223; *Assamatheunissa v. Roy Luchmiput*, 4 C. 142; 2 C. L. R. 223; *Luchmiput v. Land Mortgage Bank*, 14 C. 464; *Ambashankar v. Ali Rasul*, 19 B. 278; and *Dallu Mal v. Hari Das*, 23 A. 263. In all these cases it has been held that, under the Mahomedan law, a decree against one heir of a deceased debtor cannot bind the other heirs

The creditor of a deceased Mahomedan cannot follow his estate into the hands of a *bona fide* purchaser for value from his heir.—*Bazayet Hossain v. Dooli Chand*, 4 C. 402, P. C.; *Narsingh Das v. Najmuddin*, 8 C. 20; 10 C. L. R. 225; *Land Mortgage Bank v. Roy Luchmiput*, 8 C. L. R. 447. See also, *Land Mortgage Bank v. Bidyadhari*, 7 C. L. R. 460 and *Yasin Khan v. Muhammad Yar Khan*, 19 A. 504.

**Effect of a Decree Passed Against a Dead Person.**—Where a defendant in a suit dies after argument and before decree, and a decree is passed against him on the supposition of his being still alive, without placing on the record his legal representatives—*held*, that the decree on its face was a good decree and was capable of execution against his heirs and representatives.—*Ramacharya v. Ananta*, 21 B. 314. See also, *Hira Chand v. Kastur Chand*, 18 B. 224; and *Surendro v. Doorga Soondary*, 19 C. 513, p. 538. Followed in *Chetan Charan v. Balbhadra*, 21 A. 314 and 26 M. 101. See, however, *Roop Narain v. Ramayee*, 3 C. L. R. 192; *Girendro Nath Tagore v. Huro Nath Tagore*, 10 W. R. 455; 14 B. L. R. 334-note; *Monee Lall v. Hazee Fazul*, 14 W. R. 337; and *Imdad Ali v. Jagan Lal*, 17 A. 478; *Radha Prasad v. Lal Sahab*, 13 A. 53. In all these cases it has been held that a decree passed against a deceased defendant on the supposition of his being alive is incapable of execution.—See also, *Umrao Chand v. Brindabon*, 17 A. 475, p. 482; and *Jonardhan v. Ram Chandra*, 26 B. 317; *Narendra v. Gopal*, 17 C. L. J. 634; 14 C. W. N. 100n; *Subramania v. Vaithinatha*, 38 M. 682

A suit is not maintainable against a deceased person—*Veerappa v. Tindal*, 31 M. 86.

**Insolvency of Heirs After Decree.**—Where a decree is passed against the estate of a deceased debtor, and the heirs became insolvent after the decree but before execution, the deceased's estate must be treated as having vested in the Official Receiver like the other assets of the heirs, and as being immune from execution proceedings under s. 16 (2) of the Pro Insolvency Act, and the decree-holder must prove the debts like other unsecured creditors. The decree-holder has therefore no rights to a lien or charge on the deceased's property in the hands of his heirs or of the Official Receiver. S. 52 merely states the extent to which and the manner in which debts such as the decree-holder's in this case can be recovered and in no way provides for the reservation of property to satisfy him; *Gade Lakshme v. Pillawan*, 18 M. L. T. 147.

other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf :

Provided that the following particulars shall not be liable to such attachment or sale, namely :—

- (a) the necessary wearing apparel, cooking vessels, beds and bedding of the judgment-debtor; his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman;
- (b) tools of artizans, and, where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section;
- (c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him;
- (d) books of account;
- (e) a mere right to sue for damages;
- (f) any right of personal service;
- (g) stipends and gratuities allowed to pensioners of the Government, or payable out of any service family pension fund notified in the Gazette of India by the Governor-General in Council in this behalf, and political pensions; [S. 266.]
- (h) allowances (being less than salary) of any public officer or of any servant of a railway company or local authority while absent from duty; [New.]
- (i) the salary or allowances equal to salary of any such public officer or servant as is referred to in clause (h), while on duty, to the extent of—

where a son or grandson takes any ancestral property by survivorship he is bound to pay out of such property all debts of his ancestor not incurred for immoral or illegal purposes; but whether the creditor can follow the property in the hands of the son or grandson in execution, is a debatable point under the Code. The question is one merely of procedure, and the Committee have come to the conclusion that any controversy between the parties with regard to the liability of the son or grandson to pay the debts of his ancestor should be determined in execution, it being open to them to raise any objection or defence in such proceedings which they might have raised in a separate suit instituted by the creditor, the clause in question not imposing upon them a greater liability than that imposed by the Hindu law."—*Notes on Clauses.*

S 53 has been enacted to give effect to the recognized rule of Hindu law, that members of a joint Hindu family are liable for the payment, out of the joint family property, of any debt incurred by their father and decreed against him before his death, provided that such debt is not tainted by immorality. This section has no application where the joint family property passed by survivorship to a collateral, i.e., a nephew, because, under the Hindu law, he is under no obligation to pay his uncle's debts; *Jagannath v. Motilal*, 45 A. 455: A. I. R. 1923 A. 599: 78 I. C. 958.

This section only applies to the case of a deceased father; the principle of the section cannot be extended to a case where the father is living; *Kameswaramma v Venkatasubba*, 38 M 1120

**Liability of Ancestral Property in Execution Proceedings.**—Section 53 has been introduced to explain the meaning of the expression "*property of the deceased*" which occurs in sections 50 and 52. It is properly speaking an explanation to the above two sections. The precise scope of this section, which gives legislative sanction to the principle laid down in the Full Bench case of *Amar Chandra v. Sebak Chand*, 34 C. 642: 11 C. W. N. 592: 5 C. L. J. 491, will be clearly understood from the following extract from the above Full Bench Case. In that case *Maclean C J.* observed: "No doubt, under s. 50, the representative is only liable to the extent of the property of the deceased which has come to his hands. S. 50 codifies the English Law on this subject protecting the representative from personal liability for the debts of the judgment-debtor. Does that prevent the question as to the liability of the ancestral property for the debt covered by the decree being disposed of under s. 47? Upon a liberal construction of ss. 50 and 47, His Lordship held that the liability of the ancestral property or of a share of it for the debt covered by the decree is to be determined in the execution proceedings under s. 47 and not by a separate suit, if the legal representative has been properly brought on the record under s. 50. Again *Mitra, J.*, in his judgment observed: "The law is now well-established that sons or grandsons are legally bound to pay the debt of their ancestor to the extent of the assets which the ancestors could claim during his lifetime, inasmuch as, it is the pious duty of the sons or grandsons to pay their ancestor's debt, unless such debt was incurred for immoral purposes. The creditor is entitled to follow such assets in the hands of the sons or grandsons after the death of the original debtor, and the burden of proving non-liability is on the sons or grandsons. There is, however, a conflict of opinions between the High Courts in India and a conflict of authority in this Court itself as regards the procedure which the

mediately appurtenant thereto and necessary for their enjoyment) from attachment or sale in execution of decrees for rent of any such house, building site or land, or

(b) to affect the provisions of the Army Act or any similar law for the time being in force. [S. 266.]

## COMMENTARY.

**Alterations Made in the Section.**—This section corresponds with s. 200 of the C. P. Code, 1882, with some additions and alterations:—

In cl. (a) of the Proviso to clause (1) of this Section the words "*cooking vessels*" "*beds*," and "*such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman*" have been added.

In cl. (b), the last sentence, commencing from the words, "*and such portion of agricultural produce, etc.*," has been added.

In cl. (c) certain words have been added and its scope has been extended.

In cl. (g) the words "*or payable out of any service family pension, etc.*," have been added.

Cl. (h) has been added and is new.

In cl. (i) the words "*allowances equal to salary*" and "*while absent on duty*" have been added.

Cl. (k) has been newly added.

Cl. (l), the words "*whether payable in money or in kind*" have been added. Besides these some other minor alterations have been made in sub-section (2).

**Scope of Section.**—Clause (1) of this section applies only to decrees for money and not to mortgage decrees, for which provision has been made in Or. XXXIV rr 4 and 5. The words "*sale in execution*" in the beginning of the section are intended to be applicable to money-decrees or not necessary in mortgage decrees. Therefore, where the house of an agriculturist is mortgaged, cl. (c) of the proviso does not save the house from being sold in execution of the mortgage decree—*Bhola Nath v. Musst. Kishori*, 84 A. 25. F. B.: 8 A. L. J. 1045 (33 A. 136 dissented from).

This section is merely a rule of procedure, it does not supersede the rule of substantive law embodied in the Transfer of Property Act, Tenancy Act and such other Acts. For instance properties which are declared not saleable under ss. 6 and 10 of the T. P. Act, or by B. T. Act, or by some other Acts, cannot be sold in execution, although such properties are not specifically mentioned in the proviso to this section. The proviso is not exhaustive. The words "*following particulars shall not be liable to such attachment or sale*" in the proviso do not indicate that other properties

suit. The whole of the ancestral property, and not merely the father's share is liable for the satisfaction of the decree against a Mitakshara father on a debt not immoral; *Lachmi Pershad v. Basant Lal*, 16 C. L. J. 85.

In a partition suit, costs were awarded against the father. After decree the father died. The decree-holder proceeded to execute the decree for costs and attached the share which had fallen to the father at the partition, but which after his death had passed into the hands of the sons. Held, that the sons were liable for the costs, and the property in their hands was liable to attachment under this section; *Krishna Rao v. Dinkar Rao*, 19 I. C. 252.

A person who stood surety for restitution in case the decree is reversed can be proceeded against in execution in the same manner as if he were the judgment-debtor. Such a decree though it may be executed against the family properties of the surety and his sons in a state of union, cannot be executed against the properties in the hands of the son allotted to him at a bona fide partition taking place after the order but before the attachment. The analogy of s. 53 of the new Code cannot be used to justify such execution; *Kamaswaramma v. Venkata Subba Row*, 27 M. L. J. 112; 24 I. C. 414.

"Property in the hands of a son or other descendant."—It is only the son or lineal descendant of a deceased Hindu that comes within the scope of s. 53 of the C. P. Code and there is no obligation on the part of any other co-parcener who has acquired rights by survivorship to pay up the decree debts of the deceased co-parcener; *Jagarnath Singh v. Moti Lal*, 21 A. L. J. 353; 45 A. 455.

"Shall be deemed to be property of the deceased."—A gratuity granted to the heirs of a deceased employee by a Railway Administration is not assets of the employee in the hands of his heirs and cannot be attached in execution of a decree against him; *Lachmi Narain v. Umaid Rai*, 9 O. L. J. 401; 26 O. C. 1.

*This section being an explanation to ss 50 and 52 is to be read with those sections and the cases noted there with reference to the property of the deceased should be consulted.*

54. Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates. [S. 265.]

Partition of estate  
or separation of  
share.

## COMMENTARY.

**Partition by Collector.**—This section corresponds with section 265 of the C. P. Code, 1882 with some additions and alterations in the language and wording. It is merely an enlargement of the provisions of the old section. From the provisions of s. 54 and of Or. XX, r. 18 it is clear that

is liable to be attached and sold in execution of a decree against him; *Annaji v. Chandrabai*, 17 B. 503. The equity of redemption in mortgaged premises is immovable property liable to be attached and sold under this section; *Parashram v. Govind*, 21 B. 226. The right to claim specific performance of a contract to sell land is also attachable and saleable; *Rudra v. Krishna*, 14 C. 241. Land assigned to a Hindu widow for her maintenance, with a proviso against alienation, cannot be attached and sold; *Diwali v. Apaji*, 10 B. 342; *Gulab Kuar v. Bansidhar*, 15 A. 371; *Bansidhar v. Gulab Kuar*, 16 A. 443. The right of a Hindu widow to reside in her husband's family is a purely personal right and cannot be transferred. Such right cannot be attached and sold in execution of a decree; *Salakshi v. Lakshmayee*, 31 M. 500. The income of property subject to a restraint upon alienation, accruing due after the date of the judgment, cannot be attached in execution of decree against the separate property of a married woman passed under s. 8 of the Married Woman's Property Act; *Goudoin v. Vencatesa*, 30 M. 378; 17 M. L. J. 363. Land burdened with the performance of a service of a public nature, e.g., land held on *amattinackal* service tenure, is inalienable and cannot be attached; *...* M. 620; 70 I. C. 466; A. I. R. 1922 M. ... law, the wife ceases to have any interest in the joint property of her husband and herself from the time of divorce, and so attachment of the property after divorce is futile; *Maung Pya Gyi v. Maung Po Pa*, 9 Bur. L. T. 74. A religious office is not saleable; *Kuppa v. Dorasami*, 6 M. 76; *Narasimma v. Anantha*, 4 M. 891; *Rangasami v. Ranga*, 16 M. 146, *Mancharam v. Pranshankar*, 6 B. 298 (300). So also the right of managing a temple, of officiating at the worship conducted in it, and of receiving the offerings at the shrine, is not saleable; *Durga Bibi v. Chanchal*, 4 A. 81; *Rama Varma v. Ramannayar*, 5 M. 89; *Rajah Vurmah v. Rabi Vurmah*, 1 M. 235; 4 I. A. 76; *Gnanasambanda Pandara v. Velu Pandaram*, 23 M. 271; 27 I. A. 69; *Srimati v. Ratanmani*, 1 C. W. N. 493; *Shoilojanand v. Peary*, 29 C. 470. The right to officiate at funeral ceremonies is also not saleable; *Jhummun v. Dinnonath*, 16 W. R. 171. The property of a temple cannot be sold away from the temple, but there is no objection to the sale of the right, title and interest of the servant of a temple in land belonging to the temple which he holds as remuneration for his service, the interest sold being subject, in the hands of the alienee, to determination by the death of the original holder or by his removal from office for failure to perform the service; *Lottlikar v. Wagle*, 6 B. 506; *Bishen Chand v. Nadir Hussein*, 15 C. 329; 15 I. A. 1. The earnings of a *Gayawal* derived from offerings made by pilgrims are saleable; *Panna Lall v. Kanhaya Lall*, 19 C. 730. Money or other valuable security deposited as security for the due performance of a duty by a servant with his master may be attached in execution of a decree against the servant, but the attachment will be subject to the lien which the master has upon the deposit, and the deposit cannot be sold until the same is at the disposal of the servant free from the lien of the master at the expiration of the period of employment; *Karuthan v. Subramanya*, 9 M. 203. Letters in the Post Office addressed to the judgment-debtor are liable to be attached; *Narasimhulu v. Adiappa*, 13 M. 242. Fine paid into a Criminal Court again becomes the property of the depositor as soon as the order of fine is set aside in appeal, and is attachable; *Harmam Singh v. Saligram*, 89 P. R. 1912; 16 I. C. 779.

order partition at the instance of a Hindu widow, stated.—*Mohadevy Koor v. Haruk Narain*, 9 C. 244.

A Collector or Assistant Collector trying a question of title raised in the course of a hearing of an application for partition under the North-Western Provinces Land Revenue Act (XIX of 1879) is not bound to cause a formal decree to be drawn up embodying the result of his order.—*Nias Begam v. Abdul Karim*, 14 A. 500.

A decree of a Civil Court for partition is subject to the provisions of s. 107 of the United Provinces Land Revenue Act and cannot be fully executed until the decree-holder's name is recorded in the revenue papers.—*Tulsi Das v. Sheo Narain*, 28 A. 375: 8 A. L. J. 336: A. W. N. (1906), 53.

The object of the Estates Partition Act (V of 1897) is to exclude the jurisdiction of the Civil Court in cases where the question relates to the division of the Government revenue, or to the details of the partition. Where however, the question raised goes to the very root of the matter and relates to the jurisdiction of the Collector to make a partition, the Civil Court has jurisdiction and is competent to decide the matter in controversy; *Ananda Kishore v. Daije Thakurani*, 10 C. L. J. 189.

#### **Civil Court's Jurisdiction to Hear Objections to Collector's Partition.—**

Where a decree relates to an estate of the kind mentioned in this section, it should declare the rights of the several parties interested in the property; but as regards partition or separate possession of share, it should direct the same to be made by the Collector or any of his gazetted subordinates deputed by him in that behalf; *Rupan Rai v. Subh Karan*, 41 A. 217: 49 I. C. 267; *Asman Singh v. Tulsi Singh*, 2 Pat. L. J. 221: 39 I. C. 178. This section places the execution of the decree entirely in the hands of the Collector. But where the Collector contravenes the decretal command of the Court or otherwise acts *ultra vires*, his action is subject to the control of and correction by the Court which passed the decree and sent it to him for execution; *Purushottam v. Bal Krishna*, 28 B. 238: 5 Bom. L. R. 950; *Dev Gopal v. Vasudev*, 12 B. 371; *Ganoji v. Dhondu*, 14 B. 450; but the power given to the Collector is not in any way subject to the superintendence of the Civil Court; *Srinivasa v. Gurunath*, 15 B. 527; *Bhiman Gouda v. Hanmant*, 42 B. 689: 20 Bom. L. R. 411. In Bombay it has been held that an objection that the Collector has made an unequal partition, is no ground for interference with the Collector's order; *Dev Gopal v. Vasudev*, 12 B. 371; *Shrinivasa v. Gurunath*, 15 B. 527. This view was not accepted in Madras where the contrary was laid down; *Chinna v. Krishnavanamma*, 19 M. 435.

Where a Collector has once made partition, there is nothing to prevent him from reversing the partition for mistake or other cause before he has passed final orders and returned the proceeding to the Court. In such a case the remedy of the aggrieved party is to proceed by an application under s. 47 and not by a separate suit. *Krishnaji v. Damodar*, 5 Bom. L. R. 648.

### **ARREST AND DETENTION.**

55. (1) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his detention may be in the civil

Arrest and detention.



C. L. J. 180. Maintenance allowance that has already become due, private pensions that have already become due, and the wages of private servants [other than those mentioned in cl. (1)] that have already become due are "debts" within the meaning of this section; *Kasheeshuree v. Greesh*, 6 W. R. Mis. 64; *Bhojrub v. Madhab*, 6 C. L. R. 19, *Ayyavayar v. Virasami*, 21 M. 393; *Devi Prasad v. Lewis*, 81 A. 304. Where, by an agreement between the seller and buyer of immoveable property, the purchase-money is agreed to be paid on the execution of a conveyance, the purchase-money is not a "debt" until the conveyance is executed, and hence it cannot be attached in execution of a decree against the seller; *Ahmaduddin v. Mejlis Rai*, 8 A. 12. Where a person delivers goods to his agent for sale, the sale proceeds of the goods may be attached in execution of a decree against such person, because the sale proceeds in the hands of the agent constitute a debt due to such person; *Madho Das v. Ramji*, 16 A. 286.

Clause (a). **Necessary Wearing Apparel, Ornaments, etc.**—Necessary wearing apparel is not liable to attachment—*Gangaram Velgi v. Parbhu Dayaram*, 9 B. H. C. 272. A *manqalsutra* or neck ornament worn by a Hindu married woman during the lifetime of husband, is a part of her necessary wearing apparel.—*Appana v. Tangamma*, 9 B. 108.

Ornaments on the person of a Hindu wife, if forming part of her *stridhan*, cannot be taken under an execution against her husband.—*Tukaram Bin v. Gunaji Bin*, 8 Bom. H. C. 129.

Property to be found in the zenana of a judgment-debtor is not exempt from attachment.—*Doorga Churn v. Huree Mohun*, 17 W. R. 86.

Clause (b). **Tools of Artisans, etc.**—Before property of a judgment-debtor can be exempted from execution as falling under clause (b), it is necessary that the Court should first express its opinion that such property is necessary to enable the judgment-debtor to earn his livelihood. Beasts used in agriculture are not exempt unless the Court has declared them to be so.—*Bakhr Mohamed v. Doorga*, 10 C. 39: 13 C. L. R. 200.

A *charak*, a *kadhai* and a plank of timber, used by an agriculturist for the purpose of extracting sugar juice from sugar-cane and of turning it into jaggery, are "implements of husbandry" within the meaning of this clause and are exempt from attachment; *Lakshman v. Narhari*, 25 Bom. L. R. 1211: A. I. R. 1924 B. 294: 81 I. C. 679.

Where crops are grown on a tenancy by the heir of a deceased tenant after his death, such crops cannot be said to be his crops and as such are liable to attachment and sale in the hands of the heir under s. 60.—*Abdul Aziz v. Sarab Dayal*, 69 I. C. 520.

In the case of attachment of the cattle of an agriculturist, the Court has to see whether the cattle are necessary to enable an agriculturist to earn his livelihood.—*Gul Mahomed v. Faiz Mahomed*, 13 S. L. R. 201; *Ghurey v. Sanwalla*, 61 I. C. 777. Seed-grain and cattle of agriculturists is not absolutely free from attachment. When the judgment-debtor is not indigent and is able to replace them, they may be attached.—*Chakravarthi v. Ammayappa*, 25 I. C. 117; 1 L. W. 519.

Fodder for cattle belonging to an agriculturist judgment-debtor is also exempt from attachment.—*Gur Buksh v. Khairati*, 82 P. R. (1907).

satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court may release him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be realized or commit him to the civil prison in execution of the decree. [S. 336.]

### COMMENTARY.

**Alterations Made in the Section.**—This section corresponds with s. 886 of the C. P. Code, 1882, with several additions and alterations. It is an amplification of the provisions of the old section. Under proviso (2) to sub-section (1) an outer door of a dwelling house may now be broken open, if it is in the occupancy of the judgment-debtor and if he refuses or in any way prevents access. But under the old Code, of 1882 the breaking open of any outer door of a dwelling house was strictly prohibited.

Sub-section (2) is new. It has been added with a view, to avoid danger and inconvenience to the public which might be caused by the summary arrest of certain persons or classes of persons, as in the case of railway servants.

Sub-section (4) is to be read with section 18 (1) of the Provincial Insolvency Act III of 1907.

Provision for the realization of security has been omitted, and the mode of realizing security has been provided by section 145.

Compare provisos 1, 2 and 3 of this section with section 62.

**"May be arrested."**—The Court being satisfied that the judgment-debtor has determined to evade payments of his debt, can issue a warrant for his arrest notwithstanding that a previous order for attachment of his property has been made —*Chena Pemaji v. Ghelabhai*, 7 B. 301.

A judgement-creditor has the option of enforcing his decree against the person or property of the judgement-debtor, and the fact that such decree is an *ex parte* one, makes no difference.—*Raj Chunder v. Shama Soondaree*, 4 C. 583.

In execution of decree payable by instalments, the judgment-debtor cannot be arrested and imprisoned separately for default in the payment of each instalment.—*Damodar v. Malhari*, 7 B. 106

A person who has taken the benefit of the insolvency proceedings and who is undischarged, but has not inserted in his schedule a debt for which a decree is subsequently obtained, is not protected from arrest in execution of such decree, merely because his property is in the hands of the receiver in Insolvency; *Panna Lall v. Kanhaiya Lal*, 16 C. 85

There is no provision in the Code to prevent the Court from issuing a warrant of arrest against a judgment-debtor at the instance of one decree-holder pending an enquiry into the judgment-debtor's application for insolvency in the execution of a decree of another decree-holder. In such cases the Court has a discretion not to issue the warrant if the judgment-debtor

or convenient for his calling. The exemption extends, after the death of an agriculturist, to his representative, who occupies the house in good faith as an agriculturist.—*Radha Kishan v. Balvant Ramji*, 7 B. 530; *Bhaiya Lal v. Balakhadas*, 15 N. L. R. 83. But if by a consent decree an agriculturist agrees, in consideration of time being given to him, that his house may be attached and sold on default in payment of the decretal amount, the house may be attached and sold in default; *Uzir Biswas v. Haradeb Das*, 24 C. W. N. 575: 57 I. C. 249. The house of an agriculturist is not absolutely unsaleable. The judgment-debtor can waive the privilege under s. 60, cl. (c) and sell the house of his own free will; consequently, where the judgment-debtor has entered into an agreement to give the house in security for the amount of the decree, he is estopped from pleading that the house is not saleable; *Ganga Bishun Ram v. Jag Mohan*, 6 Pat. 254: A. I. R. 1927 Pat. 233: 102 I. C. 616.

This clause refers to a house occupied by an agriculturist as agriculturist. It does not extend to the town residence of an agriculturist—*Maneek Lal v. Mani Lal*, 7 Bom. L. R. 685. *Nirbhay Lal v. Kallan*, 45 I. C. 446; *Sagarmal v. Girraj*, 39 A. 129. Nor can a house in a town belonging to a family which lived by agriculture be said to be appurtenant to the agricultural holding, *Nirbhay Lal v. Kallan*, 45 I. C. 546.

An agriculturist whose house is exempt from attachment by s. 60 (c) is one who belongs to the class of common agriculturists who till the field and whose main source of livelihood is cultivation.—*Ashmatullah v. Pan Mahmud*, 20 C. W. N. 874; *Rubine v. Balwantrao*, A. I. R. 1923 B. 12, *Bachan Singh v. Bhika Singh*, A. I. R. 1927 A. 601.

The site upon which the agriculturist's house is built is not exempted from attachment.—*Jiban Bhaga v. Hirabhaiji*, 12 B. 363.

In the absence of proof, the exemption from liability to attachment and sale, under clause (c), does not exist for the purposes of execution proceedings. Strangers to a suit are justified in believing that the Court has done that which by the direction of the Code it ought to do.—*Pandurang Balaji v. Krishnaji*, 28 B. 125. See *Narayana v. Gowbai*, 37 B. 415: 15 Bom. L. R. 278.

Where the judgment-debtor is both zemindar and agriculturist, the onus is upon him to prove that his case comes strictly within clause (c). *Jamna Prasad v. Raghunath*, 35 A. 307; *Tej Singh v. Banwari*, 15 A. L. J. 540. A person who is a tenant of 50 bighas of land but who also owns 20 bighas of zemindari land and whose chief occupation and means of livelihood is agriculture, is an agriculturist under s. 60 (c) and his zemindari house is not liable to attachment; *Shafian v. Hamidullah*, 14 A. L. J. 240.

Where a *Khurli* of the judgment-debtor which he neither lived in nor used, was attached.—*Held* that it could be attached. In cl. (c) "belonging to" and "occupied by" are not synonymous. The latter is not a mere repetition, but means "lived in by" or "used for agricultural purposes."—*Altar Singh v. Bhagwan Das*, 65 P. R. 1909: 104 P. W. R. 190: 2 I. C. 933.

A house in the city to which an agriculturist takes his cattle and where he spends the nights, is exempt from attachment, even if it be proved that he has a house in the vicinity of his agricultural lands. The

olvency Act or not; *Ponnuswami v. Narain Swamy*, 22 M. L. J. 545: 14 M. L. T. 805.

The pendency of insolvency proceedings neither takes away from the executing Court the power of committing the judgment-debtor to civil jail, nor is he entitled to get time to apply to be declared insolvent. The object of the provisions of s. 55 (3) of the C. P. Code, is to give the judgment-debtor time to apply, but if he has already done so and proceedings are going on, there would be no sense in giving again the time; *Kishan Chand v. Sassoon etc.*, 83 P. W. R. 1910: 7 I. C. 851; *Ganpat Bhagwan v. Mahadeb Hari*, 22 B. 781.

Where the judgment-debtor is arrested and brought before the Court in execution of money decree; the Court is bound to inform him that he may apply to be declared insolvent; *Ram Lal v. Mackenzie*, 16 P. W. R. 1909: 50 P. L. R. 1909: 1 I. C. 402.

**Clause (4). Liability and Discharge of Surety.**—Under the old Code, of 1882 (s. 336), the security required was "that the judgment-debtor will appear when called upon, and that he will, within one month, apply to be declared an insolvent." It was therefore held that a person who executes a bond, undertaking to produce a judgment-debtor at any time when the Court should direct him to do so and standing security under s. 336 for the judgment-debtor's applying to be declared insolvent, is released from his obligation under the bond when the judgment-debtor files his petition to be declared an insolvent; *Ramzan v. Gerard*, 18 A. 830; *Dwarkanadas v. Isabhai*, 19 B. 210; *Krishnaiyar v. Krishnasamy*, 26 M. 866; *Thakur Singh v. Ram Das*, 100 P. R. 1894; *Bauna Mal v. Jamnadas*, 15 A. 183; *Imbichunni v. Lalji*, 24 M. 560. These decisions under the old Code are no longer law. Clause (4) now makes it clear that where a security bond is executed and the surety undertakes that the judgment-debtor will within one month apply to be declared an insolvent and will appear when called upon in any proceeding upon the application or upon the decree in execution of which he was arrested, the security will not be released by the mere filing, by the judgment-debtor, of the insolvency petition. The security continues until a final order is made on the petition.—*Abdul v. Mistri*, 46 B. 702: A. I. R. 1922 B. 340: 64 I. C. 648. A surety is, however, discharged by the death of the judgment-debtor, and it is not open to the decree-holder to proceed against him.—*Nobin v. Mritunjoy*, 41 C. 50: 19 I. C. 981; *Krishnan Nayar v. Ittinar Nayar*, 24 M. 637. But the death of the judgment-debtor, after the undertaking to be declared as an insolvent within one month has been fulfilled, cannot affect the security's liability with regard to that undertaking.—*Makanji v. Bhukandas*, 48 B. 500; A. I. R. 1924 B. 428. A surety is also discharged if the execution proceedings are struck off.—*Lalji v. Odoya*, 14 C. 757; but not if the surety had executed a bond before the proceedings were struck off, taking upon himself a general liability to pay the decretal amount.—*Dudhraj v. Mahabir*, 5 Pat. L. J. 417.

A surety executing a bond, undertaking to produce the judgment-debtor before the Court until he was finally discharged of his insolvency, is not absolved of his duty to do so merely because the judgment-debtor had got protection order between the date of the bond and the date when he was called upon to produce the judgment-debtor; *Nachiappa Chettiar v. Kandappan Chettiar*, (1926) M.W. N. 612: A. I. R. 1926 M. 958: 97 I. C. 418.

decree against a *shebait*.—*Dubo Misser v. Srinivas*, 5 B. L. R. 617: 11 W. R. 409. See also *Kali Charan v. Bangshi*, 6 B. L. R. 727: 15 W. R. 839.

Right to receive offerings, which may in future be made to a Hindu idol cannot be attached in execution of a decree against the idol.—*Shoilojanund v. Peary Charan*, 29 C. 470: 6 C. W. N. 728. See also *Puncha Thakur v. Bindaswari*, 43 C. 28. But the interest of an *utpat* or priest's share in the net balance of the offerings to the deity can be attached and sold in execution of a decree; *Digambar v. Hari Damodar*, 29 Bom. L. R. 102 :A. I. R. 1927 B. 143 (23 B. 131; 23 C. 645; 43 C. 28 *distd*).

A future perquisite on account of offering or *bhog* to the deity will be an uncertain and indefinite income which cannot be attached, the priestly office with emoluments attached to it being inalienable (29 C. 47; 1 C. W. N. 493; 1 M. 235; 23 M. 271 *folld*.)—*Balmakund v. Madan*, 1 Pat. L. T. 75.

The right of managing a temple, of officiating at the worship conducted in it, and of receiving offerings at the shrine, *Durga Bibi v. Chanchal*, 4 A. 81 (L. R. 4 I. A. 76 *followed*); or emoluments of attending to an idol are not saleable.—*Narasimha v. Ananth*, 4 M. 391.

Offerings made at the temple by the worshippers being the personal property of the *Begalis* (priests) cannot be attached in execution of a decree against a deceased *Begali*; *Rakha Mal v. Balvant*, 126 P. L. R. 1917: 159 P. W. R. 1917.

The sale of a religious office to a person not in the line of heirs, though otherwise qualified for the performance of the duties of the office, is illegal.—*Kuppu Gurukul v. Dorasami Gurukul*, 6 M. 76. See also *Girijanund v. Sailajanund*, 23 C. 645 (665); *Sarkum Abu Torab v. Rahman Buksh*, 24 C. 83; and *Trimbak Ram Krishna v. Lakshman*, 20 B. 495. See, however, *Mancharam v. Pranshankar*, 6 B. 298. Relied on in 86 C. 975: 18 C. W. N. 1034.

Religious office attached to a temple, involving services of personal nature and entitling the holder of it to receive emoluments, cannot be attached or sold even in execution of a mortgage-decree, as mortgage or sale of such office is against public policy and will not be recognized or enforced by the Courts.—*Lakshmanaswami v. Rangamma*, 26 M. 31 (23 B. 181 *referred to*).

In execution of a personal decree against a Mahant, *Asthal* property is not liable to be attached and sold; *Gorind Das v. Babu Narindra Bahadur*, 61 I. C. 757.

A gift of an idol and of the lands with which it is endowed, made with the concurrence of the whole family to another family for the purpose of carrying on the regular worship of the idol, if made for the benefit of the idol, is not invalid, and is one binding on the succeeding *shebait*s.—*Khetter Chunder v. Hari Das*, 17 C. 557. Relied on in 86 C. 975: 18 C. W. N. 1034.

The property of a temple cannot be sold away from the temple; but there is no objection to the sale of the right, title and interest of a servant

An order refusing execution of decree simultaneously against the person and property of the judgment-debtor is appealable as a decree.—*Chena Pemji v. Ghelabhai*, 7 Bom. 301.

For cases under provisos 1, 2 and 3, in sub-sec. (1), see the cases noted under section 62, the provisions of which are similar to provisos 1, 2 and 3.

Realization of Security.—See section 145

**56.** Notwithstanding anything in this Part, the Court shall not order the arrest or detention in the civil prison of a woman in execution of a decree for the payment of money. [S. 245-A.]

Prohibition of arrest or detention of women in execution of decree for money.  
A woman may however be detained in the civil prison in execution of a decree for restitution of conjugal rights.—See *Order XXI, rule 32* and the cases noted thereunder. She can however be called upon to give security for defendant's costs.—See *Or. XXV, r. 1 (3)*.

**57.** The Local Government may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtors. [S. 338.]

Subsistence-allowance.  
As to the mode of payment of subsistence allowance, see *Order XXI, rule 39* and the cases noted thereunder.

**58.** (1) Every person detained in the civil prison in execution of a decree shall be so detained,—

- (a) where the decree is for the payment of a sum of money exceeding fifty rupees, for a period of six months, and,
- (b) in any other case, for a period of six weeks : [S. 342.]  
Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be,—
- (i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or
- (ii) on the decree against him being otherwise fully satisfied, or
- (iii) on the request of the person on whose application he has been so detained, or
- (iv) on the omission by the person, on whose application he has been so detained, to pay subsistence-allowance :

Meaning of the words "political pension" explained. Where immoveable property was granted in lieu of pension and at the desire of the grantee revenue was assessed and the members of the family treated it as an ordinary zemindari. Held that the zemindari so granted was not pension and therefore attachable; *Amna Bibi v. Najimmunissa*, 31 A. 382; 6 A. L. J. 519. See also *Fatima Begum v. Sakina Bibi*, 22 C. W. N. 577 (P. C.); *Bansi Ram v. Nararasingha*, 24 I. C. 805.

An annuity, the payment of which is a charge upon an estate, is property which can be attached under this section, at the instance of the person who has inherited the estate from the grantor of the annuity and by whom the annuity is payable. *Dhraj Mahatabchand v. Dhun Coomaree*, 17 W. R. 254.

**Private Pensions.**—*Private Pensions*, as distinguished from Government pensions, are not exempt from attachment and it is only arrears in respect thereof actually accrued due that are attachable in execution of a decrees. *Bhojrab Chunder v. Madhub Chunder*, 6 C. L. R. 19 (17 B. L. R. 186 P. C. followed).

**Clause (h).—Allowances (being less than salary) of any Public Officer, etc., While Absent from Duty.**—This clause is new and its effect is to exempt from attachment, the allowances (being less than salary) of a public officer while absent from duty. It was held under the old Code that the salary of a public officer drawing half pay (exceeding Rs. 20 per mensem) on sick leave was held liable to attachment; *Beard v. Egerton*, 6 M. 179. This ruling has now been overruled by this clause.

**Clause (i).—Salary or Allowances of Public Officer, etc., While on Duty.**—Under this clause as now amended by Act XXVI of 1923, the whole of the salary of a public officer is exempt from attachment where such salary does not exceed Rs 40 per month; but where it exceeds Rs 40 per month, it is partially exempt from attachment. There was no such exemption in the Code of 1859, hence the whole of the salary of a public officer was attachable as a "debt" but not before it had become due; *Tejram v. Kusaji*, 7 B. H. C. 110. But under the Codes of 1877 and 1882 and under the present Code, the salary of a public officer to the extent to which it is attachable may be attached in advance; *Beard v. Egerton*, 6 M. 179; *Bhojrab v. Madhub Chandra*, 6 C. L. R. 19. That the debtor is a European and the attachment if allowed would not leave him enough to live on, is no ground for refusing attachment; *Debi Prasad v. Lewis* 40 A 218; 43 I. C. 984.

**Salary of a Private Servant.**—The salary of a private servant can be attached as a "debt"; hence it cannot be attached before it has become due. *Ayya Vayyar v. Virasami*, 21 M. 393, (*Debi Prasad v. Lewis*, 31 A. 304; 6 A. L. J. 227).

**Salary of Army Officers.**—Clause (b) of sub-section (2) of this section originally ran as follows: "Nothing in this section shall be deemed to affect the provisions of the Army Act or of any similar law for the time being in force." These words were omitted from sub-section (2) by the Repealing and Amending Act X of 1914, sch. II. Before the passing of the Repealing and Amending Act of 1914, there was some conflict of judicial decisions as to whether the salaries of Army Officers were liable to attachment. It was held by the High Courts of Madras and Calcutta





been extended to the Provident Fund of the Calcutta Corporation by notification, dated 8th July 1902 in the *Gazette of India*; *Seth Manna Lal v. Gainsford*, 85 C. 641: 12 C. W. N. 633.

**Clause (l)—Wages of Labourers, etc.**—Labourers are persons who earn their daily bread by personal manual labour or in occupation which require little or no art, skill or previous education. Persons who agree to spin cotton and to receive a certain amount of money for a certain quantity of cotton spun are labourers.—*Jechand v. Aba*, 5 B. 132. The defendants were sirdars of coolies. A decree was obtained against them by the plaintiff in respect of goods supplied for the coolies. In execution of the decree an order was made upon the officer of the Public Works Department, in whose employ the coolies were, attaching all money payable to the debtors whether on their own personal account or on account of the coolies over whom they were sirdars. *Held* that the wages of the coolies were not attachable.—*Sajiwan v. Gopal*, 1 B. L. R. S. N. 15: 10 W. R. 149.

**Clause (m)—Expectancy of Succession, etc.**—The interest of a Hindu reversioner expectant upon the death of a Hindu female is not transferable or attachable.—*Nund Kishore Lal v. Kanu Ram*, 29 C. 855: 6 C. W. N. 895. In this case it has been further held that *Brahmadeo Narayan v. Harjan Singh*, 26 C. 778, has been overruled by the Privy Council case of *Sham Sunder Lal v. Achhan Kumwar*, 1 B. L. R. 25 1. A. 183: 2 C. W. N. 720. See also *Anandibai v. Rajaram*, 22 Bom. 984; *Ram Chunder v. Dhurmo Narain*, 15 W. R. 17 F. B.: 7 B. L. R. 341, F. B., *Dhoorjeti v. Dhoorjeti*, 30 M. 201; *Ramasami v. Ramasami*, 30 M. 255; *Manick Ram Pillai v. Ramalinga*, 29 M. 120 and *Sumsuddin v. Abdul Hossein*, 31 B. 165; folld. in 9 C. L. J. 50: see 30 A. 53. Contra, *Gaur Hari v. Radha Govind*, 7 B. L. R. 343-note; 12 W. R. 54; *Brahmadeo Narayan v. Harjan Singh*, 35 C. 778; *Annaji Dattatraya v. Bhandra Bai*, 17 B. 503.

The interest in the pre-empted property of a successful pre-emptor, who has not yet paid the pre-emptive price fixed by his decree, is a contingent right, the attachment of which is prohibited by this section.—*Gorakh Singh v. Sidh Gopal*, 28 A. 383: 3 A. L. J. 163: A. W. N. (1906), 69.

A mere right to receive profits, which is not yet due, is not attachable in execution of decree.—*Sher Singh v. Sri Ram*, 30 A. 246.

**What are Not Expectancies.**—A settlement was made by a Mahomedan on his wife under the condition that, if he should have no child by her, his two sons by another wife should each have an estate therein. He died without other children. *Held* that the two sons had taken definite interest capable of being attached within the meaning of this section, and not mere expectancies.—*Umes Chunder v. Zahur Fatima*, 18 C. 164.

The remainder vesting in a widow is liable to be attached by husband's creditor. S. 60 (m) of the C. P. Code, and s. 6, cl. (a) of the T. P. Act are inapplicable to an attachment of the interest in the widow's hand; *Segu Chidambaram v. Saraddi*, 29 M. L. J. 546: (1915) M. W. N. 577. The interest of a grandson in the ancestral property of a joint Hindu family, governed by the Mitakshara Law, can be attached and sold in execution of a decree.—*Jugal Kishore v. Shib Sahai*, 5 A. 430.

(i) the whole of the salary, where the salary does not exceed forty rupees monthly;

(ii) forty rupees monthly, where the salary exceeds forty rupees and does not exceed eighty rupees monthly; and

(iii) one moiety of the salary in any other case;

Provided that where the decree-holder is a society registered or deemed to be registered under the Co-operative Societies Act, 1912, and the judgment-debtor is a member of the society, the provisions of sub-clauses (i) and (ii) shall be construed as if the word 'twenty' were substituted for the word 'forty' wherever it occurs and the word 'forty' for the word 'eighty';

(j) the pay and allowances of persons to whom the Indian Articles of War apply;

(k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1897, for the time being applies in so far as they are declared by the said Act not to be liable to attachment; [NEW.]

(l) the wages of labourers and domestic servants whether payable in money or in kind;

(m) an expectancy of succession by survivorship or other merely contingent or possible right or interest;

(n) a right to future maintenance;

(o) any allowance declared by any law passed under the Indian Councils Acts, 1861 and 1892, to be exempt from liability to attachment or sale in execution of a decree; and,

(p) where the judgment-debtor is a person liable for the payment of land-revenue, any moveable property which, under any law for the time being applicable to him, is exempt from sale for the recovery of an arrear of such revenue.

*Explanation.*—The particulars mentioned in clauses (g), (h), (i), (j), (l) and (o) are exempt from attachment or sale whether before or after they are actually payable.

(2) Nothing in this section be deemed—

(a) to exempt houses and other buildings (with the materials and the sites thereof and the lands im-

which was capable of being attached in execution of a decree against the vendor.—*Harshankar v. Baijnath*, 23 A. 164 (27 C. 38 referred to).

Clause (p).—As regards fodder for cattle belonging to an agriculturist judgment-debtor, s. 60 (p) C. P. Code, 1908 taken with s. 70, Land Revenue Act, makes it clear that the Civil Court can attach only so much as will leave, in the opinion of the Collector, a sufficiency for the owner's cattle calculated according to the rules of his department.—*Gur Baksh v. Khariati*, 82 P. R. (1907).

Objection that Property is Not Attachable and Saleable, When to be Raised.—Where a judgment-debtor with a full knowledge of the execution proceedings and full opportunity of raising an objection that the property is not attachable and saleable in execution, fails to raise that objection at the time of the sale, it is not competent to him to resist the purchase after the confirmation of the sale; *Dwarkanath v. Tarini*, 84 C. 199; *Lala Ram v. Thakur Prasad*, 40 A. 680: 47 I. C. 947; *Pandurang Balaji v. Krishnaji*, 28 B. 125; *Umed v. Jasram*, 29 A. 612; *Somasundaram v. Kondayya*, A. I. R. 1926 M. 12. In *Lala Ram v. Thakur Prasad*, 40 A. 680: 47 I. C. 947, a house was sold by auction in execution of a decree obtained against the defendant in the case and was purchased by the plaintiff. When he failed to get actual possession, he instituted a suit for its recovery, but his claim was contested by the defendant judgment-debtor on the ground that the house was not liable to sale in view of the provisions of s. 60 (c) of the Code of Civil Procedure. The learned Judge held in the case that "after the sale and confirmation of sale it was not open to the defendant at this stage to question the validity of the sale and the title which the plaintiff had acquired under it." In *Sheik Murullah v. Sheik Burullah*, 9 C. W. N. 972, it was similarly held that "after a judgment-debtor, with a full knowledge of the execution proceedings and full opportunity of raising an objection to the effect that the holding was an occupancy holding and not transferable, had failed to raise that objection at the time of the sale, it was not competent to him to resist the purchaser after the confirmation of the sale and that, as between the purchaser and the judgement-debtor, the title to the property vested in the purchaser on the confirmation of sale." But if the judgment-debtor was not aware of the proceedings in attachment of the property or of the proceedings in connection with the sale thereof, the application to set aside the sale may be entertained even after the sale is confirmed; *Durga Charan v. Kali Prasanna*, 26 C. 727.

See notes to section 47, ante.

61. The Local Government; with the previous sanction of the Governor-General in Council, may, by general or special order published in the local official Gazette, declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear to the Local Government to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the Judgment-debtor and his family, shall, in the case of all agriculturists

Partial exemption  
of agricultural pro-  
duce

which are declared by any other enactments not to be saleable, can be sold (see 80 M. 878 and 85 A. 25 F. B.).

**Provisions should be Strictly Construed.**—The provisions of s. 60 which restrict the right of the decree-holder to realise the decretal amount from the property of the debtor should be strictly construed (47 P. R. *refd.* to).—*Jahangir Singh v. Hira*, 4 P. W. R. 1917: 21 P. L. R. 1917.

**Amendment of the Section.**—In clause (i) of the proviso to sub-rule (1) the word "forty" was substituted for "twenty" and the word "eighty" for "forty" by Amendment Act, XXVI of 1923.

The proviso to clause (i) was added by Amending Act XX of 1925.

Clause (2), as it originally stood, contained a clause, being clause (b), which ran thus: "(b) to affect the provisions of the Army Act or of any similar law for the time being in force." That clause was repealed by Act X of 1914, Sch. II.

**Property Liable to Attachment and Sale.**—This section provides that all saleable properties, both moveable and immovable, belonging to the judgment-debtor, over which or the profits of which he has a disposing power are liable to be sold in execution of a decree, with the exception of those mentioned in the provisos.

The word "property" here includes any property (moveable or immovable) over which or the profits of which the judgment-debtor has a power to dispose for his own benefits; in other words, in which he has saleable interest, i.e., such an interest as is capable of being sold. It therefore does not include property or any interest therein, which by prohibition of law or usage or for some other reason is not saleable.

**"In Execution of a decree."**—The expression "decree" in this section refers to a money-decree and not a mortgage decree, because attachment is not necessary in mortgage decrees. The result is that the exemptions from attachment and sale contained in the proviso to this section do not apply to a mortgage decree for sale; *Mubarak v. Ahmad*, 46 A. 489: A. I. R. 1924 A. 829 F. B.

**Saleable Property.**—The word "saleable" in the section means saleable by auction at a compulsory sale under the orders of the Court and not transferable by act of parties. Where in a permanent lease there was a condition that the landlord would re-enter if the tenant made any transfer of the land demised. Held that the lease forbade a sale by the tenant but did not prevent a sale by the Court; *Keshab Chandra v. Ajahar Ali*, 19 C. W. N. 1182: 23 C. L. J. 428 (20 C. 278 referred to).

Country liquor is "saleable" property within the meaning of this section, though the permission of the Collector may be necessary to the sale thereof under the Akbari Act; *Purshottam v. Balvant*, 10 Bom. L. R. 18.

The share of partner in a partnership business is "saleable" property and can be attached and sold in execution of a decree against the partner; *Jagat Chunder v. Iswar Chunder*, 20 C. 693. A life interest in trust funds is attachable and "saleable" in execution of a decree; *Abdul Lateef v. Doutre*, 12 M. 250. A vested remainder of a son in a gift by him, to his mother, of a family house as a provision for her maintenance

The section has been amended by the insertion of the words "*unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto.*"

"The Committee have inserted a new provision to authorise the breaking open of the outer door of a judgment-debtor's house. They do not think that it would be safe to extend the operation of this provision to the house of a stranger."—*Notes on Clauses.*

**Scope of Section.**—Under the old section a person executing a process was not authorized to break open the outer door of a dwelling house; but the present section authorises him to break open the outer door of a dwelling-house in the occupancy of the judgment-debtor if he refuses or prevents access thereto; the process-server has however, no power to break open the outer door of the house of a stranger. The section does not provide for a case, where a house is in joint occupation of the judgment-debtor and strangers. For instance the owner of a house has let out certain portions of it to different persons and he also lives in the house. Again where several members of a joint family live in one house, how is the person entrusted with the execution of attachment-process to proceed?

**May Break Open Outer Door.**—A person executing a process for attachment of moveables having gained access to a house, has a right to remove the lock from the door of a room, in which he has reasonable ground for believing moveable property to be lodged.—*Kondasammy Pillay v. Kristnaswamy*, 5 M. H. C. 189.

A Civil Court's bailiff, in executing a process against the moveable property of a judgment-debtor, has authority to use force and break open a door or gate;—*Soudamini v. Jageswar*, 5 B. L. R. Ap. 27; 13 W. R. 339; and *Damodar v. Ishvar*, 3 B. 89, where it has been held that a nazir has authority to break open the door of a shop or godown which is not a dwelling-house within the meaning of this section. In *Baikumar v. Vendidas*, 8 Bom. H. C. 127, it has been held that a nazir cannot, break open a dwelling-house to execute process against the person or goods, if the outer door is locked. The privilege extends to a man's dwelling-house only, and not to a building standing at a distance from it.

An attachment of moveables effected by an *amin* is not invalidated by the fact that he entered the house, which had been closed, after the same had been opened by certain persons who gained entrance into it by getting over the roof; *Chakravarthi v. Ammaiaappa*, 25 I. C. 117.

Warrant of attachment must be a legal one, i.e., must be strictly in accordance with form No. 13 Sch. I of the C. P. Code, otherwise its resistance does not constitute an offence.—*Uma Charan v. Emperor*, 20 C. 244.

"Dwelling house."—A shop or a godown is not a "dwelling house" within the meaning of this section; *Damodar v. Ishvar*, 3 B. 89.

**63. (1)** Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to

Property attached  
in execution of de-  
crees of several  
Courts.

**"Property."**—Where, in a suit for partnership accounts, the question of accounts is, with the consent of both parties, referred to arbitration, and before the award is made, a creditor of the plaintiff applies for the attachment of the right and interest of the defendant in the award, the attachment cannot be allowed, because a claim which may accrue under an award is not property within the meaning of this section; *Taffuzool v. Raghoonath*, 14 M. I. A. 40: 7 B. L. R. 186.

The doors, windows and shutters of a pucca building cannot be separately attached in execution of a decree, forming as they do part of an immoveable property and having no separate existence; *Peru Bepari v. Ronuo*, 11 C. 164.

**"Disposing power."**—A judgment-debtor may have a disposing power over a property, exercisable for his own benefit, although it may not belong to him. Such property can under this section be attached, subject to the proviso to this section. A trustee of a religiously endowed property has no disposing power over the corpus of the property; hence the corpus cannot be attached. A policy of life insurance, expressed to be for the benefit of the wife of the assured but not in any way assigned by him to her or to trustees for her, remains as part of his estate, and after his death can be attached in the hands of the wife as part of the assets received; *Shankar v. Umabai*, 37 B. 471. A letter containing Currency Notes addressed to the judgment-debtor and sent through the Post Office can be attached as property in the disposing power of the addressee; *Narasimhulu v. Adiappa*, 18 M. 242. An auctioneer has no disposing power over the whole of the sale proceeds of goods sold for his client, but only over that portion which represents his commission; hence the whole of the sale proceeds cannot be attached, but only so much of it which represents his commission; *Smith v. Allahabad Bank*, 23 A. 185. A bonus is a gift which requires to be completed either by a registered document or by actual payment to the donee. Hence the donee has no disposing power over it, and it cannot be attached by a creditor of the donee till actual payment is received by him; *Janki Das v. E. I. R. Ry.*, 6 A. 634: *Natha v. Schiller*, 25 Bom L R 599. A I R 1924 B 88: 87 I. C. 312. A Hindu widow has no disposing power over property which, under a compromise with the reversioner, she was allowed to enjoy for her life but was forbidden to alienate it; *Basangowda v. Irgowdatti*, 47 B. 597: A. I. R. 1923 B. 276: 73 I. C. 196.

**"Debts."**—The word "debt" in this section means an actually existing debt, that is, a perfect absolute debt, not merely a sum of money which may or may not become payable at some future time or the payment of which depends upon contingencies which may or may not happen; *Hari Das v. Baroda Kishore*, 27 C 88. 4 C W. N. 87; *Udoy Kumari v. Hari Ram*, 28 C. 483; *Dambar Kori v. Sham Kishen*, 9 C. W. N. 703. A money-claim that has already become due is a debt, and it may be attached as such, though it may be payable at a future day; but a money-claim accruing due is not a debt and cannot be attached; *Tuffuzool v. Raghoonath*, 14 M I A. 40 (50): 7 B L R. 186; *Sher Singh v. Sriram*, 30 A 246. A debt over which no Court in British India has jurisdiction is not liable to attachment under this section; *Ghansam Lal v. Bhausali*, 5 B 249. A present debt, though payable in future, and in the circumstances only actually payable after the death of the creditor is a debt; *Banchharam v. Adayaram*, 38 C. 836: 19 C. W. N. 966: 10

directory and deals with procedure. It is not intended by this section to take away the jurisdiction conferred by Or. XXI, r. 84. It must be shown by the clearest language that jurisdiction given by one section has been taken away by another subsequent section.—*Gopichand v. Kasemunnassa*, 84 O. 886: 6 C. L. J. 130 (4 A. 859; 18 A. 848; 26 A. 538 and 27 A. 56 differed from). See also *Baikant Nath v. Rajendra Narain*, 12 C. 833: *Abdul Karim v. Thakurdas*, 22 B. 88; *Subbiah Iyer v. Muthu Kumaraswami*, 82 I. C. 41; *Giris v. Srikrishna*, 88 C. L. J. 266; *Kunhayyan v. Ithu Kutti*, 22 M. 295: 9 M. L. J. 1; *Ram Narain v. Mina Koery*, 25 C. 46. Sale by inferior Court with consent of parties is not invalid or illegal having regard to s. 63, cl. (2); *Parsotam v. David*, 18 A. L. J. 893; *Narayanan Nambudripad v. Tawker*, 83 M. L. J. 217.

**Procedure to be Adopted when Property Attached by Two Courts of Different Grades but Sold by Court of Inferior Grade.**—Where the same property has been attached in execution of two decrees, one passed by a Court of superior grade and the other by a Court of inferior grade, the sale should be held by the Court of superior grade. When, however, the sale has been held by a Munsif, the Subordinate Judge is not to direct the Munsif, to transmit the proceeds to his Court, but should move the District Judge to have the proceeds so transferred and the sale proceeds should then be rateably distributed in accordance with the provisions of s. 73.—*Nilkantha v. Goshto Behary*, 46 C. 64: 27 C. L. J. 145: 44 I. C. 249; *Patel Narainji v. Haridas*, 18 B. 458 (403). According to the Bombay High Court, where both the Courts are subordinate to the District Court, the procedure is for the petitioner to apply to the District Court to have the sale proceeds transferred to the Court of higher grade; *Patel Narainji v. Haridas*, 18 B. 458. The petitioner can also apply to the Court of the higher grade for a transfer of the sale proceeds to that Court and that Court is competent to make the order; *Dee Kappa v. Chabhasappa*, 49 B. 655: 89 I. C. 980: A. I. R. 1925 Bom. 420.

When a property has been sold in execution of decrees in a Munsif's Court, and, prior to the realization of the assets by sale, a decree-holder in the Sub-Judge's Court, who attached the same property before Judgment, applies to the Sub-Judge for the execution of his decree, the only Court which has jurisdiction to decide questions relating to the rateable distribution of the sale-proceeds under s. 295, C. P. Code, 1882 (s. 73), is the Court of the Sub-Judge, and not that of the Munsif. It is doubtful whether the Sub-Judge has authority to set aside the order of Munsif's Court.—*Bhugwan Chunder v. Chundra Mala*, 29 C. 773: 1 C. L. J. 97; *Krishna Kumar v. Pasupati*, 25 C. W. N. 740.

**Attachment by Two Courts of the Same Grade—Sale by One of Such Courts—Validity of.**—Where immoveable property was attached in execution of decrees of two Courts of the same grade, and sold by one Court pending prior attachment by other Court, held that, though the property had been first attached in the Court of the first Munsif, that Court was not a Court of higher grade than that of the second Munsif within the meaning of s. 295, C. P. Code, 1882 (s. 63), and the sale to the plaintiff in execution of the decree of the second Munsif was valid.—*Dwarka Nath v. Banku Behari*, 19 C. 651 (12 A. 899 followed; 4 A. 859, and 6 A. 615 dissented from). See also *Naranji Morarji v. Haridas*, 18 B. 458; and *Ram Narain v. Mina Koery*, 25 C. 46.

*Meaning of "Artisan."*—"Artisan" is not defined in this or any other Act. The popular meaning is one engaged in a mechanical employment. Musicians and washermen are not artisans. Musical instruments are not tools of "artisans" within this section and are therefore not exempt from attachment.—*Lokasikmani v. Thiagaroya*, 5 L. W. 596: (1917) M. W. N. 420; *Maung Than v. Maung Hle*, (1916) 2 U. B. R. 183.

A sewing machine owned by a tailor is a tool of an "artisan" and therefore exempt from attachment under s. 60 (b).—*Vittoba v. Babulal*, 65 I. C. 416.

**Clause (c) Houses and Other Buildings.**—Clause (c) does not prohibit the sale of property specifically mortgaged, *albeit*, that the property be materials of a house belonging to, or occupied by, an agriculturist.—*Bhagawan Das v. Hathibhai*, 4 B. 25; *Bhola Nath v. Must. Kishori*, 84 A. 25, F. B.: 8 A. L. J. 1045; *Mubarak v. Ahmad*, 46 A. 489: A. I. R. 1924 A. 828 F. B.

The term "agriculturist" in s. 60 (c) not only means persons who cultivate land in which they have an interest as proprietors or tenants but includes persons engaged in the cultivation of the land. Therefore a professed cultivator of land earning his wages from another employer and owning house is entitled to be protected from the attachment of that house under this section.—*Derara v. Vaikunt*, 41 B. 475: 19 Bom. L. R. 281.

Where a judgment-debtor's only source of living is not by cultivation of land, he is not an "agriculturist" within the meaning of s. 60 (1) (c) and is not entitled to any exemption.—*Surangini v. Kedar*, 63 I. C. 691.

The phrase "houses and other buildings" does not include a vacant site used for storing manure and fodder and with no structure over it.—*Jahangir v. Hira*, 21 P. L. R. 1917: 4 P. W. R. 1917.

Where a house of an agriculturist is in ruins and there are no doors in it and there is no roof, it is not exempt from attachment, because such a structure can hardly be called a house; *Baladin v. Lakhan Sing*, A. I. R. 1927 A. 214.

A person does not cease to be an agriculturist merely because he transfers his land by lease or mortgage. He still continues to be an agriculturist and his property is protected from attachment; *Amolak v. Eknath*, 16 N. L. R. 89.

By this clause, an ordinary judgment-creditor is precluded from attaching or selling the materials of a house or other building belonging to his judgment-debtor. By explanation (a) of the section, this prohibition does not extend to a creditor whose decree is for rent.—*Manick Lal v. Lakha*, 4 B. 429.

The house of an agriculturist, if specifically mortgaged, can be taken in execution of the mortgage decree; *Bhagwandas v. Hathibhai*, 4 B. 25; *Bhola Nath v. Mt. Kishori*, 84 A. 25: 11 I. C. 646.

Clause (c) is intended to exempt from attachment the house dwelt in by an agriculturist as such, and the farm buildings appended to such dwelling. The exemption does not extend to other houses not in the physical occupation of an agriculturist-owner, as a dwelling appropriate



*Explanation.*—For the purposes of this section, claims enforceable under an attachment, include claims for the rateable distribution of assets. [New.]

## COMMENTARY.

**Alterations Made in the Section.**—This section corresponds with section 278, C. P. Code, 1882, with some additions and alterations. The words "*transfer or delivery*" have been substituted for the word "*alienation*," as the word *transfer* is more comprehensive and includes, sale, gift, mortgage, &c. The words "*or any interest therein*" have been added. The words "*by actual seizure or by written order duly intimated and made known in manner aforesaid*" which occurred in the old section have been omitted. The words "*contrary to such attachment*" have been substituted for the words "*during the continuance of the attachment*," which occurred in the old section. By these alterations the section has been made more concise.

The explanation has been added in accordance with the principle laid down in 16 B. 91.

**Object and Scope of the Section.**—The object of the provisions of section 64 of the C. P. Code, is to secure to the creditor protection of his rights obtained by the attachment against all subsequent acts of his debtor which may imperil his obtaining the fruits of his decree through the attachment which has been effected. A creditor can only attach, the right title and interest of his debtor at the date of the attachment, and he has no ground for complaining if prior to his attachment the debtor has created obligation against him touching the property. A conveyance, therefore, of property executed after its attachment before judgment, by a creditor in pursuance of a contract dated before the attachment, should prevail, in as much as it was merely carrying out an obligation which was incurred prior to the attachment; *Madan v. Rebati*, 23 C. L. J. 115.: 21 C. W. N. 158. The object of this section is to prevent fraud on decree-holders (*Shivlingappa v. Chanbasappa*, 39 B. 397) and to secure intact the rights of the attaching creditor against the attached property by prohibiting private alienations pending attachment (*Dino Bundhu v. Jagmaya* 29 C. 154. 29 I. A. 9).

"Where an attachment has been made."—The mere issue of a prohibitory order does not amount to an attachment within the meaning of this section, thus a promissory note must be attached by actual seizure as provided by Or. 21, r. 51 and not by the issue of a prohibitory order restraining the payee from receiving the money under it; *Suhramania v. Chokkalinga*, 46 M. 415: A. I. R. 1923 Mad. 317: 72 I. C. 189. In the same way, the attachment in the case of immoveable property, to render a subsequent alienation invalid must be made in the manner provided by Or. 21 r. 54, *Ahmad Yar v. Bose*, 7 Lah. L. J. 501: A. I. R. 1925 Lah. 583, *Nur Ahmad v. Altaf Ali*, 2 A. 58, *Satya v. Madhub*, 9 C. W. N. 693. An attachment under Or. XXI, r. 54, operates as a valid prohibition against alienation from the date on which the necessary proclamation is made and a copy of the order of attachment is affixed as provided by that Rule and not from the date of the order of attachment; *Mularam v. Jiwan-daram*, 4 Lah. 211: A. I. R. 1923 Lah. 423.

words "occupied by" mean living in or using for agricultural purposes; *Noor Din v. Sulakhan Mal*, 92 I. C. 759: A. I. R. 1926 L. 230.

**Clause (d). Books of Accounts.**—Books of account cannot be attached.—*In re Pestonji Cursetji*, 3 B. H. C. 43. But to prevent the judgment-debtor from making away with his books and defeating a decree-holder, it is competent to a Court to require the judgment-debtor to produce his books in court, and leave them in the custody of the Court.—*Ajoodhya Pershad v. Middleton*, 3 N. W. P. 334.

**Clause (e). Right to Sue for Damages.**—A right to bring a suit cannot be attached.—*Carapiet v. Panna Lal*, 14 W. R. 152; *Drury v. Haridhan*, 3 W. R. Mis. 8; *Mahomed Hadee v. Sheo Sewak*, 6 N. W. P. 95. So also a judgment-debtor's right to appeal; *Bopro Protap v. Dea Narain*, 3 W. R. Mis. 16. But a decree may be attached and sold, *Golam Mahomed v. Indro Chand*, 15 W. R. 34: 7 B. L. R. 818.

Mesne profits are in the nature of damages and the right to sue for mesne-profits, "is a right to sue for damages;" therefore, it cannot be attached.—*Shyam Chand v. Land Mortgage Bank*, 9 C. 695: 12 C. L. R. 440.

The claim of a *mulgani* tenant in South Kanara to compensation for improvement cannot be attached nor sold in execution; *Ananta Bhatta v. Mavinamale Ananta Bhatta*, (1918) M. W. N. 887.

**Clause (f). Right of Personal Service.**—A *vritti* is an hereditary priestly office, by virtue of which certain religious ceremonies are performed on the river Godavery, on behalf of pilgrims who pay fees. Such *vritti* is a right of "personal service" and therefore protected from attachment.—*Ganesh Ram Chandra v. Sankar Ram Chandra*, 10 B. 395; *Govind v. Ram Krishna*, 12 B. 366; *Rajaram v. Gonesh*, 23 B. 131. But where a decree of a Civil Court expressly declares that a person's right in a *vritti* shall be sold, it is incompetent, in execution-proceedings, to question the command, on the ground of the *vritti* being protected from sale under s. 60.—*Sadasiv v. Jayanti Bai*, 8 B. 185. Distinguished in *Raja of Vizianagaram v. Dantivada*, 28 M. 84.

A *Birt Moha Brahmin*, or right to officiate as priest at funeral ceremonies of Hindus dying within a particular District, is a right of personal service, and therefore not liable to attachment.—*Durga Prasad v. Shambhu*, 41 A. 656: 51 I. C. 539. So also is *Jotishi vritti*, which is a right to receive emoluments as a reward for personal service.—*Govind Lakshman v. Ram Krishna*, 12 B. 366. *Jatri bahis*, which merely contain the names and addresses of pilgrims who are clients of the judgment-debtor and which are of use to him to perform personal service to the pilgrims, are not attachable; *Lachman v. Baldeo*, 1 Pat. 619: A. I. R. 1922 Pat. 556: 68 I. C. 944.

A judgment-debtor's right as a *shebait* to perform the service of an idol cannot be sold in execution of a decree, nor can his right to the surplus profits of the *sheba* can be sold so long as that right is unascertained and uncertain.—*Juggurnath v. Kishan Pershad*, 7 W. R. 266.

The right of a *shebait* of a Hindu idol to perform the services and receive the customary remuneration cannot be sold in execution of a

is kept alive for the benefit of the new mortgagee; and an attachment of properties though prior to the new mortgage, does not affect the interest of the new mortgagee. This section does not make the fresh mortgage void as against the attaching creditor. *Dinobundhu Shaw v. Jogmaya Dasi*, 6 C. W. N. 209 P. C.; 29 C. 154, P. C.

The effect of s. 64 is not to invalidate for all purposes the alienation of the property by the judgment-debtor after it has been attached. The transferee of property from the judgment-debtor after attachment can make an application under Or. XXI, r. 89 to cancel the sale; *Gosla Behari v. Sankarnath*, 26 C. L. J. 127.

**Private Transfer Void Only as Against All Claims Enforceable Under the Attachment and Not Absolutely.**—The provisions of this section make the private alienation void, not absolutely, but only "as against all claims enforceable under the attachment" referred to in it. Where the execution proceedings in the course and for the purpose of which the attachment was made have come to an end on account of satisfaction of the decree by judgment-debtor, and in consequence the decree is no longer alive, the attachment ceases and there is no longer any claim "enforceable" under the attachment to make the private alienation effected by the judgment-debtor under the attachment void. The person for whose protection the section was primarily intended has had his claim in that event satisfied otherwise than by the attachment. As to any claim under another decree cognizable under s. 73, that had been dependent on the continuance of the said attachment, when that attachment was swept away, all other claims cognizable under it ceased to be operative for the purposes of this section and section 73. The only bar in the way of private alienation was removed as if it never existed in law, and the question as to the private alienation made by the judgment-debtor to the transferee during the attachment became reduced to one between that judgment-debtor and his alienee; *Khushal Chand v. Nandram*, 35 B 516 13 Bom. L. R. 976.

A private *bona fide* alienation, for value of property attached, made during the continuance of the attachment is null and void only as against the attaching creditor or persons who may acquire rights under or through the attachment and not as against the whole world.—*Anund Lal v. Jullodhur Mohan*, 10 B. L. R. 134; 17 W. R. 313, P. C.; 14 M. I. A. 453; *Dinendra v. Ramkumar*, 7 C. 107, 118; *Ram Churn Lal v. Jhatu Sahu*, 12 B. L. R. 413-note; 14 W. R. 25; and *Bal Mokund v. Ramhit*, 13 W. R. 134. In *Abdul Rashid v. Gappo Lal*, 20 A. 421, it has been held that a private alienation of property under the attachment is void "as against all claims enforceable under the attachment" only, and not as against the claims of other decree-holders under any other attachment. See *Gobind Singh v. Zalim Singh*, 6 A. 33; *Gangadin v. Kushali*, 7 A. 702 and *Durga Churn v. Manmohini*, 15 C. 771. See also *Puddomonne v. Roy Mothoora Nath*, 12 Bom. L. R. 411; 20 W. R. 133; *Goonjessur v. Luchmee Narain*, 20 W. R. 418; *Matongany v. Junmejoy*, 25 W. R. 513; *Balaji Ram v. Gayanan Babaji*, 11 Bom. H. C. 159; *Nathu Mal v. Gangaram*, 63 I. C. 108.

**Private Transfer During Attachment—When Not Void.**—Where the judgment-debtor sells the property when the attachment is pending and pays out of the sale-proceeds the decretal amount into Court, the attachment ceases. In such a case the sale is valid, the decree having been

of the temple, and the land belonging to the temple which he holds as remuneration for his service.—*Lotlikar v. Wagle*, 6 B. 500.

**Clause (g)—Stipends, Gratutlies, Political Pensions, etc.**—"We have omitted the words 'military and civil,' because the word *pensioners* covers every class of pensioners. The exemption has been extended so as to cover pensions granted out of any service family pension fund notified in that behalf by the Governor-General in Council."—*Report of the Select Committee*.

**Stipends.**—The stipends allowed by Government to the members of the Mysore family cannot be attached; *Hazee Mohammed v. Shahzada Mohammed*, 7 W. R. 169. For notification issued under cl. (g), see General Statutory Rules and Orders, Vol. IV p. 685.

**Gratutlies.**—A gratuity or bonus allowed by Government to its servants, whether pensioners or not, in consideration of past services is exempt from attachment; *Bawan Das v. Mul Chand*, 6 A. 173; *Muham-mad v. Carlier*, 4 M. 272.

**Political Pensions.**—The word "pension" in this section has the same meaning as it has in s. 11 of the Pensions Act, that is, a periodical allowance or stipend granted not in respect of any right, privilege, perquisite or office, but on account of past services or particular merits or as compensation to dethroned Princes, their families and dependants; *Banshi Ram v. Narasingha*, 24 I. C. 805. Meaning of the word "pension" explained.—*Jiban Krishna v. Sripati Charan*, 8 C. W. N. 665.

An allowance which the Government of India has given a guarantee that it will pay, by a treaty obligation contracted with another Sovereign Power, is a political pension; *Bishamber v. Imdad Ali*, 18 C. 216: 17 I. A. 181. The following are instances of political pensions which have been held not liable to attachment.—Stipends allowed to members of the Mysore family, *Hazee Mohammed v. Shazada Mahamed*, 7 W. R. 169; to the members of the family of the King of Oudh; *Bishambar v. Imdad Ali*, 18 C. 216: 17 I. A. 181; to the descendants of the Nawab of the Carnatic, *Mahomed v. Comandur*, 4 M. H. C. R. 277; to the members of the last reigning family of Ceylon; *Muthusami v. Prince Alagia*, 26 M. 423.

The amount due as arrears of political pension to a deceased prisoner at the time of his death does not lose his character as a pension. The character of the fund remains unchanged and it cannot be attached so long it remains unpaid in the hands of the Government. But as soon as the amount has passed out of the hands of the Government into the hands of the legal representatives of the deceased it is available for attachment; *Valia v. Anujani*, 26 M. 69.

A grant of Zemindari by Government as a reward for past services is not a pension, but a gift and can therefore be attached; *Lachmi Narain v. Mukund*, 26 A. 617. Similary a grant of an annual sum made by Government to compensate the grantee on account of improper resumption by Government of rent-free land; *Jiban v. Sripati*, 8 C. W. N. 665; a hereditary right to an allowance payable annually from the *melwaram* of an estate, *Vaidya Nath v. Eggia*, 80 M. 279: 17 M. L. J. 873; a *toragonas hak*, *Secy. of State v. Khem Chand*, 4 B. 482; *Amar Singh v. Jethalal*, 88 B. 258 are not pensions and are attachable in execution of a decree.

**Effect of Private Transfer Made in Conformity with Or. XXI, r. 83.**—Where a judgment-debtor makes a private transfer of his property under Or. XXI, r. 83, the transfer is absolute, notwithstanding the provisions of this section, even against claims enforceable under the attachment; *Shivlingappa v. Chanbasappa*, 30 B. 337; 8 Bom. L. R. 16.

**"Contrary to such attachment."**—The words contrary to such attachment have been substituted for the words "during the continuance of the attachment" which occurred in the old section. The substitution has been made to give effect to the Privy Council decision in *Dinobundhu v. Jogmaya*, 29 C. 154 P. C.; 29 I. A. 9, 16. The words during the continuance of the attachment "were too wide in that they comprised alienations that could not possibly prejudice the rights of an attaching creditor.

**Right of Decree-holder to Question a Transfer.**—Section 64 aims at preventing fraud on decree-holders and to secure intact the rights of attaching creditors as well as creditors who have obtained decrees and are entitled to satisfaction out of the assets of the judgment-debtor without further attachment. A transfer by the judgment-debtor of his property which is under attachment is inoperative as against a judgment-creditor who obtains his decree after the transfer in question and seeks to attach the property in execution of that decree; *Kali Kumar v. Kaliprasanna*, 33 I. C 192

**Explanation.**—This explanation has been added to give legislative sanction to the principle laid down in *Sorabji v. Govind*, 16 B. 91, where it was held that private alienation of property under attachment is void as against all claims enforceable under the decree as well as against other creditors who may apply for rateable distribution under s. 73. *Sorabji v. Govind* has been followed in *Chunilal v. Karam Chand*, 46 B. 895; 69 I. C 161. A. I. R. 1922 Bom. 241 and referred to in *Mina Kumari v. Bijoy Singh*, 44 I. A. 72. 44 C. 662 P. C. See also *Khusal Chand v. Nandram*, 35 B. 516 and *Jethabhimba v. Lady Janbai*, 37 B. 138; 14 Bom. L. R. 511; *Sheikh Mahomed Muzaffar v. Bhagwati*, 66 I. C. 642; *Velchand v. Mussoon*, 14 Bom. L. R. 633, *Mg. Hyin Ba v. Mg. Pe Ukin*, 8 Bur. L. T. 14; *Rangi Ram v. Gangu*, 5 P. R. 1919; *Chunilal Devaji v. Karam Chand Shri Chand*, 24 Bom. L. R. 364. The Explanation overrides the law as laid down in 15 C. 771; 23 M. 478; 28 M. 380; 25 A. 421; 81 P. R. 1908, so far as they decided contrary to the Explanation.

The Explanation to this section protects only those decree-holders who are entitled to rateable distribution under s. 73, and no decree-holder can be entitled to rateable distribution under that section unless there are assets held by the Court, *Annamalai v. Palamalai*, 41 M. 265; 43 I. C. 539; *Jetha Bhima and Co v. Lady Janbai*, 37 B. 138 17 I. C. 625. It must be remembered however that no decree-holder can claim the protection offered by the Explanation unless his claim is a claim enforceable under the attachment; *Mina Kumari v. Bijoy Singh*, 44 C. 662; 44 I. A. 72 (79).

The claim for rateable distribution is a claim enforceable under an attachment and must be in actual existence when the private transfer or delivery of the attached property is made; *Barendra v. Martin & Co.*, 33 C. L. J. 7

**Effect of Alienation under Irregular Attachment.**—Before an attachment can be relied on under this section for the purpose of invalidating any

that an officer in the Indian Army was not an officer of His Majesty's Regular Forces within the meaning of s. 136 of the Army Act and that his salary was therefore liable to be attached to the extent mentioned in s. 60 (1) (i); *Watson v. Lloyd*, 25 M. 402; *Calcutta Trades Association v. Ryland*, 24 C. 102. On the other hand, it was held by the High Court of Bombay relying on s. 190, sub-s. (8) of the Army Act that an officer in the Indian Army was an officer of His Majesty's Regular Forces and his salary was therefore not attachable; *King King & Co. v. Davidson*, 88 B. 667; 23 I. C. 575. Cl. (b) of Sub-s. (2) having been repealed by the Repealing and Amending Act X of 1914, it has now been held by the High Courts of Bombay and Allahabad that the salary of an officer of his Majesty's Regular Forces can be attached under s. 60 (1) (i); "s. 60 (2) (b) having been repealed by Act X of 1914 is a dead law and the decisions based thereon are absolute;" *Kering Rupchand v. Murray*, 43 B. 716; *Hay v. Ram Chander*, 39 A. 308; 39 I. C. 92. As regards officers of the British Army, it was held that they were officers of His Majesty's Regular Forces under s. 136 of the Army Act and that their salary would not therefore be attached at all; *Vel Chand v. Bour Cheir*, 37 B. 26, *Lecky v. Bank of Upper India*, 33 A. 529; 9 I. C. 1023.

As regards the salary of a first class Warrant Officer, it has been held by the Bombay High Court that it cannot be attached under the C. P. Code in execution of a decree for maintenance obtained against him by his wife, because a first class Warrent Officer being a "soldier" under s. 190 of the Army Act, his pay cannot be attached; *Duckworth v. Duckworth*, 43 B. 368; 50 I. C. 427.

**Clause (j)—Indian Articles of War.**—The pay and allowances of soldiers and followers of the Indian Army are exempt from attachment under the Indian Articles of War which apply to soldiers and followers of the Native Army. See Act V of 1869 amended by Act XII of 1914.

**Clause (k)—Compulsory Deposits.**—"Compulsory deposit" is defined in the Provident Funds Act XIX of 1925 and, under s. 2 (a) of the said Act, it means a subscription to, or deposit in, a Provident Fund which, under the Rules of the Fund, is not, until the happening of a specified contingency, repayable on demand otherwise than for the purpose of the payment of premia in respect of a Policy of Life Insurance, etc. The contribution of a railway servant to the Provident Fund is a compulsory deposit within the meaning of s. 4 of the Act and it does not cease to be so when he leaves the service of the company. It retains that character so long as it is in the hands of the Company and is unattachable. But once it is paid out it loses that character and can be attached; *Veerchand v. B. B. & C. I. Ry. Co.*, 20 B. 259; 6 Bom. L. R. 921. Referred to in *Secy of State for India v. Raj Kumar*, 50 C. 347; A. I. R. 1923 C. 585, where it was further held that the fact that the deposits became repayable to the officer of the Railway after he left service did not remove them from the category of compulsory deposits. The Provident Fund established by the Corporation of Calcutta is not liable to attachment; *Hindley v. Jay Narain*, 46 C. 962; 54 I. C. 439; *Devi Prasad v. Secy. of State*, 45 A. 554; A. I. R. 1924 A. 68; 74 I. C. 746; *Nagindas v. Ghelabhai*, 44 B. 673; 56 I. C. 450; The same principle applies to the case of an optional subscriber who cannot under the rules demand payment of his deposits at his option; *Jagannath v. Tara*, 8 Pat. 74; A. I. R. 1924 Pat. 524; 80 I. C. 424. The provision of the Provident Fund Act has

that the prior attachment had ceased before application for the second attachment.—*Hafiz Suleman v. Abdullah*, 16 A. 183. Dist. in 26 I. C. 81.

Cases like these will no longer arise, because Rule 57 of Or. XXI is expressly intended to put an end to such cases. See notes and case under that rule.

**Effect of Order of Release of Attached Property Afterwards Set Aside.**—The effect of an order under Or. XXI, r. 60 of the C. P. Code allowing a claim to make it obligatory on the Court to release the property from attachment; but the order of release is only provisional and is liable to be set aside by a regular suit. The order for release does not put an end to the attachment so as to leave the claimant free to deal with the property as he likes; if a suit is brought by the decree-holder to establish his right to attach the property and a decree is passed in his favour, the effect of the decree is to set aside the order of release and to maintain uninterrupted the attachment originally made. Any private transfer of the property by the claimant though made after an order under Or. XXI, r. 63; *Pratab Chandra v. Sarat Chandra*, 33 C. L. J. 201 25 C. W. N. 544. An order for release subsequently established by a suit under Or. XXI, r. 60 releasing the regular suit has not the effect of putting an end to an attachment duly made.—*Ram Chandra v. Mudeshwar*, 33 C. 1153; 10 C. W. N. 978. Followed in *Ali Ahmed v. Bansidhar*, 31 A. 367, where it has been held following 21 W. R. 434, 23 C. 829, and 10 B. 400 that the lien of an attaching creditor over the property attached is not destroyed or affected by an order of release which is set aside by subsequent decree in a regular suit. See also *Bhuna v. Balram*, A. I. R. 1922 Nag. 138 65 I. C. 220; *Anthaya Hegade v. Manjaya Shetty*, 41 M. L. J. 893.

**Effect of Striking Off or Dismissal of Execution Proceedings.**—If an execution proceeding is struck off or removed from the file it does not necessarily put an end to the attachment. The decree-holder can revive the proceeding and continue it from the point where it had previously stopped.—*Peari Lal v. Chandi Charan*, 11 C. W. N. 163. 5 C. L. J. 80. Where after an attachment has been made, the execution proceedings are struck off or removed from the file and the judgment-debtor then makes a private transfer of his property, the question that arises in such a case is whether the private transfer of the property made by the judgment-debtor, after the execution proceedings were struck off or removed, is valid. Whether it is valid or not depends on the circumstances of each case. If the execution proceedings were struck off or removed under circumstances which made a fresh attachment necessary to bring the judgment-debtor's property to sale, the transfer by the judgment-debtor is valid; but if the execution proceedings are struck off under circumstances which do not make a fresh attachment necessary, the transfer is invalid; *Shaikh Kamaruddin v. Javahir Lal*, 32 I. A. 102; *Kishen Lal v. Charat Singh*, *Puddomonee v. Muthoora Nath*, 12 B. L. R. 411. It is a question of fact in each case under what circumstances the execution proceedings were struck off or removed, *Mahant Bhagwan v. Khetter Mani*, 1 C. W. N. 617; *Rangasami v. Perasami*, 17 M. 58; *Mahomed v. Kishori Mohan*, 22 C. 909; *Yakub Ali v. Durga*, 37 A. 518. It should be remembered in this connection that Or. XXI, r. 57 expressly provides that where any property has been attached in execution of a decree but the Court cannot proceed further with the

Usufruct of certain land was given to a Hindu widow for her life in lieu of her maintenance. Held that the reversionary right of the grantor was liable to be attached and sold in execution.—*Kachwan v. Sarup Chand*, 10 A. 462.

Clause (n)—Right to Future Maintenance.—The words "right to future maintenance," in cl. (n) and when such maintenance is attachable and when not, are fully explained in *Raja Padmanand v. Rama Prasad*, 16 C. L. J. 354; 17 C. W. N. 692.

A monthly maintenance allowance payable under an agreement cannot be attached until after it has become due; *Kashishuree v. Grees*, 6 W. R. Mis. 64. A maintenance allowance cannot be attached until it has become due: *Haridas v. Baradakishore*, 27 C. 88; *Dambar Koeri v. Rai Sham Kissen*, 9 C. W. N. 703.

A prospective right of maintenance cannot be attached.—*Palikandi v. Krishnan*, 40 M. 302; *Asad Ali v. Haidar*, 88 C. 13; *Haridas v. Barada Kishore*, 27 C. 88.

Arrears of maintenance are capable of being attached as a debt due to a widow in execution of a decree against her.—*Hoymobutty v. Koroonamoyee*, 8 W. R. 41.

An annuity is not a "right to future maintenance" within the meaning of this section and can be attached.—*Gopal Lal v. Marsden*, 10 C. W. N. 1102; *Govinda v. Gonapathy*, 10 M. L. T. 493; (1911) 2 M. W. N. 563; 22 M. L. J. 204; *Madan Lal v. Lala Ambika Baksh*, 24 O. C. 250; *Sundar Bibi v. Raj Indar*, 43 A. 617; 63 I. C. 181.

A Hindu widow's right to maintenance out of lands which belonged to her husband, and have devolved on her son, is a purely personal right, which cannot be sold in execution of a decree.—*Bhojrub Chunder v. Nubo Chunder*, 5 W. R. 111. So also is an interest in the income of immoveable property, assigned by way of maintenance to a Hindu widow by the members of her family.—*Gulab Kuar v. Bansidhar*, 15 A. 371; see also *Diwali v. Apaji Gonesh*, 10 B. 342; *Bansidhar v. Guab Kuar*, 16 A. 443 and *Munisami v. Ammani*, 15 M. L. J. 7; *Basangowda v. Irgowdati*, 47 B. 597.

Property assigned to the female members of a Zamindari household for their enjoyment in common, cannot be attached in execution of a decree passed against the female personally, as the right of any such member ceases on her death. The case is different when a decree is passed against the estate; *Narayanawamy v. Mathusri*, 83 I. C. 83.

A hereditary grant of an allowance of paddy out of the *melwaram* of certain land is not a right to future maintenance and is therefore not exempted from attachment.—*Vaidyanatha v. Eggia*, 80 M. 279; 17 M. L. J. 873.

A maintenance allowance cannot be attached until it becomes due.—*Haridas v. Baroda Kishore*, 27 C. 88; 4 C. W. N. 87. See also *Maharani Dambar Koeri v. Rai Sham Kissen*, 9 C. W. N. 703; 1 C. L. J. 90-n.

Where a person made over property to the Court of Wards, partly in consideration of a present payment and partly in consideration of an annuity payable to the vendor, such annuity was property of the vendor



## SALE.

**65.** Where immoveable property is sold in execution of a decree and such sale has become absolute, the purchaser's title, property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute. [S. 316, latter part.]

## COMMENTARY.

This section with its additions and alterations corresponds with the latter part of s. 316 of the old Code. The first part of s. 316 is to be found in Or. XXI, r. 94. Under the present section, the property shall vest in the purchaser from the date of the sale and not from the time when the sale is confirmed. The language of section 316 of the old Code was to the following effect: "*The title to the property sold shall vest in the purchaser from the date of such certificate and not before.*" In consequence of the ambiguity in the language of s. 316 there was some diversity of judicial opinions, as will appear from the cases noted below. The proviso to section 316, C. P. Code, 1882, which was to the following effect: "*Provided that the decree under which the sale took place was still subsisting at the time,*" has been omitted, probably to protect the title of *bona fide* and innocent purchasers. The leading case on the point is the Privy Council case of *Zainul Abidin Khan v. Muhammad Ashgar Ali*, 10 A. 166, P. C., where it has been laid down that a sale having duly taken place in execution of a decree in force at the time cannot afterwards be set aside as against an innocent and *bona fide* purchaser not a party to the decree, on the ground that, on further proceedings, the decree has been, subsequently to the sale, reversed by an appellate Court. The proviso was contrary to the principle laid down in the Privy Council case; because according to the Privy Council case, it is immaterial whether the decree was subsisting at the time of the sale or not; the only material question is whether the purchaser is a *bona fide* and innocent purchaser or not. If the purchaser is a stranger and is a *bona fide* purchaser for value without notice, his purchase must stand, whether the decree was subsisting at the date of the sale or not; on the other hand if he was a party to the suit and proceedings and had notice of all the proceedings, then his purchase cannot stand and must be cancelled. It is therefore not necessary that the decree should be subsisting at the time of the confirmation of sale. The above Privy Council case has been followed in several cases; see the rulings noted hereafter.

Under s. 316 of the old Code, the title to immoveable property sold, vested in the purchaser from the date of the confirmation of the sale; and a certificate was to be granted to the auction-purchaser after the confirmation of the sale. Under this section the title to the property sold vests in the purchaser from the time of the sale, when the sale becomes absolute. A sale becomes absolute after applications to set aside the sale are disallowed (vide Or. XXI, r. 92). A sale certificate will be granted after the sale becomes absolute (vide Or. XXI, r. 94). It is therefore clear that if the decree under which the sale takes place is reversed at any time before a sale certificate is granted to the purchaser, the title of the auction-purchaser does not become absolute. See *Ram Sukh v. Ram Sahai*, 20 A. 591; 4 A. L. J. 485; A. W. N. (1907) 198.

or of any class of agriculturists, be exempted from liability to attachment or sale in execution of a decree. [New.]

### COMMENTARY.

"The Committee have reproduced this clause from the former Bill in accordance with what they understand to be the wishes of the Government. But the conditions should in their opinion be so modified as to relieve the Courts from fixing the portion to be released from attachment. To impose this duty on the Courts, would materially increase their work in a matter in regard to which they are not in a position to form the best opinion and would probably result in an undesirable lack of uniformity."

—Notes on Clauses.

*Compare this section with the latter part of clause (b), section 60.*

As to mode of attachment of agricultural produce, see Or. XXI, rr. 44 and 45. As to procedure for sale of such produce, see Or., XXI, rr. 74 and 75.—

62. (1) No person executing any process under this Code directing or authorizing seizure of moveable property shall enter any dwelling house after sunset and before sunrise.

Seizure of property in dwelling-house.

(2) No outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the person executing any such process has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe any such property to be.

(3) Where a room in a dwelling-house is in the actual occupancy of a woman who, according to the customs of the country, does not appear in public, the person executing the process shall give notice to such woman that she is at liberty to withdraw; and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal. [Sec. 271.]

### COMMENTARY.

**Alterations Made in the Section.**—This section corresponds with s. 271 of the C. P. Code, 1882, with some additions and alterations. In the old section there were only two paras. The first para. has been divided into two clauses. Clause (1) corresponds with the first part of the old section, and clause (2) corresponds with latter part of the old section with some additions. Clause (3) corresponds with the second para. of the old section with some change of words and phrases.

tor of the title of the judgment-debtor; the maxim "*caveat emptor*" applying.—*Dhondu v. Ramji*, 4 B. H. C. 114; *Krishnappa v. Panchapa*, 6 B. H. C. 258; *Jummāl Ali v. Tirbhce Lal*, 12 W. R. 41; *Sahabooddeen v. Ramguttty*, 9 W. R. 556. Therefore in the absence of fraud or misrepresentation on the part of the decree-holder a suit by the auction-purchaser for refund of his purchase money after reversal of the sale was held not maintainable, the principle of *caveat emptor* applying.—*Ram Narain v. Mahtab Bibee*, 2 A. 828.

Only the right, and interest of the judgment-debtor passes to the purchaser at a court-sale subject, however, to the condition that the purchaser may recover back his purchase-money when he finds that the judgment-debtor has no saleable interest at all. The implied warranty of title in respect of sales by private contract cannot be extended to court sales except so far as such extension is justified by the processual law in India, viz., by Or. XXI, r. 93:—*Sundara Gopalan v. Venkata Varada*, 17 M. 229; (3 C. 808, P. C. followed) Followed in *Sonaram v. Mohiram*, 28 C. 235 and in 5 B. L. R. 58 See also 23 A 335, p. 357

After the confirmation of a sale, the purchaser is entitled to a conveyance and until he obtains a conveyance, the property in the estate purchased does not, having regard to the High Court Rule 481, pass to him so as to give him rights as against parties not bound by the decree under which the sale took place.—*Johur Mull v. Taran Kisto*, 10 C. 252.

The purchaser takes the property subject to prior encumbrances attached to it. If after the purchase the encumbrances turn out to be invalid, the purchaser gets the benefit. After the purchase is completed, the vender has no claim to participate in any benefit which the purchaser may derive from his purchase; *Izzatunnisa v. Partab Singh*, 31 A. 583, P. C. 10 C. L. J. 313; 13 C. W. N 1143

#### Successive Purchasers at Sales in Execution of Money Decrees.—

Purchaser at successive execution sales—Purchaser at a second sale obtaining sale certificate and possession of property prior to grant of certificate to purchaser at first sale—*Held*, that the purchaser at the first sale was entitled to priority, as by his prior purchase he had obtained an equitable interest in the property, although he had not obtained a sale certificate.—*Yeshwant v. Govind Shankar*, 10 B. 453. See also *Chintamanrav v. Vithabai*, 11 B. 538.

Purchasers at successive sales—Sale to the second purchaser confirmed, before the confirmation of the sale to the first purchaser—Sale certificates issued to both on the same day, and the second purchaser was put in possession—The first purchaser then sued for possession of the property. *Held* that the first purchaser was entitled to recover. By his prior purchase he had acquired an equitable or inchoate title to the property which was subsequently perfected by the certificate of sale. Nothing therefore passed to the second purchaser. The words "title to the property sold" in this section, mean the full perfected title arising on the sale becoming absolute.—*Dagdu v. Pancham Sing*, 17 B. 375. Approved in *Chiddo v. Piari Lal*, 19 A 188; and distinguished in *Banke Lal v. Jagat Narain*, 22 A. 168. See also, *Ram Chunder v. Samir Gazi*, 20 C. 25, where the plaintiff and the defendant purchased the same tenure at successive sales in execution of two decrees, and the defendant's purchase being first in point of time, it was held that his title must prevail.

the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached. [285.]

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees. [New.]

## COMMENTARY.

**Alterations Made In the Section.**—Sub-section (1) of this section is similar to s. 285 of Act XIV of 1892. The words "*is under attachment*" have been substituted for the words "*has been attached*" which occurred in the old Code. Sub-section (2) is new.

**Object and Applicability of this Section.**—This section is merely a section for procedure, to prevent different claims arising out of the attachment and sale of the same property by different Courts. Its object is to prevent a confusion in the execution of decrees; *Ram Narain v. Mina Kocry* 25 C. 46. It is doubtful whether the section applies to immoveable property. The words "*where property not in the custody of any Court has been attached, etc.,*" seem to be more applicable to moveable than to immoveable property; *Obhoy Churn v. Golam Ali*, 7 C. 410 (413): 9 C. L. R. 361. But in 7 M. 47 it was held that the section applies both to moveable and immoveable property. This section is applicable only to cases of attachment and not to sales—*Chunni Lal v. Debi Prasad*, 3 A. 356.

**"Is under attachment."**—These words have been substituted for the words "*has been under attachment*" which occurred in the old Code, because under the old Code it was held that the provisions of the section were inapplicable where there were not two or more attachments existing at the same time.—*Stowell v. Ajudhianath*, 6 A. 255.

**"Decrees of more Courts than one."**—This section applies only as between Civil Courts of different grades or as between Revenue Courts of different grades. It has no application where one decree is that of a Civil Court and another that of a Revenue Court. Hence where the same property is attached both by a Civil Court and a Revenue Court and it is first sold by the Revenue Court, the purchaser will get a good title and it cannot be sold again in execution of the decree of the Civil Court; *Roshan Lal v. Muhammad*, 43 A. 612: 19 A. L. J. 643: 63 I. C. 919.

**Attachment by Two Courts of Different Grades—Validity of Sale by Court of Inferior Grade.**—The term "*grade*" in this section has reference to the "*the pecuniary or other limitations*" of the jurisdiction of the particular Court, and therefore, the Small Cause Court is inferior in grade to the Court of the first-class Subordinate Judge.—*Turmuk Lal v. Kalyan Das*, 19 B. 127. See *Patel Naranji v. Haridas*, 18 B 453. In *Ballu Ram v. Raghubar Dial*, 16 A 11, F. B., it has been held that in the N. W. Provinces, the Court of a Munsif must, for the purposes of this section be regarded as of a higher grade than a Court of a Small Causes.

Where the same property is under attachment by two Courts of different grades, a sale effected by the Court of the lower grade is not a nullity and a valid title, passes to the purchaser. This section is

Where a mortgaged property is sold in execution of a decree in a suit brought upon the mortgage, the interest of the mortgagee at whose instance the sale is made, is held to pass to the purchaser, and the mortgagee is estopped from disputing that such is the effect of the sale.—*Khewaj Jusrup v. Lingaya*, 5 B. 2. See also, *Sheshgiri Shanbhoy v. Salvador Vas*, 5 B. 5.

When the Court sells the right, title and the interest of a judgment-debtor in property, it cannot be regarded as selling more than the judgment-debtor himself could honestly sell. The Court cannot be deemed to do that which would be a fraud if done by the judgment-debtor.—*Sobhag Chand v. Bhai Chand*, 6 B. 193. See also, *Lakshman Das v. Dasari*, 6 B. 168; *Rup Chand v. Daulatraw*, 6 B. 495.

By a sale of mortgaged property in execution of a decree obtained by a mortgagee against the mortgagor upon the mortgage, the interests both of the mortgagor and mortgagee passes to the purchaser. But by a sale of mortgaged property in execution of a money-decree obtained by the mortgagee against the mortgagor, the interest of the mortgagor alone passes to the purchaser.—*Magan Lal v. Shakra*, 22 B. 945.

Same property was sold by Court at different times in execution of two mortgage-decrees obtained against such property. Held that the purchaser on prior sale in subsequent mortgage takes the entire interest of the judgment-debtor; *Kutti Chettiar v. Subramania*, 32 M. 485.

A purchaser at a Court-sale takes only what the judgment-debtor could himself honestly dispose of. Possession or registration is necessary to validate a mortgage in the Bombay Presidency (except Guzarat) against a private purchaser for valuable consideration, but not against a purchaser at a Court-Sale.—*Bapuji Balal v. Satya Bhamabai*, 6 B. 490; *Shivaram v. Genu*, 6 B. 515.

Where a judgment-creditor in execution of a money-decree sells property as belonging to his judgment-debtor, he is afterwards estopped from enforcing, as against the purchaser, a previous mortgage of the property which was created in his own favour, but of which he has given no notice at the time of the sale, and in ignorance of which the purchaser has bid for the property, and paid the full price. This principle applies even though the mortgage-deed has been registered.—*Agarchand Gumarchand v. Rakhma*, 12 B. 678.

Held, that although at a sale under a decree for sale by a mortgagee the right, title, and interest of the mortgagor which is sold is his right, title, and interest at the date of the mortgage, and any right, title, and interest he may have acquired between the date of mortgage and the sale, still any puisne incumbrancer or purchaser from the mortgagor, prior to the date of the mortgagee's decree, and who was not a party to the suit in which the mortgagee obtained his decree, would have the right to redeem the property which the mortgagor would have had but for the decree—*Gajadhar v. Mul Chand*, 10 A. 520 (9 A. 125 followed).

Where mortgagees executed their decree on the mortgage, and having obtained leave to bid at the judicial sale, purchased the property, held that they could not be held to have purchased as trustees for the mortgagors, the leave granted to bid having put an end to the disability of

**Procedure to be Adopted when Property is Attached by Order of Two Different Courts.**—Every holder of money-decree who attaches the property of the judgment-debtor is entitled to share equally with other decree-holders in the assets subsequently realized or received by Court. *Narsimha v. Krishnama*, 26 M. L. J. 406; 23 I. C. 909; *Ma Nyein Hla v. Maung Gyi*, 8 Bur. L. T. 201.

The duty of the superior Court under this section is to consider and determine the rights of the attaching creditors in all the cases to which that section applies, whether they have applied to the superior Court or not. There is nothing in that section which requires that before an attaching creditor can have his claim determined, he must obtain a transfer of his decree to the superior Court, and apply to that Court for execution.—*Clark v. Alexander*, 21 C. 200 (7 C. 553, and 12 C. 333 followed; 6 M. 357, and 16 B. 693 not followed). See also *Harbhagat v. Anandaram*, 2 C. W. N. 126. But see *Muttalagiri v. Muttayyar*, 6 M. 357 (7 C. 353, and 4 B. 472 approved).

All that the Court is competent to do under this section is to determine (1) any claim to property attached in execution of decrees of more Courts than one, and (2) any objection to attachment thereof. An application for rateable distribution cannot be deemed to be an application for determination of any claim to attached property or of any objection to the attachment thereof. The word "shall determine any claim thereto and objection to the attachment thereof" refer to claims of the sort which can be summarily enquired into and decided as provided by ss. 278-281 of the C. P. Code, 1882.—*Ramjus Agarwala v. Guru Churn*, 11 C. L. J. 69. 14 C. W. N. 396 (21 C. 200; 2 C. W. N. 126 distinguished).

**Sub-section (2).**—This sub-section is new, and has been added to set at rest the conflicting decisions of the several High Courts on the question whether the rule contained in s. 285 of the old Code [now s. 63 (1)] was a rule of procedure only or whether it affected jurisdiction. The High Courts of Calcutta, Bombay, and Madras held that the rule was only a rule of procedure and therefore the jurisdiction of the inferior Court was not ousted; *Bykant Nath v. Rajendro*, 12 C. 333; *Ram Narain v. Mina*, 25 C. 46; *Gopi Chand v. Kasimunnissa*, 34 C. 836; *Abdul Karim v. Thakordas*, 22 B. 88; *Turmuklal v. Kalyandas*, 19 B. 127; *Patel v. Haridas*, 18 B. 458; *Kunhayyan v. Ithukutti*, 22 M. 295. The High Court of Allahabad held, on the other hand, that the rule affected jurisdiction; in other words, it took away the jurisdiction of the inferior Court as regards the matters mentioned in the section; *Chiranjivi v. Jawahir*, 26 A. 538; *Harprasad v. Jaganlal*, 27 A. 56; *Durpati v. Ram Rai Pal*, 31 A. 527. Sub-section (2) has been enacted to give effect to the Calcutta, Bombay, and Madras decisions; *Gitis v. Srikrishna*, 38 C. L. J. 266; A. I. R. 1924 Cal. 168; *Srinivasachariar v. Apavoo*, 47 M. L. J. 720; A. I. R. 1924 Mad. 889.

**64.** Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

[S. 276.]

Private alienation of property after attachment to be void.

**Rights of Purchasers in Joint Property.**—The auction-purchaser of a share of one of several co-sharers takes only the share of the co-parcener whose interest is sold, and he cannot before partition insist on the possession of any particular portion of the undivided family estate, and he takes any such share subject to the prior charges or incumbrances affecting the family estate or that particular share.—*Udaram Sitaram v. Ram Pandu*, 11 Bom H. C. 76. See also, *Pandurang Anandra v. Bhaspar Shadashi*, 11 Bom H. C. 72.

Where the interest of one of several joint tenants in a family dwelling-house and in certain land let out on service tenure is sold in execution, the purchaser is entitled to joint possession of the dwelling-house with the other shareholders, and also to a right to share in the service rents.—*Rajani Kanth v. Ram Nath*, 10 C. 244. See also, *Eshan Chund v. Nund*, 8 W. R. 239.

In execution of decree against one of several joint-holders of a tenure when it is clear that what is sold is the interest of the judgment-debtor only, the sale must be confined to that interest. But if, however, it appears that the judgment-debtor has been sued as representing the ownership of the whole tenure, and that the sale, although purporting to be of the right, title, and interest of the judgment-debtor only, ought to operate as a sale of the tenure, the whole tenure must be considered as having passed by the sale.—*Jeo Lal Singh v. Gunga Pershad*, 10 C 996. Followed in *Nitayi Behari v. Hari Govinda*, 26 C 677; and referred to in *Radhakrishna Pershad v. Ramkhalawan Singh*, 23 C. 302.

**Mortgage of joint family property by managing member of a Mitakshara joint Hindu family for joint family purposes and legal necessity.**—Sale of the mortgaged property in execution of a decree against the managing member alone.—*Held* that the interest of the members who were not parties to the mortgage was unaffected by the sale.—*Abilak Roy v. Ram Roy*, 11 C. 293; *Armugam v. Sabapathi*, 5 M. 12; *Subramaniyayyan v. Subramaniyayyan*, 5 M. 125; *Sundar Lal v. Yakub Ali*, 6 A. 362; *Sathyanarayana v. Muthusami*, 12 M. 325.

If, in execution of a personal decree against the *Karnavan* of a *Mala* *bar tarwad*, the *tarwad* property is sold, the auction-purchaser obtains nothing and in such case the question whether the purchase has been made *bona fide* and for value is immaterial.—*Elayachanidathil Kombi v. Kenatum Kora*, 5 M. 201; and *Achuta v. Mammavu*, 10 M. 357 (p. 361). See also *Kunhappa Nambiar v. Shridevi*, 18 M. 451.

In a Mitakshara joint Hindu family, a son's interest may pass on the sale of ancestral property in execution of a money-decree against his father; but whether it does or does not pass will have to be determined by the circumstances of each case.—*Baso Koer v. Hurry Dass*, 9 C. 495; 12 C. L. R. 292; See, however, *Bhagwat Dass v. Gouri Kunwar*, 7 C. L. R. 218; and *Kagal Ganpaya v. Manjappa*, 12 B. 691.

Where in execution of a money-decree against the father alone, the joint family estate was attached and sold—*held*, that the sale was limited to the interest of the father alone, and that the purchaser acquired the right, title, and interest of the father alone.—*Subayyan v. Rupa Naqasami*, 8 M. 155, and *Umameswara v. Singaperumal*, 8 M. 376.

This section prevents transfer by judgment-debtor and not by a successful claimant after the date of the claim order and before institution of a suit under Or. XXI, r. 63; *Krishnappa v. Abdul Khader*, 26 M. L. J. 449: 25 I. C. 11.

When the right, title and interest of a Hindu son in a joint ancestral property has been attached in execution of a decree against him and its private alienation by him has been prohibited by an order of the Court under this section, his father is deprived of the power of alienation of that interest in satisfaction of his own debts. *Subraya v. Nagappa*, 33 B. 264.

"Or of any interest therein."—The transfer of an easement is an alienation within the meaning of this section; *Kristodhone v. Nandarani*, 35 C. 889: 12 C. W. N. 969

**What does not Amount to Private Transfer Within the Meaning of This Section.**—A renewal of mortgage already existing on the property prior to attachment which does not enhance the charge is not an alienation within the meaning of this section.—*Mahadevappa v. Srinivasa Rau*, 4 M. 417.

An arbitration award, directed transfer of certain property by way of sale. Between the date of the award and of the decree in accordance therewith, such property was attached in execution of a decree against the party who was directed by the award to make the transfer. After the attachment a conveyance was executed in compliance with the decree made in accordance with the award. *Held* that such conveyance was not a "private alienation" within the meaning of s. 64 and was therefore, not void.—*Quartan Ali v. Ashraf Ali*, 4 A. 219; *Kashi Vishvanathan v. Ramaswami*, 35 M. L. J. 441; *Narayana v. Biyari Bibi*, 41 M. L. J. 557.

A bequest by a Mahomedan to a stranger of more than one-third share of his property with the consent of his heirs. *Held* that such consent, though given after the property bequeathed has been attached in execution of a decree against the testator's heirs, is good, and does not amount to an alienation such as is prohibited by this section.—*Daulatram v. Abdul Kayum*, 26 B. 497.

The title obtained by the purchaser on a private sale of property in satisfaction of a decree differs from that acquired upon a sale in execution. Under a private sale, the purchaser derives his title through the vendor, but under an execution sale he derives his title by operation of law and adversely to the judgment-debtor, and free from all alienations and incumbrances effected by him, after the attachment of the property sold. *Dinendra Nath v. Ram Kumar*, 7 C. 107, P. C

**Effect of Alienation During Attachment.**—Under this section no private alienation made by a judgment-debtor after the attachment of property can be valid; but this section does not apply to a transfer by operation of law. *Ghulam Husain v. Dinanath*, 23 A. 467, p. 470; see *Mg. Hyin v. Mg. Pe Ukin*, 26 I. A. 264, 8 Bur L T 14

Where a mortgagor in order to pay off a previous mortgage-decree executes a mortgage free from incumbrances in favour of a third party, and after paying off the mortgage-decree with the fresh loan, makes over the old mortgage-deed to the new mortgagee, the old mortgage



not the life-interest. The subsequent reversal of the previously accepted interpretation of the law cannot have retrospective effect.—*Abdul Aziz v. Appayasami Naicker*, 27 M. 181, P. C.: 8 C. W. N. 186, P. C. (10 A. 272 P. C., and 22 M. 383, P. C., followed).

**Effect of Reversal of Decree upon Sale where Decree Reversed After Confirmation of Sale.**—A sale to a *bona fide* purchaser in execution of a decree is not liable to be set aside if the decree was afterwards reversed on appeal. There is a great distinction between decree-holders who come in and purchase under their own decree, which is afterwards reversed or modified, and *bona fide* purchasers who come in and buy at a sale in execution of the decree to which they are no parties, and at a time when that decree is a valid and subsisting decree and when the order for sale was a valid order. A *bona fide* purchaser, who is a stranger to the decree, does not lose his title to the property by the subsequent reversal of the decree; but where the decree-holder himself is the purchaser, the sale may be set aside if the decree is subsequently reversed; *Zain-ul-Abdin v. Mahammad Ashgar Ali*, 10 A. 166; 15 I. A. 12; *Mukhoda v. Gopal*, 26 C. 734; *Set Umed Mal v. Raja Srinath*, 27 C. 810; 4 C. W. N. 692; *Paresh v. Hari Charan*, 38 C. 622; *Shivbai v. Yesso*, 43 B. 235; *Piari Lal v. Hanifunnissa*, 38 A. 240; *Chintaman v. Chunisahu*, 1 Pat. L. J. 43; 34 I. C. 747; *Chinna Vamanan v. Chettiappa*, A. I. R. 1926 Mad. 78. But where property sold in execution of a decree is bought by the decree-holder and it is subsequently resold by him to a *bona fide* purchaser for value, such purchaser acquires a good title, though the decree may be subsequently reversed; *Sheik Ismail v. Rajab*, 30 M. 295; *Marimuthu v. Subbaraya*, 13 M. L. J. 23.

The modification or reversal of a decree in appeal does not affect the title of a *bona fide* purchaser at a sale in execution of that decree in the absence of fraud, and collusion.—*Shivlal v. Shambhu Prasad*, 29 B. 435; 7 Bom. L. R. 585, F. B. (10 A 166, referred to).

Where a sale in execution of decree has taken place pending an appeal, and the decree has subsequently been reversed, the Court executing the decree cannot, after such reversal, grant confirmation of the sale.—*Mulchand v. Mukta Prasad*, 10 A. 83. See also, *Basappa v. Dundaya*, 2 B. 540, where it has been further held that if a decree be reversed after the sale under it has become absolute, and certificate has been granted to the purchaser, the title of the purchaser is not affected by the sale.

The title of an auction-purchaser at a sale held in execution of a decree does not become absolute if the decree under which the sale took place is reversed at any time before a certificate of sale is granted to the purchaser.—*Ram Sukh v. Ram Sahai*, 29 A. 591; 4 A. L. J. 486; A. W. N. (1907) 198.

In execution of a decree, certain property was sold in pursuance of an order under s. 244, C. P. Code, 1882 (s. 47) and purchased by a person not party to the suit. That order was subsequently set aside. In a suit by the judgment-debtor for possession of the property from the auction-purchaser by setting aside the sale. Held, that the order directing the sale had the force of a decree, and the plaintiff is not entitled to the relief claimed.—*Murari Singh v. Prayag Singh*, 11 C. 362. See also *Ganesh Pershad v. Fazul Emam*, 23 C. 857.

satisfied by payment into Court, and there being no claim outstanding which is enforceable under the attachment; *Umesh v. Raj Bullub*, 8 C. 279, *Anundlal v. Julladhur*, 14 M. I. A. 543, *Abdul Rashid v. Gappotal*, 20 A. 421; *Khusal Chand v. Nand Ram*, 35 B. 516.

Where a judgment-debtor's property is attached by one decree-holder in execution of his decree and after such attachment other decree-holders apply for rateable distribution of sale-proceeds without attaching the property in execution of their decrees and subsequently the judgment-debtor privately sells the property to a third person and pays off the attaching decree-holder, the decree-holders cannot question the validity of the sale. The alienation cannot in such a case be said to be an alienation contrary to the attachment because the decree in execution of which the attachment was made was satisfied by such alienation; *Annamalai v. Palamalai*, 41 M. 265, (276): 43 I. C. 539 F. B.

An alienation of attached property made for the *bona fide* purpose of satisfying the decree in respect of which the attachment has been made and where the consideration for the alienation is applied to the satisfaction of the decree, is not void.—*Purmeshur Rai v. Hidayatoolah*, 1 N. W. P. 60; Ed. (1873), 144. See also, *Ramdhan Mitter v. Kailash Nath*, 4 B. L. R. 20; 12 W. R. 457.

A decree-holder though entitled to rateable distribution of sale-proceeds under the explanation to s. 64, is not entitled to question a private alienation unless his claim is one "enforceable under attachment" within the meaning of this section. A claim under any attachment other than the attachment under which the execution sale is made is not a "claim enforceable under the attachment" within the meaning of this section. If a judgment-debtor's property is attached by a certain decree-holder in execution of his decree and subsequently to such attachment, the judgment-debtor sells his property to A and thereafter the property is attached and sold by auction by another creditor of the judgment-debtor in execution of his decree and purchased by B and A sues B for possession. In such a case A's title to the property is better than B's title and he is entitled to possession of the property. The attaching decree-holder is not entitled to question the alienation to A because the sale in execution did not take place under his attachment and his claim therefore cannot be said to be a "claim enforceable under the attachment"; *Mina Kumari v. Bejoy Singh*, 44 I. A. 72: 44 C. 662.

Where a mortgage-debt was attached, but no copy of the attachment order was affixed in the Court-house as required by Or. XXI, r. 46, held that the assignment of the mortgage-debt, four days after such attachment was not invalid, as the attachment was ineffectual.—*Satya Charan v. Madhub Chunder*, 9 C. W. N. 693.

A private alienation of attached property between its release under Or. XXI, r. 61 and subsequent decree declaring the property liable to be sold under the attaching creditor's attachment is void as against the attaching creditor.—*Bonomali Rai v. Prosonna Naram*, 23 C. 329.

**Purchaser's Rights, When Transfer Voidable.**—Purchase made during pendency of an attachment is void and the purchaser has not even a lien on the property to the extent of the purchase money; *Ram Khelwan v. Sundor Raut*, 34 I. C. 34.

ground that the execution of the decree is barred by the provisions of s. 230, C. P. Code, 1882 (Or. XXI, rr. 10, 21; s. 48).—*Gangathara v. Rathabai*, 6 M. 237.

Where a decree under which a sale took place remains unreversed, and the sale under it has been confirmed, a sale certificate will operate as a valid transfer of the property sold, notwithstanding that the sale had actually taken place at the time when execution of the decree is barred by limitation.—*Sarada Churn v. Mahomed Isuf*, 11 C. 376. See, *Mohamed Hossein v. Kokil Singh*, 7 C. 91; 9 C. L. R. 53. See also, *Doyamoy v. Sarat Chunder*, 25 C 175; 1 C. W. N. 656.

After confirmation of sale and grant of sale certificate to the purchaser, the decree under which the sale took place was declared barred by limitation. Held, that the judgment-debtor was entitled to have the sale set aside by a regular suit and to recover the property sold in execution.—*Mina Kumari v. Jagat Sattani*, 10 C. 220. In *Set Umed Mal v. Srinath Roy*, 27 C. 810; 4 C. W. N. 693, it has been held that where the decree-holder is himself the auction-purchaser, the sale cannot stand if the decree be subsequently set aside. See also, *Golam Asgar v. Lakimani*, 5 B. L. R. 68; 13 W. R. 273.

Where property has been released from attachment under s. 280, C. P. Code, 1882 (Or. XXI, r. 60), and subsequently declared liable to attachment by a decree against which an appeal is pending, a sale of such property before the final result of the appeal is not illegal.—*Fathula v. Muniyappa*, 6 M. 98.

Where a revenue sale was set aside in suit brought by one of the defaulters and the decree setting aside the sale was not executed within six months as provided by Section 34 of Act XI of 1859, held, in a suit brought by the auction-purchaser to recover possession of the share he had bought at the sale, that the purchaser must succeed, and he must be restored to his previous position.—*Abdul Latif v. Yusuff*, 21 C. 255.

**What Passes by Execution Sale—Rights of Purchasers.**—Nothing passes to the auction-purchaser at a sale in execution of a decree, but the right, title, and interest of the judgment-debtor at the time of the sale.—*Akhe Ray v. Nand Kishore*, 1 A. 236; *Khub Chand v. Kalian Das*, 1 A. 240; *Barton v. Brij Nath*, 3 W. R. 65; *Ram Onoogroho v. Montorun*, 6 W. R. 223; *Kushaba Bin v. Pitambar Dhari*, 12 Bom. H. C. 15; *Mahomed Buksh v. Mahomed Hussain*, 3 Agra 171, *Baluk Das v. Nimaye Chunder*, 17 W. R. 511.

The auction-purchaser of the right or interest which the vendor of the immoveable property has in the purchase-money, where it has been agreed that the same shall be paid on the execution of the conveyance, takes nothing by his purchase, such interest not being subject to attachment and sale under s. 266, C. P. Code, 1882 (s. 60).—*Ahmaduddin v. Majlis Raf*, 3 A. 12.

In execution of a decree obtained by a co-sharer landlord for arrears of rent under Act VII of 1869, B. C. against a Hindu daughter for arrears accruing after her father's death, an under-tenure was sold. Held, that only the limited interest which she took as her father's daughter and not an absolute interest in the estate passed by the sale.—*Jiban Krishna v.*

subsequent alienation, it must be shown that the attachment order was duly made and notified in the manner prescribed by law.—*Dwarka Nath v. Ram Chandra*, 18 W. R. 186; and *Sahoo Chand v. Geetum Singh*, 9 Agra 206; *Simrik Lal v. Radharaman*, 39 I. C. 857; *Bhaswan Das v. Ahmed Jan*, 3 O. L. J. 422; *Bishambhar v. Girdhari*, 23 O. C. 18: 7 O. L. J. 1.

An attachment operates as a valid prohibition against the alienation of the attached property only from the date on which the necessary proclamation is made under Or. XXI, r. 54 (2) of the C. P. Code; *Sinnapan v. Arunachalam*, 42 M. 844 (F. B.); 37 M. L. J. 375; *Yuna Ramanaya v. Boya Peddabasappa*, 42 M. 665: 36 M. L. J. 284.

Private alienation after an attachment which was not in accordance with the provisions of this section and in which there were irregularities, is not null and void.—*Nur Ahmed v. Altaf Ali*, 2 A. 58. See *Lalje v. Ganga Prasad*, 26 I. C. 204. See, however, *Ramasami v. Srinivasa*, 28 M. L. J. 338.

Where there was a material misdescription of the property in the order of attachment, held that such misdescription in the order of attachment protected the *bona fide* purchaser from having the private alienation set aside as void under s. 64.—*Gumani v. Hardwar Pandey*, 3 A. 698. See also *Hargu Lal v. Muhammad Raza*, 12 A. 119.

An objection that an attachment was invalid because the formalities prescribed by the law have not been complied with, cannot be allowed to be taken for the first time in appeal. The *onus* of proving non-observance of the formalities lies on the person who wishes to invalidate the attachment.—*Ram Krishna v. Surfannissa Begum*, 6 C. 129, P. C.

**Attachment When Effective.**—An order of attachment of property under the C. P. Code takes effect only from the date of its actual promulgation under Or. XXI, r. 54 and not from the date of the Court's order; *Simrick Lal v. Radharaman*, 32 I. C. 276.

**Presumption of Abandonment of Attachment.**—By the dismissal of an execution case for want of prosecution, the attachment does not necessarily fall through, nor raises a presumption of abandonment of attachment.—*Govinda Chandra v. Dwarka Nath*, 33 C 666: 3 C L. J. 93-note. See also *Srinivasa Sastrial v. Sami Rau*, 17 M. 180

It does not follow because subsequent applications for attachment were made by a decree-holder that the original one is abandoned.—*Dhiraj Mahatabchand v. Surnomoyee*, 12 B. L. R. 414-note; 15 W. R. 222.

An attachment, which had, at one time, prohibited alienation of the property, and on which the plaintiffs relied as having rendered the mortgage invalid, was held under the circumstances to have been no longer in operation at the time when the mortgage was executed.—*Mahomed Hossein v. Kishori Mohan*, 22 C. 909 P. C.

A re-attachment of property after decree does not imply an abandonment of attachment before decree.—*Ram Krishna v. Surfunnissa Begum*, 6 C. 129, P. C; *Kosuri v. Mandapaka*, 26 I. C. 81.

When application is made for attachment of property which has been previously attached, it lies upon the decree-holder or his assignee, to show that the first attachment is subsisting, failing which a Court may presume

and interest of the persons named as judgment-debtor passes; *Musst. Raja Koer v. Gunga Singh*, 10 C. L. J. 201: 13 C. W. N. 750; see also *Nand Kumar v. Ajodhaya*, 14 C. L. J. 292: 16 C. W. N. 351.

**Rights of Purchasers Pendente Lite.**—Whatever doubts may have at one time been entertained as to whether a purchaser at an execution sale is bound by the doctrine of *lis pendens* (see 8 C. 690), they have been completely set at rest by the repeated decisions of the Privy Council since that case, affirming the proposition that he is bound; see, *Radhmadhub v. Monohur*, 15 C. 756 P. C.; *Faiyaz Husain v. Munshi Prag Narain*, 29 A. 389 P. C.: 11 C. W. N. 561: 5 C. L. J. 563; *Mati Lal v. Preo Nath*, 9 C. L. J. 96: 13 C. W. N. 226; *Moharaj Bahadur v. Surendra Narain*, 19 C. W. N. 152, where it has been held that the doctrine of *lis pendens* rests on the principle that the law does not allow litigant parties to give to others pending the litigation rights over the property in dispute so as to prejudice the opposite party. See also *Shivlal v. Shambhu*, 29 B. 435, 7 Bom. L. R. 585. See *Gobind v. Guru Churn*, 15 C. 94, *Deno Nath v. Shama Bibee*, 4 C. W. N. 740: 28 C. 23; *Kishori Mohun v. Mahomed Mujaffar*, 18 C. 188; *Moti Lal v. Karbuddin*, 25 C. 179 P. C. (p. 185); *Shibjiram v. Waman*, 22 B. 939; *Samol v. Babaji*, 28 B. 361; *Jharoo v. Raj Chunder*, 12 C. 299; *Shyama Churn v. Ananda Chandra*, 3 C. W. N. 323; *Sukhdeo Prasad v. Jamna*, 23 A. 60; *Byramji v. Chuni Lal*, 27 B. 266; and *Har Pershad v. Dal Mordan*, 9 C. W. N. 728; in all these cases it has been held that a purchaser at execution sale is bound by a *lis pendens*, for it would be impossible that any action or suit could be brought to a successful termination if alienation *pendente lite* were permitted to prevail.

A purchaser at a revenue sale is a voluntary purchaser and as such is affected by the doctrine of *lis pendens* and is not an assignee *in invitum* like the official assignee, who is not affected by the doctrine.—*Kadir Mohideen v. Muthu Krishna*, 26 M. 230, p. 236.

The doctrine of *lis pendens* applies to a case where a person purchases, at an auction held under section 13 and 54 of Act XI of 1859, a share of an estate sold for its arrears of revenue, and at the time of such purchase a suit to enforce an existing mortgage on the property was pending.—*Hara Sankar v. Shew Gobind*, 26 C. 966: 4 C. W. N. 317. See also 10 C. L. J. 540.

Where a creditor obtains a decree against his debtor, and in execution puts up for sale, and himself becomes the purchaser of certain property of his debtor, which is already under mortgage to another, and such other has previous to the decree and sale, commenced a suit on his mortgage bond (although such suit has not proceeded to a decree), such judgment-creditor, purchasing *pendente lite*, only obtains the right and interest of the mortgagee in such property, viz, the equity of redemption and does not acquire the property free from the incumbrance created by the debtor.—*Lala Kali Prasad v. Bali Singh*, 4 C. 789: 3 C. L. R. 398.

In the case of a mortgage suit, the *lis* continues after the decree *nil* and the doctrine of *lis pendens* is applicable to proceedings to realize the mortgage after the decree for sale.—*Surjiram v. Barhamdeo*, 2 C. L. J. 288. See also *Bhowani Koer v. Mathura*, 7 C. L. J. 1. See also 10 C. L. J. 590: 9 C. L. J. 485.

application for execution owing to the decree-holder's default, it shall either dismiss the application or adjourn the proceedings to a future date for sufficient reason; upon the dismissal of such application, the attachment shall cease.

The dismissal of an application for execution for want of further prosecution does not necessarily put an end to the attachment.—*Rangasami Chetti v. Peria Sami Mudali*, 7 M. 58. See also *Gobinda Chandra v. Dwarka Nath*, 83 C. 666; 8 C. L. J. 93-n.; *Syed Muhammad Amirul Hasan v. Mussammatt Wazir Bibi*, (1918) Pat. 353.

Applications to determine mesne-profits are applications for execution and the striking off of such cases does not prevent the decree-holder from making a further application. There is no distinction between striking off and dismissing an application for default.—*Upendra Chandra v. Sakhi Chand*, 7 C. L. J. 301.

Where an attachment ceases to exist consequent on the dismissal of an execution application for default, a mortgage which was made pending such attachment cannot be impeached by the attaching creditor when he attaches the property on a fresh execution application; *Bhagwanlal v. Rajendra*, 4 Pat. L. T. 409.

**Effect of Attachment Before Judgment.**—The effect of attachment of a property under the Civil Procedure Code, whether made before or after decree is the same, provided that in the former case a decree is made for the plaintiff at whose instance the attachment takes place. Any private alienation of a property attached before judgment is void as against all claims enforceable under the attachment.—*Ganu Singh v. Jangi Lal*, 26 C. 531. The fact that the property was not actually attached until after the passing of the decree, does not make any difference, *Venkata Subbiah v. Venkata Seshaya*, 42 M. 1: 48 I. C. 232. See, however, *Bansiam v. Kattayani*, 38 C. 448 15 C. W. N. 795, where it has been held that an attachment before judgment does not for all purposes stand on the same footing as an attachment in execution proceedings; see also, *Subio Mangesh v. Mahadevi*, 38 B. 105 and *Bisheshwar Das v. Ambika*, 37 A. 575.

When the attachment before judgment is *ultra vires* and has been passed without complying with the formalities prescribed by Or. XXXVIII, r. 5, C. P. Code, the alienation is not void; *Bansilal v. Sitaram*, A. I. R. 1922 Nag. 238 68 I. C. 188.

See notes and cases noted under Or. XXXVIII, r. 5

**Effect of Vesting Order on Attachment.**—Where vesting order has been made after attachment and before decree, the title of the Official Assignee takes effect and prevents the attaching creditor from obtaining satisfaction of his decree; *Sadayappa v. Ponnama*, 8 M. 554; see also *Shib Kristo v. Miller*, 10 C. 150; *Turner v. Pestoni*, 20 B. 403, *Peacock v. Madan Gopal*, 29 C. 42s, F. B. 6 C. W. N. 577 (28 C. 419: 5 C. W. N. 761 overruled); *Krishnaswamy v. official Assignee*, 26 M. 673; *Jitmand v. Ramanand*, 29 B. 405; *Shrishand v. Murari Lal*, 34 A. 628; *Raghunath v. Sundardas*, 41 I. C. 251 42 C. 72; *Muhammad Sharif v. Radha Mohan*, 41 A. 274: 57 I. C. 760.

principles laid down in *Kanizak Sukhina v. Monohur Das*, 12 C. 204, *Subha Bibi v. Hara Lal*, 21 C. 519 and *Uncovenanted Service Bank v. Abdul Bari*, 18 A. 461. In these cases it has been held that s. 317, C. P. Code, 1822 (s. 65) contemplates a case between the certified purchaser and the beneficial owner and not a suit by a creditor of such person in which the creditor seeks to establish that the purchase was in reality made by his debtor and that the certified purchaser is only a *benamidar* of the debtor. There cannot be any doubt that if a creditor of a real owner of a property brings a suit for a declaration that it belongs to his debtor and not to the certified *benami* purchaser, it would not be precluded by this section. The section is intended to prevent and not to promote fraud.

**Object and Scope of the Section.**—The object of this section is to check *benami* purchases at execution sales and not to declare *benami* transactions illegal or void. It was enacted against what are known as *benami* purchases at execution sales, that is, purchases made secretly by one person for another, the ostensible purchaser having no interest in the purchase wishing for some reason that his name should not appear. The section is intended to meet only this kind of transaction and to put an end to them by rendering impossible a suit by a real purchaser against the ostensible purchaser. This section applies only when a suit is brought by a person claiming to be the real and beneficial purchaser as plaintiff against the certified purchaser or his representative as defendant on the allegation that the auction-purchase was in fact made on his behalf. It does not bar a suit brought by a certified purchaser or his representative as plaintiff, for a declaration that the auction-purchase was made on his behalf and not on behalf of anybody else and that he is the real and beneficial owner of the property purchased. Thus, this section contemplates a suit between the beneficial owner as plaintiff, against the certified purchaser or his representative as defendant. Nor does it debar a person in possession of property purchased at execution sale, when sued by the certified purchaser from setting up as a defence to the suit that the certified purchaser is only a *benamidar* on his behalf. The section does not bar a suit by a third party as plaintiff against the certified purchaser as defendant for a declaration that the ostensible purchaser of the property was merely *benamidar* for the judgment-debtor, who was the real owner and for whose debt the property is liable to be sold to satisfy his debt.

It should however be noted here, that the section has application only to real transactions. It contemplates a real sale, in execution of a real decree in a real suit. It does not apply to a case of a fictitious sale, held in execution of a fictitious decree obtained in a fictitious suit; see *Akhil Prodhan v. Monmothath*, 18 C. L. J. 616. 18 C. W. N. 1313. This section is intended to prevent its being set up in Court that a purchase at auction sale was *benami* for the plaintiff except in the three classes of cases mentioned in sub-section 2. Each of the three cases refers to a case where the plaintiff has not been a party to any fraud but wishes to get rid of the effect by an admitted fraud against himself by the certified purchaser with or without the cognizance of the real owner or purchaser as the case may be, *Sourcar Kumadeen v. Noor Mahamad*, 28 M. L. J. 351. 17 M. L. T. 158.

S. 66 can only apply where the plaintiff's claim is based on an auction purchase but not where it is dependent and prior to the sale; *Ram Khelawan v. Asgar Ali*, 36 I. C. 681.

**Title of Purchaser, When Accrues.**—The title of an auction-purchaser at a sale held in execution of a decree does not become absolute if the decree under which the sale took place is reversed at any time before a certificate of sale is granted to the purchaser.—*Ram Sukh v. Ram Sahai*, 29 A. 591; 4 A. L. J. 486; A. W. N. (1907) 198.

The title to the property sold vests in the purchaser at a Court-sale on the date on which the sale is confirmed —*Ramasami v. Annudoria*, 25 M. 454.

His title becomes complete upon payment of the purchase-money and confirmation of sale.—*Naigar Timapa v. Bhaskar Parmaya*, 10 B. 444. See also *Muzaffar Husain v. Ali Husain*, 5 A. 297.

Title does not pass to the purchaser until the sale is confirmed and until confirmation, it is open to the judgment-debtor to transfer his interest, so as to entitle the transferee to apply under Or. XXI, r. 89.—*Appaya Chetti v. Kanhali*, 30 M. 214; 17 M. L. J. 127; *Sirajuddin v. Mumtazunnissa*, 2 I. C. 81.

An auction-purchaser has a good equitable or inchoate title to the property sold and when the sale certificate is actually granted, it makes the title absolute, and makes that title relate back to the date of the sale.—*Adhur Chunder v. Aghore Nath*, 2 C. W. N. 589.

In a suit instituted by the landlord against the auction-purchaser for arrears of rent, held that the auction-purchaser was liable for the whole instalment of rent accrued due after his purchase, but before the confirmation of sale, notwithstanding that his title was not perfected till the latter date.—*Satyendra Nath v. Nil Kantha*, 21 C. 383.

Where a purchase is made at a sale in execution of decree, it is complete for purpose of limitation at the date of the purchase and not at the date of its confirmation.—*Ahmed Kutti v. Raman Nambudie*, 25 M. 99.

On application for possession by auction-purchaser, held that the right to apply for possession contemplated, accrued on the date the certificate of sale was issued, and not on that date on which the sale was confirmed, and that the period of limitation against the purchaser counted from the former date.—*Basapa v. Marya*, 3 B. 433.

An auction purchaser's title cannot be defeated by any transfer made by the judgment-debtor between the date of the sale and the date of its confirmation; *Ramsaran v. Khakran*, 15 C. W. N. 312

**Liability of Auction-purchaser for Rent and Revenue.**—Under s. 65 of the C. P. Code, the property purchased vests in the auction-purchaser from the date of the sale; and therefore, he is liable for arrears of rent in respect of the tenure which become due between the date of the sale and its confirmation; *Bejoy Chand v. Shashi Bhusan*, 18 C. W. N. 136. See also *Hasan Ali v. Minjan*, 38 A. 45; 7 A. L. J. 893; *Shiam Lal v. Nathe Lal*, 33 A. 63; *Bhawani Kumar v. Mathura Prosad*, 16 C. L. J. 606, P. C. 16 C. W. N. 985; 23 M. L. J. 311; 14 Bom. L. R. 1046. See however, 2 C. 141; 15 C. 546; 7 C. L. J. 1; 24 A. 475; 33 A. 63, which were decided under the old Act and are no longer the law

**Title of Purchasers Generally.**—In a sale of immoveable property in execution of a decree, there is no implied warranty by the execution



Where a purchaser at a sale in execution was named in the sale certificate as "mother and guardian of her infant son," the title to the property was held to be vested in the minor absolutely.—*Hemanginee v. Jogendro*, 12 W. R. 236.

**Certified Purchaser Includes his Representatives.**—Under the old Code it was held that the statutory protection afforded to a certified purchaser does not extend to a person claiming through or under him (see 26 C. 950: 3 C. W. N. 657; 21 A. 193; 10 B. L. R. 159 P. C.; 18 W. R. 157; 14 M. I. A. 496; 2 C. W. N. 433; 21 M. 7; 5 C. W. N. 341; 3 C. W. N. 657). But by the addition of the words "any person claiming a title under a purchase certified by the Court," in the present section, it now extends to a person claiming through or under him. This alteration has been made in accordance with the case of *Hari Govind v. Ram Chandra*, 31 B. 61: 8 B. L. R. 873, in which (following 8 M. 511) it was held that the word "certified purchaser" includes the person standing in the shoes of the Court purchaser, see also, *Manji Karimbhai v. Hoorbai*, 35 B. 342 (347): 12 Bom. L. R. 1044, *Gaya Prasad v. Lareti Kuar*, 12 A. L. J. 1145: 25 I. C. 821; *Laxman v. Govind*, 16 N. L. R. 87; *Ashfaq Husani v. Syed Nazi Husain*, 22 O. C. 222; *Assad Ali v. Bujrus*, 29 I. C. 716. The present section is a legislative recognition of the correctness of the above Bombay case. The above alteration in the present section has rendered the cases decided under the old Code, above referred to obsolete and inoperative in so far as they decided contrary with regard to the meaning of the words "claiming title under a purchase," in sub-section (1).

S. 66 is applicable to the cases of persons claiming title under certified purchasers and not the real ones; *Easin v. Ebejennessa Bibi*, 24 C. W. N. 659.

The essential difference in the drafting of s. 66 of the present Code as compared with the wording of s. 317 of the Code of 1882 shows that the legislature did not approve of the narrow construction given to s. 317 by decisions of which 21 A. 193 is an example. S. 66 intended to make it clear that the legislature, disapproving of benami transactions meant to prevent actions against certified purchasers and their transferees; *Abdul Jahl v. Obedullah*, 43 A. 416.

Plaintiff, owner of certain property, purchased it in the name of defendant No. 1 in execution of a decree against himself obtained by defendant No. 3. Defendant No. 1 sold the property to defendant No. 2. The plaintiff brought a suit for declaration of title and confirmation. Held that it was open to defendant No. 2, transferee from the certified purchaser, to plead in defence the bar created by this section; *Nisakar Das v. Bairagi*, 19 C. L. J. 330 (26 C. 920, 3 C. W. N. 657, 21 M. 7, 21 A. 196 followed: 31 B. 61 dissented from; 33 C. 967 referred to).

**S. 66 Not Retrospective—Title of Purchaser under Old Code Not Affected by New Code.**—S. 66 does not apply to an execution purchaser whose title was perfected when s. 317 C. P. Code (1882) was in force. In a suit where the sale took place and was confirmed before 1st January 1909 but the sale certificate was issued later, held that the provisions of s. 317 and not of s. 66 applied; *Promotha Nath v. Mohini Mohan*, 24 C. W. N. 1011; *Promode Kumar v. Madan Mohan*, 27 C. W. N. 305.

**Effect of Waiver by Certified Purchaser of his Right to Possession.**—S. 66 applies to suits for declarations also and even where defendant has

A sale in execution at the instance of an assignee of rent-decree when the landlord's interest in the property itself was not transferred to the assignee, passed no title to the auction-purchaser under cl. (h), s. 148 of the B. T. Act. A purchaser of the same property in execution of a mortgage-decree obtained after the first sale, acquired a good title as against the first purchaser.—*Guru Charan v. Kartick Nath*, 10 C. W. N. 44 (1 C. W. N. 694; 26 C. 176 referred to).

**Rights of Purchasers under Mortgage Decree.**—There are substantial differences between a sale in execution of a money-decree and a sale under a mortgage-decree. In the former case, the Court proposes to sell whatever interest in the property would, under any circumstances, be available to the creditors at the date of the attachment; in the latter case, whatever interest the mortgagor was, under any circumstances, competent to create and did create at the time of the mortgage.—*Ponnappa Pillai v. Pappu Vayyanganar*, 4 M. I.

At a sale in execution of a mortgage-decree, the intention of the Court is to pass to the purchaser the right, title and interest, both of the mortgagor and the mortgagee, as it stood when he made the mortgage, and not merely as it stood at the time of Court-sale.—*Abdulla Saiba v. Abdulla*, 5 B 8 See also *Shringapure v. Pethe*, 2 B. 602.

Certain immoveable property was sold on the same day in the execution of two decrees, one of which enforced a charge upon such property created in 1864, and the other a charge of 1867. Held that the purchaser of such property at the sale in execution of the decree which enforced the earlier charge, was entitled to the possession of the property in preference to the purchaser of it at the sale in execution of the decree which enforced the later charge.—*Janki Das v. Badri Nath*, 2 A. 698 (25 W R 254 distinguished)

**Sale under a mortgage made for the purpose of paying Government revenue.**—Prior sale for the express purpose of paying the debts of the judgment-debtor. Held that the purchaser under the mortgage which was made for the purpose of paying the Government revenue was to be preferred to that of the purchaser under the prior sale.—*Kassimunnissa v. Nitratan*, 8 C. 79, P. C.: 9 C. L R 173; 10 C L R 118 (4 C 897 followed)

A purchaser under a sham mortgage-decree is not to be preferred to a subsequent *bona fide* purchaser for value under a money-decree.—*Gopi Wasudev v. Markande*, 3 B. 30

A purchaser under a registered sale-deed is entitled to priority over a purchaser in execution of a subsequent decree obtained by a prior mortgagee under an unregistered deed.—*Ishan Chandra v. Gonesh Chandra*, 28 C. 103 (7 A 888 dissented from)

A creditor, having one money-decree and another mortgage-decree against the same debtor, caused the debtor's property to be sold in execution of the money-decree and a third person became a purchaser. Subsequently in execution of the mortgage-decree, the property was advertised for sale, but, on the auction-purchaser objecting, the judgment-creditor brought a suit to enforce his lien on the property. Held, that the purchaser under the money-decree will have preference unless his purchase was with the notice of the lien.—*Nursing Narain v. Roghoobur Singh*, 10 C. 609.

the defendants had, at his request, purchased the said property in their own names and obtained a sale-certificate. He further alleged that the purchase-money had been paid by him, and that he had all along remained in possession of the property, and he asked for a declaration that he was the real purchaser and in proprietary possession of the property in suit. *Held*, that the suit was barred by s. 317, C. P. Code, 1882 (s. 66).—*Bishan Dial v. Ghaziuddin*, 23 A. 175. Approved and followed in *Hanuman Pershad v. Judunadan*, 43 C. 20: 20 C. W. N. 147. But see *Ghaziuddin v. Bishan Dial*, 27, A. 448. 2 A. L. J. 111: A. W. N. (1905) 39.

**Benami Purchases.**—For a suit to be barred by s. 66 of the C. P. Code, the plaintiff must be one who claims to be a beneficial owner or his representative and the defendant must be the certified purchaser or some one claiming through him—The section has to be construed strictly and not extended beyond its express terms; *Abdul Hamid v. Mohamed Sharif*, 2 Lah. L. J. 353.

A suit against a benamidar purchaser at a Court auction sale is not maintainable by the real owner under s. 66, C. P. C. (1908) but such suit was not barred under s. 317, C. P. C. (1882). A cause of action against the benamidar which arose under the old Code 1882 is not affected by the new; *Promotho v. Saurav Das*, 23 C. W. N. 604.

**This Section does Not Debar a Beneficial Owner as Defendant from Pleading that the Certified Purchaser is his Benamidar.**—This section does not debar a person in possession of property purchased at auction sale held in execution of a decree, when sued for the rents and profits of such property by the certified purchaser, from setting up as a defence to the suit that the certified purchaser was only a *benamidar* on his behalf.—*Ghaziuddin v. Bishan Dial*, 26 A. 443: 2 A. L. J. 111: A. W. N. (1905) 39 (23 A. 175 discussed). See also, *Jan Muhammad v. Ilahi Baksh*, 1 A. 290; *Zoolfeekar Ali v. Mahomed Tukee*, 9 W. R. 438; *Hiralal v. Mt. Gopika*, 11 N. L. R. 130.

Where the certified purchaser is a plaintiff, the real owner, if in possession, and if that possession has been honestly obtained may show in defence that the holder of the certificate is a mere trustee.—*Lokhee Narain v. Kaly Paddo*, 23 W. R. 358, P. C.: L. R. 2 I. A. 164.

**Suit by Beneficial Owner in Possession for Declaration of Title.**—There is a conflict of authorities on the question, whether a suit by a beneficial owner in possession, for a declaration of his right to the property against the certified purchaser, is barred under this section. The Calcutta High Court held (under s. 317 of the old Code) that such a suit was not barred; *Sasti Charan v. Annopurna*, 23 C. 699. The Allahabad High Court, on the other hand, held that it was barred; *Bishan Dial v. Ghazi-ud-din*, 23 A. 175. The correctness of the decision in *Sasti Charan v. Annopurna*, 23 C. 699, was however doubted by the Calcutta High Court in *Hanuman v. Jadu*, but the principle of that decision was later followed by the same Court in *Muhammad v. Muhammad*, 24 C. W. N. 51. 54 I. C. 127. It is settled law, however, that where the beneficial owner has been in possession for 12 years or more, a suit will lie at his instance against the benamidar for declaration of his title to the property, *Karamuddin v. Niamut*, 19 C. 199.

the mortgagees to purchase for themselves, putting them in the same position as any independent purchaser.—*Mohabir Pershad v. Macnaghten*, 16 C. 632, P. C. See also, *Krishnasami Ayyar v. Janakiammal*, 18 M. 153; *Bhagbut Lal v. Narku Roy*, 21 C. 789; and *Muhammad Husen v. Dharam Singh*, 18 A. 31.

A purchaser, subject to a mortgage, has a right to redeem, although his sale-certificate was not issued until after the institution of his redemption suit. If a party who title is to some extent imperfect, seeks to redeem, and is able to prove a perfect title, at the hearing of his cause he should have a decree for redemption.—*Krishnaji v. Ganesh Bapuji*, 6 B. 139 (4 B. 155, and 12 B. H. C. 247 explained and distinguished).

**Rights of Purchasers at Sales in Execution of Decrees Against Representatives.**—A suit was brought against A's widow upon a bond given by A. In execution of the decree obtained against the widow, A's property was sold. The sale notification in one place said that the property to be sold was the property of the widow, and in another, the rights and interests of the debtor. Held that the property intended to be sold, and sold, was the rights and interests not of the widow personally but of the widow as A's representative.—*Buksh Ali v. Essan Chunder*, W. R. (F. B.) 119; Marsh 614; *Court of Wards v. Coomar Ramaput*, 10 B. L. R. 29, P. C.; 17 W. R. 459, P. C.; *Satish Chunder v. Nilcomul*, 11 C. 45; *Achut v. Manjunath*, 21 B. 539; *Nazir Mahomed v. Girish Chunder*, 2 C. W. N. 251; *Narendra Nath v. Bhupendra Narain*, 23 C. 374; *Devji v. Sambhu*, 24 B. 135.

Where the decree in form is a personal decree against a widow, and the sale certificate purports to pass only the right, title, and interest of such widow, the purchaser only takes the widow's interest, and not the absolute estate.—*Baijun Doobey v. Brij Bhookun Lall*, 1 C. 133, P. C.; 24 W. R. 306.—See also, *Radha Mohun v. Soshi Bhoosun*, 3 C. L. R. 530; *Alukmonee Dabee v. Banee Madhab*, 4 C. 677; 3 C. L. R. 473, *Jotindra Mohun v. Jugul Kishore*, 7 C. 357; 9 C. L. R. 57 (affirmed by the P. C. in 10 C. 985, P. C.) See also, *Baroda Kanta v. Jotindro Narain*, 22 C. 974; *Narana Maiya v. Vasteva Karanta*, 17 M. 208; *Kristo Gobind v. Hem Chunder*, 16 C. 511; *Brajanath v. Joggeswar*, 9 C. L. J. 346.

By sale in execution of a decree against some of the heirs of deceased judgment-debtor, the interests of the other heirs of the deceased, not party to the decree or execution proceedings, are not affected.—*Hendry v. Nutty Lall*, 2 C. 395; *Assamathunessa v. Lutchmeeput*, 4 C. 142; 2 C. L. R. 223; *Sitanath v. Luchmeeput*, 11 C. L. R. 268 See, however, *Kurshet Bibi v. Keso Vinayek*, 12 B. 101; and *Kunhammad v. Kutti*, 12 M. 90.

**Purchaser at a sale in execution of a decree directing sale of the whole right, title, and interest of grandfather**—Assignment by grandsons of the same property subsequently to such sale Held, that the language of the decree showed that the intention was to make the land itself liable for the debt, and not merely the grandfather's interest, and therefore the purchaser purchased the entire interest in the land.—*Sakaram v. Sitaram*, 11 B. 42; *Kunhali Beari v. Kishana*, 11 M. 64; and *Gnanammal v. Muthusami*, 13 M. 47.

*Bikram Ahir v. Lala Rajpati Lal*, (1921) Pat. 21. (24 C. W. N. 51; 23 A. 175 referred to).

By an agreement in writing the defendant promised to convey to the plaintiff certain land, which he stated that he had bid for at an execution sale on account of plaintiff, and for which deposit had been made by him on plaintiff's account, and that plaintiff had himself paid the balance. In a suit by the plaintiff to recover the land, he is not precluded by s. 92 of the Evidence Act from proving that the defendant's purchase was not *benami* but was made on his own account, under circumstances, which would entitle the plaintiff to sue for the specific performance of a contract to convey; *Kumara v. Srinivasa*, 11 M. 213.

A's property was sold under a decree to B, a *bona fide* purchaser, who offered to A to re-convey to him on being repaid the purchase-money. Held that if A accepted the proposal, s. 317 of Act XIV of 1882 (s. 66) did not preclude a contract from arising—*Mor Joshi v. Muhammad Ibrahim*, 10 B. 344

"Fraudulently or without the consent of the real purchaser."—This section is no bar to a suit for declaration that the name of the certified purchaser was inserted in the sale certificate fraudulently and without the consent of the real purchaser.—*Gosmiah v. Taffuzzul Hosein*, 4 B. L. R. Ap. 32. See also *Kossumba v. Taffuzzul Hosein*, 13 W. R. 85; *Sheetanath v. Madhub Narain*, 1 W. R. 329.

*Benami* purchase by one of the decree-holders.—Suit by other decree-holder against the purchaser is barred; *Salle v. Mohun Lal*, 29 I C 447

"Interfere with the right of a third person."—The words "or interfere with the right of a third person, etc.," in the last part of sub-section (2) have been inserted to set at rest certain conflicting rulings under the old Code. In certain class of cases it was held that this section contemplates, a suit between the beneficial owner and certified purchaser but does not debar a third party from asserting that the certified purchaser is not the beneficial owner. See *Unconevanted Service Bank v. Abdul Bari*, 18 C. 461; *Subha Bibi v. Hara Lal*, 21 C. 519; *Puran Mal v. Ali Khan*, 1 A. 235. Nor does the section bar a suit by an execution-creditor for a declaration that the property attached in his decree and released under Or. XXI r. 60, belongs to his judgment-debtor and not to the certified purchaser who was merely a *benamidar*, for the debtor.—*Kanizak Sukina v. Monohur Dass*, 12 C. 204. Followed in 21 C. 519, referred to in 17 M. 282. A person, not claiming under either of the parties to the *benami* purchase, is entitled in the suit to show the true nature of the transaction, and is not barred by s. 66; on the other hand it has been held in another class of cases, (see *Kollantavida Mani Koth v. Tirupalil*, 20 M. 362; *Ram Kurup v. Sridevi*, 16 M. 290; *The Delhi and London Bank v. Pratab Bhaskhar*, 21 A. 29; *Kishan Lal v. Garurudhawaja Prasad*, 21 A. 238, and *Ram Narain v. Mohanian*, 26 A. 82, F. B.; *Sarjee v. Bindeshi*, 33 A. 382), that even suits brought by third persons as plaintiffs were also barred by this section. The latter part of sub-section (2) gives effect to the former class of cases, and overrides the latter class of cases in which a contrary view was taken.

Where a Hindu widow purchased property at execution sale in the name of a person and treated the property as part of her husband's

Where the father of a joint Mitakshara family mortgaged the whole joint family property, and in execution of the mortgage decree obtained upon the mortgage, the right, title and interest of the judgment-debtor was sold—*held*, that the mortgagor must be taken to have mortgaged the entire interest of the family, and that the whole interest had passed under the execution sale to the purchaser—*Studd v. Brij Nundun*, 9 C. L. R. 350.

Where a decree has been made against the father and manager of a joint Hindu family in reference to a transaction by which he has professed to charge or sell the joint ancestral property, and a sale has taken place in execution of such decree, of the joint ancestral property, without any limitation as to the right and interest sold, the rights and interests of all the co-parceners are to be assumed to have passed to the purchaser, unless and until it is established that the debt was incurred for immoral purposes—*Basa Mal v. Maharaj Singh*, 8 A. 205 See also *Minakshi Nagudu v. Immudi Konaka*, 12 M. 142, P. C.; *Appaji Bapuji v. Keshore Shamray*, 15 B. 13; *Sakharam v. Debji*, 23 B. 372; *Buldeo Sonar v. Mabarak Ali*, 6 C. W. N. 370; and *Daji Himat v. Dhiraj Ram*, 12 B. 18. See, however, *Preman Dass v. Bhattu Mahton*, 24 C. 672

By a sale in execution of a decree against the managing member of a joint-family business, the whole interest of the family in the joint-family property passes, although the other members are not parties to the decree—*Sheo Pershad v. Saheb Lal*, 20 C 453 See also, *Bhena v. Chindhu*, 21 B. 616; *Debi Singh v. Jia Ram*, 25 A 214 and *Lal Singh v. Pulandar*, 28 A 182.

By the sale of an ancestral property in execution of a mere money-decree against the father for his separate debt, only the right, title, and interest of the father passes to the purchaser, and nothing more, and this holds good whether the purchaser is a stranger or the decree-holder himself—*Bhikaji Ram Chandra v. Yeshwantrav*, 8 B 483 (6 B. 192 followed) See also, *Maruti Sakharam v. Babaji*, 15 B 87 (10 C 626, P C and 14 C. 572 followed

The question was whether the whole estate, belonging to a joint Mitakshara family including the shares of sons, or the share of their father alone, passed to the purchaser at a sale in execution of a decree against the father alone, upon a mortgage by him of his right Held that, as the mortgage and decree, as well as the sale-certificate, expressed only the father's right, the *prima-facie* conclusion was that the purchaser took only the father's share—*Shimbbhunath v. Gopal Singh* 14 C. 572, P C See also *Ram Sahai v. Kewal Singh*, 9 A 672; and *Guanammal v. Muthusami*, 13 M 47

A sale or mortgage of joint family property by a father is binding in the son's share only when there is an antecedent debt—*Venkataramanaya v. Venkataramana* 29 M 200 F B

The purchaser in execution of a decree against a father, governed by Mitakshara Law, takes only the interest of the father and is entitled to have it ascertained and allotted to him on partition—*Collector of Monghyr v. Hurdai Narain*, 5 C 425- 5 C L R 112

The holder of an impartible estate has an absolute interest in it and the purchaser in execution of a decree against him takes the absolute and

**Certified Purchasers under the Public Demands Recovery Act.**—By virtue of sub-section (2) of s. 19 of Public Demands Recovery Act of 1895, as amended by Act I of 1897, the provisions of this section apply to the case of a certified purchaser in execution of a certificate issued under the Act; *Banga Chandra v. Tara Kinkar*, 16 C. W. N. 978 (I. C. L. J. 550, *dissented from*).

**Benami Purchase or Transfer to defraud Creditors—Fraud not carried into effect or when wholly or partially carried into effect—Suit by Real Owner against Benamidar or his successor.**—Where property has been conveyed *benami* with the object of placing it beyond the reach of creditors, and the fraudulent purpose has been wholly or partially carried into effect, the real owner is precluded from maintaining an action for the recovery of the property. A distinction exists between such a case and a case where the fraud was only attempted, but was not actually carried into effect.—*Gobardhan Singh v. Ritu Roy*, 23 C. 962. (21 W. R. 422, *followed*). Followed in *Banka Behary v. Raj Kumar*, 27 C. 231, where it has been held that a suit does not lie for a declaration that a conveyance executed by the plaintiff is a *benami* and fictitious transaction, where the alleged transaction has been used to accomplish the fraudulent purpose for which it was intended (18 M. 378 and 11 B. 708, *approved*; and 1 A. 403, *dissented from*). See also *Govinda Kuar v. Lala Kishun Pershad*, 28 C. 370; (23 C. 392, and 392-note; 27 C. 231 *referred to*). The same principle has also been laid down by the Bombay High Court in *Honapa v. Naisapa*, 23 B. 406, (following 20 M. 326, and 23 C. 962; and *dissenting from* 1 A. 403). See *Kama Row v. Nukamma*, 31 M. 485. But it should be remembered that a distinction exists between those cases in which the fraud is only attempted, and those in which it has actually been carried into effect. See *Sham Lall v. Amarendra Nath*, 23 C. 400 (pp. 474-476), where it has been held that it is always open to a party to show that a document simply executed, but not carried into effect, is a *benami* and colourable document, and to recover possession of the property against the party claiming under such document; (18 W. R. 485; 20 W. R. 112, 21 W. R. 422, 24 W. R. 391 and 9 C. L. R. 64, *referred to*; 13 W. R. 87, *not followed*; 18 M. 378 and 11 B. 708, *distinguished*). Where the intended fraud has not been carried into effect, a beneficial owner is entitled to sue for a declaration that the deed of transfer executed by him is *benami* and he is entitled to recover.—*Jadu Nath v. Ram Lal*, 33 C. 967 10 C. W. N. 650 4 C. L. J. 22; (20 M. 326 and 11 B. 708 *dissented from*, all the authorities *reviewed*). Referred to in *Nisakar v. Bairagi*, 19 I. C. 909 in *Rajab Ali v. Hedayet Ali*, 22 C. L. J. 197: 19 C. W. N. 1151. In *Pether Pernal Chetty v. Munianthy Servai*, 35 C. 551, P. C. 12 C. W. N. 562 7 C. L. J. 528, it has been held by the Privy Council that where a *benami* deed of transfer of land was executed with the object of defrauding creditors, but the object failed, the real owner was entitled to recover the land from the *benamidar* without being required to set aside the deed. The deed being inoperative, it was unnecessary for the plaintiff to have it set aside as a preliminary to his obtaining possession of the property. See also, *Jagapathiraju v. Bapiraju*, 8 M. L. T. 154; *Akhil v. Monmotha*, 18 C. L. J. 616: 18 C. W. N. 1313: *Mahammad Faraugh v. Gokul Chand*, 3 P. R. 1906: 109 P. L. R. 1906 and *Munisami v. Subbarayar*, 31 M. 97. But in a suit for recovery of possession of immovable property, a defendant is not debarred from pleading that a transaction is *benami* by reason of his having previously successfully set up the *benami*

Where a person purchased *bona fide* and for value, property exposed for sale under an execution issued by a Court of competent jurisdiction, upon a valid judgment, the sale is a good one, and cannot be set aside. If the Court has jurisdiction, a purchaser is no more bound to enquire into the correctness of an order for execution, than he is as to the correctness of the judgment upon which the execution issues.—*Rewa Mahton v. Ram Kishen*, 14 C. 18, P. C., followed in *Kaunsilla v. Chandar Sen*, 22 A. 377; *Mathura Mohun v. Akhoy Kumar*, 15 C. 557.

A mortgagor is not entitled to redeem the property which was purchased by a third party at a sale in execution of an *ex parte* mortgage-decree, and affirmed whilst the *ex parte* decree was still in force though the said decree was set aside and subsequently re-affirmed after trial.—*Mukhoda Dassi v. Gopal Chandra*, 26 C. 734 (14 C. 18 P. C., and 10 A. 166, P. C., referred to).

S, having obtained a decree against M and another, brought to sale and purchased his property pending appeal. The decree having been reversed, held that M was entitled to restoration of his property and not merely to the proceeds of sale.—*Sadasivayyar v. Muttu Sabapathi*, 5 M. 106. See also *Lati Kooer, v. Sobadra Kooer*, 3 C. 720: 2 C. L. R. 75; and *Nagindas Devchand v. Natha Pitambar*, 10 Bom. H. C. 297.

On an examination of all these cases, two propositions are clear and incontestable, namely, (1) that the purchase made by the decree-holders themselves must be treated as nullity and void, and (2) that the purchase made by persons, who are not parties to the suit must be treated as unaffected. The protection is afforded to the purchaser only when he is an absolute stranger to the proceedings and not to the purchaser who is a party to the proceedings. The reason of the rule is that the stranger who purchases cannot be expected to go behind the judgment, to enquire into the irregularities in the suit, and that it is sufficient for him to know that the Court had jurisdiction and exercised it. The reason of the rule obviously disappears where the purchaser is himself a party to the suit and has notice, or at least opportunity of knowledge of all the proceedings therein.

**Title of Purchasers in Execution of Satisfied Decree.**—It cannot be affirmed as an inflexible rule of law that a purchase by a stranger in execution sale is not liable to be set aside although satisfaction had been entered of the decree: *Janakdhari v. Gossain Lal*, 37 C. 107: 11 C. L. J. 254 13 C. W. N. 710. There is a divergence of judicial opinion on this point and a distinction has sometimes been made between a purchaser who is stranger and between decree-holder purchaser. See *Mathura Mohun v. Akhoy Kumar*, 15 C. 557; *Yellappa v. Ram Chandra*, 21 B. 463; *Patdasi v. Sharup Chand*, 14 C. 376; *Ramgopal v. Rajan*, 6 C. L. J. 43.

**Rights of Purchasers in Execution of Decrees Barred by Limitation.**—A suit to recover possession of, and to establish the right to property, purchased in execution of a decree declared after the sale to be null and void as being barred by limitation, will not lie.—*Paradutt Lal v. Rutton Singh*, 5 N. W. P. 242; *Zumeer Sirdar v. Asseemooddeen*, 23 W. R. 57.

After a sale of land in execution of a decree and before its confirmation, the judgment-debtor cannot object to the validity of the sale on



Where property is bought from a wife as the ostensible owner, the husband consenting to the sale, and the transaction is *bona fide* on the part of the purchaser for a consideration, the purchase is a good one, even if the property is not the wife's but the husband's.—*Golam Russol v. Abdul*, 15 W. R. 19.

Where a person allows another to hold himself out to the world as the real proprietor of an estate, the Court will not consider him entitled to any consideration as against a person who may have advanced money upon the confidence so created.—*Nunde Lall v. Taylor*, 5 W. R. 37: 1 Ind. Jur. N. S. 55. See also *Sarat Chunder v. Gopal Chunder*, 20 C. 293, P. C. (reversing 16 C. 148); and *Nidra Dossee v. Abdool Wahed*, 25 W. R. 532.

Where the husband during his lifetime did in every way, both publicly and privately, whenever called upon to make any representation on the subject, always represented that certain immoveable property is his wife's, the purchasers from her could not, after his death, be equitably turned out of the property in favour of his heirs. The heirs after his death would be as much bound by the father's misrepresentations as he would have been during his life.—*Luchman Chunder Geer v. Kalli Churn*, 19 W. R. 292. P. C. Followed in *Chunder Coomar v. Hurbun Sahai*, 16 C. 137. Applied in 18 C. 188; affirmed in 22 C. 909 P. C. See 21 C. 639, 28 C. 23, 35 C. 877.

When a public officer purchases property *benami*, the transaction is opposed to public policy and persons deriving title through him are debarred from claiming the benefit of the *benami* purchase.—*Sheo Narain v. Mata Prasad*, 27 A. 73. (22 A. 220, approved) But see *Bojjamma v. Venkataramayya*, 21 M. 30.

**Benami Transaction—Source of Purchase-Money.**—In cases of *benami* purchases in India, the criterion of beneficial ownership is the source from which the purchase-money is derived.—*Gopi Kristo v. Gunga Pershad*, 6 M. I. A. 53. But it is not the only criterion; there are other important facts.—*Ram Narain v. Moulvi Muhammad Hadi*, 26 C. 227, P. C.: 3 C. W. N. 113. See also *Bai Mativahoo v. Purshotam*, 29 B. 306. See also *Bilas Kunwar v. Desraj*, 37 A. 557 P. C.: 19 C. W. N. 1207: 22 C. L. J. 516.

**Benami Transaction—Burden of Proof.**—Where a purchase of real estate is made by a Hindu in the name of his sons, the presumption of Hindu law is in favour of its being a *benami* purchase, and the burden of proof lies on the party in whose name it was purchased, to prove that he was solely entitled to the legal and beneficial interest in such purchased estate.—*Gopee Kristo v. Ganga*, 6 M. I. A. 53. See also *Parbati Das v. Bykantonath* 18 C. W. N. 428 P. C.

Where there are *benami* transactions, and the question is, who is the real owner, the actual possession on receipt of the rents of the property is most important.—*Imambandi Begum v. Kamlezwari Pershad*, 14 C. 109, P. C.: L. R. 13 I. A. 160. The same rule has also been laid down in *Ram Narain v. Muhammad Hadi*, 26 C. 227, P. C.: 3 C. W. N. 113 P. C.

In ascertaining whether a transaction is genuine or fictitious, where the oral evidence is conflicting, surrounding circumstances, the position of the parties, their relation to one another, the motives which could govern their actions and their subsequent conduct are to be looked into.—*Dalip Singh v. Chaudhrai Kamal Kunwar*, 12 C. W. N. 609, P. C.

*Brojo Lal*, 80 C 550, P. C.; 7 C W. N. 425, P. C. (26 C. 215 affirmed).  
*Seo Niladhari v. Bichitranand*, 37 C. 823.

The purchaser of the right, title, and interest of a judgment-debtor in a partly executed decree for possession of land acquires only the unexecuted portion of it.—*Girish Chunder v. Jibaneswari*, 6 C. 243; 7 C. L. R. 420.

The "rights and interests" of a zemindar in a certain village were sold in execution of a decree. At the time of the sale a certain building was his property—*qua* zemindar. Held that, in the absence of proof that such building was excluded from sale, the sale of his "rights and interest" in the village passed such building to the auction-purchaser.—*Abu Husan v. Ramzan Ali*, 4 A 381. But see *Durga Singh v. Bisheshwar Dayal*, 24 A. 218.

The purchaser at a Court-sale buys only the right, title, and interest of the debtor burdened with all valid liens, such as previous mortgage.—*Ranchodas v. Ranchodas*, 1 B. 581 (9 Bom H. C. 304 followed).

Under an execution sale, the purchaser, notwithstanding that he acquires merely the right, title, and interest of the judgment-debtor, acquires that title, by operation of law, adversely to the judgment-debtor, and freed from all alienations and incumbrances effected by him after the attachment of the property sold.—*Dinendra Nath v. Ram Kumar*, 7 C. 107 P. C.; 10 C. L. R. 281, P. C.; followed in *Bashi Chunder v. Enaet Ali*, 20 C. 236. See also *Oomrao Singh v. Shimbhoo Nath*, 2 N. W. P. 38.

A purchaser at a sale in execution of a mortgage decree takes the property with its emblements, *i.e.*, the mortgagee's right to the moiety of the crops in the lands of his tenants—*Land Mortgage Bank of India v. Vishnu Govind*, 2 B. 670.

Unless the right to the standing crops is expressly reserved by the sale-notice, the ordinary rule is that the right to the growing crops will pass by sale of the land to the purchaser.—*Ramalinga v. Saniappa*, 13 M. 15.

At a sale of an under-tenure for arrears of rent, the growing crop standing on the land passes to the auction-purchaser, except when it has been specially excepted by the sale notification, or a custom to the contrary has been proved.—*Afatoolla Sirdar v. Dwarka Nath*, 4 C. 814; 4 C. L. R. 95.

A judicial sale of property, purporting to be of all the interests of a judgment-debtor, carries with it any enlargement thereof that may have occurred after the attachment and before the sale.—*Umesh v. Zahur*, 18 C. 164, P. C.

Where a judgment-debtor died after the attachment and before the sale, and his representatives were not made parties to the execution proceedings, held, that the auction-sale was not invalid, and the auction-purchaser acquired a valid title under s. 65—*4ba v. Dhondee* 19 B. 276.

**Rights of Purchasers at Sale under Public Demands Recovery Act.**—In sales under the Public Demands Recovery Act, only the right, title,

be in force, or may, with the previous sanction of the Governor-General in Council, by a like notification, modify the same.

Every notification issued in the exercise of the powers conferred by this sub-section, shall set out the rules so continued or modified. [New.]

This section corresponds with the first para. of s. 327 of C. P. Code, 1882 with some change in the language. The second and third paras of s. 327 of the old Code have been omitted.

*Sub-section (2) has been added by the Civil Procedure Code Amendment Act I of 1914.*

For rules made under the old Code, see Cal. Gazette of 10th July 1898 Part I, p. 736; and of 7th January, 1880, Part I, p. 3.

### DELEGATION TO COLLECTOR OF POWER TO EXECUTE DECREEES AGAINST IMMOVEABLE PROPERTY.

**68.** The Local Government may, with the previous sanction of the Governor-General in Council, declare, by notification in the local official Gazette, that in any local area, the execution of decrees in cases in which a Court has ordered any immoveable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immoveable property, shall be transferred to the Collector.

Power to prescribe rules for transferring to Collector execution of certain decrees.

[S. 320 para 1.]

**Object of the Section.**—The object of the provisions of this section relating to the execution of decrees by Collectors is well-known. In different parts of India, the effect of sales in execution of decrees was to transfer landed estates from the old families to modern speculators. A strong opinion was entertained by certain members of the Government of India, that these results of the administration of Civil Justice were impolitic and inexpedient; and it was suggested that some procedure might be devised by which the Chief Executive Officer of the District would be enabled to liquidate the debts of encumbered land-holders without the immediate sale of their estates and so to preserve the old landed gentry of the country. The provisions of ss. 320 to 325 C. (Now ss. 68, 70, 72 and Sch. III), were inserted to give effect to these suggestions; *Huro, Prosad v. Kali Prosad*, 9 C. 290, 294.

**69.** The provisions set forth in the Third Schedule shall apply to all cases in which the execution of a decree has been transferred under the last preceding section. [New.]

Provisions of Third Schedule to apply.

This section is new; the provisions of ss. 321, 322, 322-A, 322-B, 322-C, 322-D, 324, 324-A, 325, 325-A, 325-B, and 325-C, of Act XIV of 1882, have been placed in the third schedule.

Where a claim is preferred under Or. XXI, r. 58 and an order is made in favour of the claimant, who alienates property subsequent to the order.—In a suit by decree-holder under Or. XXI, r. 63.—the doctrine of *lis pendens* was held applicable; *Krishnappa v. Abdul Khader*, 88 M. 535.

For the doctrine of *lis pendens*, affecting purchasers at private sales, see section 52 of the Transfer of Property Act (IV of 1882).

**66.** (1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff.

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner. [S. 317.]

## COMMENTARY.

**Old and New Sections Compared.**—This section has been made wider than s. 317 of the old Code. The language of the old section was that no suit shall be maintained against "*the certified purchaser*." But in the present Code the following words have been substituted for the expression "*certified purchaser*," viz., "*against any person claiming title under a purchaser certified by the Court in such manner as may be prescribed*." The above change has been introduced to set at rest the following conflicting decisions, viz., 14 M. 1 A. 496, 21 A. 196, 26 C. 950, 3 C. W. N. 657; 5 C. W. N. 341; 21 M. 7. In these cases it was held that the expression "*certified purchaser*" means only the person who buys at the sale and obtains a certificate and does not include a person claiming through or under him, such as his heirs, representatives, assignees or mortgagees, etc. But according to the language of the present section, the expression "*certified purchaser*" includes the person who stands in the shoes of the Court-purchaser. The Bombay High Court, in *Hari Govind v. Ram Chandra*, 31 B. 61; 8 Bom. L. R. 873, has adopted the law as laid down in the present section. The rulings quoted above have been rendered inoperative by the change referred to.

The substitution of the word "*plaintiff*" for the words "*any other person*" makes it clear that the legislature did not change the law as laid down by the Privy Council, *Hiralal v. Mt. Gopika*, 11 N. L. R. 130.

Another change introduced in this section is the addition of the words, "*or to interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner*." The above change has been introduced in accordance with the

Where a decree is sent to the Collector for execution, a Civil Court cannot interfere in matters declared to be in the Collector's jurisdiction, but it is not deprived of its ordinary jurisdiction in regard to other matters because the decree has been sent to the Collector; *Janardhan v. Ramchandra*, 46 I. C. 885; *Hardeo v. Narbadi*; 5 N. L. R. 121.

Where a decree is transferred to the Collector for execution, a Civil Court cannot entertain an application under Or. XXI, r. 72 inasmuch as that power has been conferred on the Collector by Bombay Civil Circular Chap. II, cl. 91, sub-cl. 16; *Shrinivas v. Jagadeappa*, 42 B. 621.: 46 I. C. 653.

Where the Civil Court is satisfied that the land which is ordered to be sold, or any portion of it, is ancestral, it should transfer the decree for execution to the Collector, so far as regards ancestral land only.—*Ahmadghaus Khan v. Lala Pershad*, 28 A. 631: 3 A. L. J. 422: A. W. N. (1906), 143; See also *Fatmatul Kubua v. Achchi Begam*, 36 A. 33.

A Sub-Judge ordered the sale of certain immoveable property which was "ancestral" within Government notification and under which execution of such decree should have been transferred to the Collector and such property was sold accordingly. Held that the order for the sale having been made without jurisdiction, the sale was void, and should be set aside.—*Sukhdeo Rai v. Shoo Gulam*, 4 A. 382.

If the execution of a decree is transferred to the Collector, the Court transferring the decree has no power to postpone the sale; *Daulat Singh v. Jugal Kishore*, 22 A. 108, 111; or to give leave to the decree-holder to bid under Or. XXI, r. 72; *Srinivasa v. Jadavappa*, 42 B. 621: 46 I. C. 653; or to re-sell the property where a re-sale is necessary; *Shazad Singh v. Hanuman Rai*, 46 A. 562. 83 I. C. 766. A. I. R. 1924 A. 704; the Collector alone has that power.

Held that a decree for the sale of ancestral land, or of an interest in such land, in enforcement of an hypothecation on such land, is a decree for money within the meaning of the rules prescribed by the Local Government under ss. 68, 70, 71.—*Birch v. Rati Ram*, 4 A. 115.

In an application to set aside a sale under s. 311, C. P. Code, 1882, (Or. XXI, r. 90) it is not competent to the applicant to raise, nor to the Court to entertain, any plea to the jurisdiction of the Court executing the decree, as for example, a plea that the property sold, or part of it, was ancestral, and ought to have been sold in accordance with the provisions of s. 320, C. P. Code, 1882 (ss. 68, 70, 71).—*Shirin Begam v. Agha Ali*, 18 A. 141.

The ownership of alluvial land must rest upon the same title as that upon which the original village was held, and that as riparian village was ancestral, the accreted property must be ancestral also.—*Ram Prasad v. Radha Prasad*, 7 A. 402.

**Power of Local Government to make Rules.**—The Local Government has power under s. 70 to confer upon the Collector all or any of the powers which a Civil Court might exercise in the execution of a decree if its execution is not transferred to the Collector's Court. If the Local Government makes such rules which give finality to an order of Revenue Court and the Revenue Court confirms the sale of an ancestral property

The object of s. 66 is to put an end to purchases at Court auction by one person in name of another; *Ramanthai Vadivelu v. Peria Manika*, 43 M. 643 (P. C.); 24 C. W. N. 699.

The provisions of this section were designed to create some check on the practice of making what are called *benami* purchases at execution sales for the benefit of judgment-debtors and in no way affect the title of persons otherwise beneficially interested in the purchase; *Ganga Sahai v. Keshri*, 22 C. L. J. 508; 19 C. W. N. 1175 P. C. : 37 A. 545 P. C. (12 B. L. R. 317 followed; 33 A. 563 affirmed); *Mongalia Swayi v. Viswanatha*, 37 M. L. J. 580. The clear intention of this section is to stop *benami* purchases. To allow the real purchaser to sue his *benamidar* on the fact of possession would be to defeat the object of the section, *Hanuman Pershad v. Jodumandan*, 43 C. 20. 20 C. W. N. 147.

The object of this section is to prevent an enquiry between the purchaser *de facto*, and any person on whose behalf he is alleged to have purchased.—*Buhun Kunwar v. Buhoree Lall*, 3 B. L. R. 15 (F. B.) 11 W. R. 16 (F. B.).

The correct interpretation of this section is to the effect that a suit by a party claiming to be the real purchaser of immovable property sold in execution of a decree, cannot be brought against the certified auction-purchaser even though the claimant has had previous possession.—*Bykunt Chander v. Khema Moyee*, 9 W. R. 390.

A suit based on the ground that the certified purchaser is not the real owner, but *benamidar* for some other person is barred by this section.—*Khuda Baksh v. Aziz Alam*, 27 A. 194; 29 I. C. 138; *Sitara Begam v. Muhammad Ishq Khan*, 2 O. L. J. 584.

**Applicability of Section 66.**—This section applies whether the ostensible purchaser at an auction sale purchases the whole or part of the property sold; *Govind Singh v. Mungagi*, 57 I C 684

Where at an auction, a person purchased property in the name of one and it was alleged by another that it was in trust for him, a suit between these claimants is not within the prohibition contemplated by s. 66; *Ramaswami v. Venkappauer*, 3 L W 233. (1916) 1 M W N 184

S. 66 has no application in a case where the *benamidar* himself does not claim under the sale certificate; *Saradindu v. Gosta Behari*, 37 C. L. J. 403. 27 C. W. N. 208.

**Certified Purchaser.**—If a person is the person to whom under this section the Court is directed to grant a sale certificate, he is entitled to be regarded as the "certified purchaser" at any time after the acceptance of his bid at the execution sale, even though a certificate may not actually have been granted to him before any suit against him, in connection with the property purchased by him, has been instituted, and this section applies so as to bar a suit by the real purchaser against him.—*Bunda Ali v. Imcerun*, 25 W. R. 197. See, however, *Aldwell v. Elahi Bakhsh*, 5 A. 478, where it has been held that until a sale certificate is granted, a person is not to be regarded as a certified purchaser, it is only after the grant of the sale certificate that he can be regarded as the "certified purchaser" within the meaning of this section.

[illegible]

## CONCLUSION

[illegible]

recognised plaintiff's title; s. 66 of the C. P. C. (1908) is merely declaratory of the real meaning of s. 317 of the Code of 1882; *Chidambaram v. Subramania*, (1916) 1 M. W. N. 220: 32 I. C. 434 (28 M. L. J. 251: 23 A. 84 followed. If after obtaining a sale certificate, the purchaser acknowledges that his purchase is *benami*, and gives up possession, or does some act which clearly indicates an intention to waive his right, or restores the property to the real owner, such acts may operate as valid transfer of property. For instance, where defendant acted *benami* in buying certain land at a Court-sale for plaintiff, paid part of the purchase-money for plaintiff, and allowed plaintiff to remain in possession, on the understanding that the defendant was to transfer the property on payment of the balance of the purchase-money. The defendant having ejected plaintiff, plaintiff sued to recover the land. Held that the suit was not barred by this section—*Monappa v. Surappa*, 11 M. 234. Followed in *Kumbalinga Pillai v. Ariaputra Padiabhi* 18 M. 436. But see *Kandasami v. Nagalinga*, 36 M. 564. 23 M. L. J. 301: 12 M. L. T. 211, where it has been held that under the Transfer of Property Act, no waiver of transfer of rights can be recognized in the case of immovable property in the absence of a registered instrument (11 M. 234 distinguished; 23 A. 175 referred to); similar view seems to have been taken in *Kumadeen v. Noor Mahomed*, 28 M. L. J. 251: 17 M. L. T. 158: (1915) M. W. N. 204.

Where the purchaser at an execution sale is the agent of the execution debtor and buys the property as such, though he advances the purchase-money on the understanding that he is to be repaid, a suit for possession of the property is maintainable by the latter against the former. Such transaction is not a mere *benami* purchase, and is not a bar to such a suit under this section—*Sankunni Nayar v. Narayanan Nambudri*, 17 M. 282. Distinguished in *Ganga Baksh v. Rudar Singh*, 22 A. 434 and referred to in *Patrachariar v. Ramaswami*, (1919) M. W. N. 693.

K and T were joint mortgagees. After their death their sons obtained a decree upon the mortgage. After this decree it was settled, by a suit ending in a consent decree that one P was entitled along with the son of K, to a certain portion of the property of K. The sons of K and T in execution of their mortgage decree purchased the mortgaged property, and obtained certificate of sale in their names. Thereupon the representatives of P sued the son of K to recover that portion of the property which they alleged ought to have come to P. Held that the suit was barred—*Durga v. Bhagwan, Das*, 23 A. 84.

Certain decree-holders were refused permission to purchase at the sale in execution, and subsequently the defendant, whom the decree-holders alleged to be their agent, purchased the property, and got his name entered in the sale-certificate. The decree-holders, hearing of the purchase, supplied the purchase-money, ratified the purchase, and agreed to take a conveyance of the property after confirmation of the sale. On refusal of the defendant to execute the conveyance, the decree-holders sued for a declaration that they were the real purchasers and for possession of the property. Held, that the suit was barred.—*Ganga Baksh v. Rudar Singh*, 22 A. 434 (17 M. 282, 18 M. 436 distinguished, 11 M. 234 referred to).

The plaintiff came into a Court, alleging that a certain property of his having been put to sale in execution of a decree against him, two of



(2) In every such case the provisions of sections 69 to 71 and of any rules made in pursuance thereof shall apply so far as they are applicable. [S. 326.]

## COMMENTARY.

**Alterations Made in the Section.**—This section corresponds to s. 326 of the old Code with some additions and alterations. The words "*or management*" after the word "*temporary alteration*" which occurred in the old Code have been omitted; and the words "*sections 69 to 70 and of any rules made in pursuance thereof*" have been substituted for the words "320 paragraph two, to 325 (both inclusive.)"

**"And the Collector represents to the Court."**—The Collector when acting under s. 72 does not perform any judicial function. If he makes any representation under the section, he does so as an officer of the Court and it is within the discretion of the Court to accept or decline to accept such representation (9 C. 290, F. B. *folld.*); *Sardarni Datar Kaur v. Ram Rattan*, 2 Lah. L. J. 333 58 I. C. 603, (F. B.).

When a decree has been sent for execution to the Collector under s. 72 and he reports his inability to act, the Court should not file the execution application but it is the duty of the executing Court to proceed with the execution of the decree in accordance with law; *Bhowani Mal v. Allahwasaya*, 96 I. C. 199: A. I. R. 1926 L. 612.

**"May authorize the Collector."**—It is discretionary with the Court to authorize or not as it thinks fit. The word "*may*" clearly shows that the Court has full power either to authorize the Collector or not. For instance where the Collector has applied to the Court under this section, proposing a scheme for the payment of the decretal money in order to avoid a sale of attached property, it is in the discretion of the Court to authorize the Collector or not, as it thinks fit, to provide for the satisfaction of the decree in the manner proposed; and the Court is bound to hear any objections which may be made by the decree-holder to the feasibility of the proposed scheme and any evidence that may be offered in support of those objections.—*Hurro Prasad v. Kali*, 9 C. 290.

The scheme for satisfaction of the decree proposed by the Collector must provide for such satisfaction, within reasonable period, by the proposed temporary alienation; and when the Collector does not submit a scheme providing for satisfaction in the manner indicated above the Civil Court ought to pass orders for the sale of the property itself.—*Jai Bhagwan v. Buali Baksh*, 63 P. R. 1066: 121 P. L. R. 1906.

The recommendation of the Collector should be dealt with by the Court executing the decree in the exercise of its own judgment, and not in deference to the opinion expressed by the Judge who forwards the Collector's recommendation to the Lower Court.—*Muttra Pershad v. Ram Pershad*, 6 N. W. P. 39. See also *Kashee Lal v. Amerjan*, 2 N. W. P. 847.

A decree for sale of mortgaged property was sent to Collector for execution who directed the sub-divisional officer to carry out the sale. That officer proposed temporary alienation which the District Judge

At a sale in execution of a decree, the plaintiff purchased certain property in the name of the defendant, and continued in undisturbed possession of the property for eight years after the sale. He then sued the defendant for a declaration of his right and for an injunction to restrain from interfering with it. *Held* that the suit was not barred by s. 317, C P. Code, 1882 (s. 66) and was maintainable.—*Sāsti Churn v. Annopurna*, 23 C. 699. Doubted in *Hanuman Pershad v. Jodu Nandan*, 43 C. 20. See also *Myatgale v. San Tha*, 25 I. C. 810.

**Certified Purchaser and Not a Third Party can Plead the Bar under this Section.**—In a suit to obtain possession of certain property purchased at an execution sale, the plaintiff who alleged that the purchase had been made for his benefit, and that the certified purchaser was his *benamidar*, made the certified purchaser, who admitted his allegation, a defendant along with the person in possession. *Held* that the suit was not barred.—*Hazi Arjun v. Farutulla*, 9 C. L. R. 295 (10 B. L. R. 159; 14 M. I. A. 496 applied); *Mahammad Emartulla v. Md. Didar Buz*, 24 C. W. N. 51.

In a suit by A against B and C to recover land, A alleged that B bought the land at a Court-sale on his behalf. B did not contest the suit. C, who did not claim under B, pleaded that A could not recover by reason of the provisions of s. 317, C P. Code, 1882 (s. 66). *Held* that s. 317, C. P. Code, 1882 (s. 66) only enable the certified purchaser and those claiming under him to avoid arrangements made with him in the nature of a trust, and was no bar to the suit.—*Rama Krishnappa v. Adinarayana*, 8 M. 511.

At a sale in execution of a decree against the plaintiffs, the pleader who had acted for the plaintiffs, purchased their property with his own money, but in the name of his *mohurir*, and for a very inadequate sum. The plaintiffs thereupon sued the pleader and his *mohurir* for a declaration that the pleader defendant, in so purchasing, was a trustee on their behalf, and also for recovery of the property. *Held* that the suit was not barred by s. 317, C P. Code, 1882 (s. 66).—*Aghore Nath v. Ram Churn*, 23 C. 805.

**Suit for Specific Performance Against Certified Purchaser.**—S. 66, C. P. Code is no bar to a suit to enforce the specific performance of an agreement by the auction-purchaser subsequently to the auction purchase to convey the property to the plaintiff even though the plaintiff alleged that the certified purchaser was a *benamidar* for the plaintiff; *Venkatappa v. Jalaya*, 42 M. 615 (F. B.); 37 M. L. J. 98; *Baburam v. Dokhina Sundan*, 21 C. W. N. 27; *Abdulla Khan v. Jalam Singh* 1923 Nag 1.

A suit by a judgment-debtor against an auction-purchaser to enforce an agreement before the sale to reconvey the properties to the judgment-debtor is barred by s. 66 C P. Code; *Muneshwar v. Kailas Pati*, 50 I. C. 516; *Ponnuswami v. Vythilingam Pillai*, 8 I. C. 258.

S. 66 is clearly intended to discourage *benami* purchases at Court sales. But where there was a prior contract between the parties by which one of them became entitled to call upon the purchaser to execute a conveyance in his favour, there is nothing in s. 66, C P. Code to take away the jurisdiction of the Civil Court to deal with a cause of action based on such a contract on the equities arising out of that contract,

Provided as follows :—

(a) where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale;

(b) where any property liable to be sold in execution of a decree is, subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold;

(c) where any immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—

first, in defraying the expenses of the sale;

secondly, in discharging the amount due under the decree;

thirdly, in discharging the interest and principal monies due on subsequent incumbrances (if any); and,

fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

(3) Nothing in this section affects any right of the Government. [S. 295.]

### COMMENTARY.

**Alterations Made in the Section.**—This section corresponds to section 293 of Act XIV of 1882 with some modifications. The first im-

estate. In a suit by the reversioner after the death of the widow against the certified purchaser in possession, *held* that the suit was not barred by this section, as the reversioner did not claim through the widow, but through her husband; *Narain Dei v. Durga Dei*, 35 A. 188: 11 A. L. J. 101 (26 A. 82 distinguished).

**Joint Purchase.**—The provisions of this section apply to ordinary *benami* purchases at execution sales, but do not affect purchases of property by one member of a joint Hindu family in his own name, but with the joint funds—*Bodh Singh v. Gunesh Chandra*, 12 B. L. R. 317, P. C.: 19 W. R. 356, P. C. Followed in *Achhaibar Dube v. Tapasi Dube*, 20 A. 557: A. W. N. (1907), 166. See also *Hari Sing v. Sher Sing*, 31 A. 282; *Gopala Sami v. Govinda Sami*, (1912), M. W. N. 1071; *Naipal Sonar v. Sheo Narain*, 6 I. C. 374; *Ram Jas Das v. Mohan Lal*, 25 I. C. 735; *Man Karan v. Baijnath*, 18 O. C. 160.

Where properties sold in execution of a decree were purchased with the funds of the Manager of a joint Hindu family in the name of his son-in-law, s. 317 (s. 66) of the C. P. Code bars the claim of the members of the joint Hindu family to the properties as being really joint family acquisitions;; *Suraj Narain v. Ratanlal*, 40 A. 159 (P. C.): 21 C. W. N. 1065. Followed in *Baijnath v. Suraj Devi*, 43 A. 711: 19 A. L. J. 787, where it was held that if a managing member makes a purchase in the name of a third person, though without the consent of his sons, the purchase must be deemed to have been made on behalf of all the members of the family within the meaning of this section and the same are precluded by this section from maintaining the suit.

Where a suit is between one member of a joint Hindu family, and another, s. 66 is not applicable but it is applicable when the suit is between the separated members of a joint Hindu family, though at the time of this separation certain property of the family was not in fact divided; *Ramadhun v. Bisheshar Dayal*, 3 O. L. J. 508

The provisions of this section are not a bar to a suit for partition brought by a Hindu son against his father and a certified purchaser of family property, who has bought as *benami* for the father with the family funds at a sale in execution of a decree against the father—*Natesa Ayyar v. Venkatara Maayan*, 6 M. 135; *Minakshi Ammal v. Kalianrama*, 20 M. 349; *Nataraja Mudaliar v. Ramaswami*, 43 M. L. J. 363 45 M. 856. A. I. R. 1922 Mad. 481

Where one of several joint decree-holders applied for execution of the decree subject to the rights of the others and properties put up to sale in pursuance thereof were purchased by him. *Held*, that the purchase was for the benefit of all the decree-holders, and the purchaser could not be allowed to retain the property as his exclusively and perpetrate a fraud against his co-decree-holders under cover of this section; *Ganga Sahai v. Keshri*, 19 C. W. N. 1175 P. C. (12 B. L. R. 317 followed 32 A. 541, *affirmed*)

Where two persons contribute jointly towards the purchase of certain properties in Court auction but the sale certificate stands only in the name of one of them, *held*, that it is a joint transaction constituting the parties, co-purchasers and not a *benami* transaction so as to fall within this section; *Vivianath v. Pandharinath* 50 B. 600: A. I. R. 1926 Bom. 525: 97 I. C. 689.

placing all the decree-holders in the position described upon the same footing and making the property rateably divisible among them instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property." In *Mohan Lal v. Humayun Jah*, 13 O. C. 291, the object of this section has been similarly explained. In this connection see also *Butloo Khan v. Gomani Singh*, 13 C. W. N. 1177. In order that a decree-holder may be entitled to a rateable distribution, the following conditions must exist: Two or more decree-holders must be holders of decrees for money against the same judgment-debtor; the decree-holders seeking rateable distribution must, prior to the realization (receipt of the assets), have applied to the Court, by which the assets are held. The section does not provide that an application for rateable distribution cannot be made in the course of the execution proceedings taken by the applicant himself, but must be made in the course of execution proceedings made by some other decree-holder; nor is it necessary that to entitle the applicant to a rateable distribution, the decree-holder, at whose instance assets have been realized, should have notice of the application.—*Chuni Lal v. Jugal Kishore*, 27 A. 132.

**Necessary Conditions for Rateable Distribution under this Section.**—To entitle a decree-holder to be placed in the position and to participate in the assets realized, the following conditions must be present:—

(1) The decree-holder claiming a share in the rateable distribution should have applied for execution of his decree to the Court which holds the assets realized:

(2) Such application should have been made prior to the receipt of the assets by the Court:

(3) The assets of which a rateable distribution is claimed must be assets held by the Court:

(4) The attaching creditors, as well as the decree-holders claiming to participate in the assets, should be holders of decrees for payments of money.

(5) Such decrees should have been obtained against the same judgment-debtors.

No rateable distribution can be claimed under this section unless all the conditions enumerated above are present. *Ramjus v. Gooru Charan*, 11 C. L. J. 69. 14 C. W. N. 396.

If, in an application for execution of decree, it has been held that the decree has been satisfied or is barred by limitation, or if such application has been dismissed, no valid claim for rateable distribution can be laid under this section. To bring a case within the scope of this section, it is necessary to establish, that before the receipt of the assets in respect whereof rateable distribution is claimed, more persons than one have applied for execution of decree for payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof; *Gopal Ch. v. Hari Mohan*, 21 C. L. J. 624.

"Where assets are held by a Court."—These words have been substituted for the words "assets realized by sale or otherwise in execution" which occurred in the old section. The question now is whether by the

transaction to defraud creditors, and it is competent for him to show the real nature of the transaction in order to defend his possession.—*Preo Nath v. Kazi Mahomed*, 8 C. W. N. 620. (18 B. 372; and 27 C. 231, referred to and explained). See, however, *Sidlingappa v. Hirsu*, 31 B. 405: 9 Bom. L. R. 542, where it has been held that the defendant could not set up his fraud to property conveyed by him to the *benamidars*. Distinguished in *Girdhari Lal v. Manikamma*, 38 B. 10. In *Ram Sumran v. Ram Pertap*, 22 C. L. J. 574, it has been held that the parties can show the fictitious nature of the transaction, so long as rights of a third party are not affected; but the title of an innocent stranger who has acquired title in good faith, cannot be impeached.

**Certified Purchaser at the Revenue-sale Law.**—The ruling of the Full Bench in 3 Bom. L. R. 15, F. B.: 11 W. R. 16, that a *benami* purchaser is debarred from setting up his title in opposition to a certified purchaser, was held not to apply in a suit in which the plaintiff was the certified purchaser who had bought at a sale for arrears of revenue.—*Brijo Beharee v. Wajed Hossein*, 14 W. R. 372.

A sale for arrears of revenue cannot be treated as governed by the principles in s. 317, C. P. Code, 1882 (s. 66).—*Muthuvaiyan v. Sinna*, 28 M. 526: 15 M. L. J. 419. See also *Narayanasami v. Govindasami*, 29 M. 473: 16 M. L. J. 505; (28 M. 526, followed and 25 M. 655, overruled).

This section applies only to sales in execution of decree of Civil Courts held under the Civil Procedure Code, and not to sales for arrears of revenue under Act XI of 1859.—*Fuzul Rahaman v. Iman Ali*, 14 C. 583.

**Benami Transaction—General Cases.**—Where the father of a joint Hindu family purchases property in the name of his minor son, the presumption is that it is a *benami* purchase by the father, on whose death it becomes property of the family.—*Bhagbut v. Huro Govind*, 2 W. R. 269.

The question for decision was whether a purchase in 1842, in the name of a Hindu wife, of an interest in part of her husband's ancestral estate was for herself or for her husband. The High Court came to the conclusion that the property was the wife's. The Judicial Committee, on the contrary, came to the conclusion, that the husband was the real purchaser, the purchase being *benami* in his wife's name.—*Dharani Kanth v. Kristo Kumari*, 13 C. 181: L. R. 13 I. A. 70 (reversing 8 C. 455: 11 C. L. R. 41).

A husband who puts his wife into the position of being the true owner of an estate, and allows her to deal with the world as the true owner, deprives himself of the right to set up, or rely on, his *benami* title.—*Nidhee Singh v. Bisso Nath*, 24 W. R. 79. See also *Kishori Mohun v. Mahomed Mojaffar*, 18 C. 188, p. 107. Affirmed by the P. C. in 22 C. 909, at p. 919.

According to the law, as it prevails in Bombay, a purchase by a husband in the name of his wife does not raise any presumption of a gift to the wife, or of an advancement for her benefit. In India, as a general rule, the criterion as to ownership of property is the source from which the purchase money was supplied; but it is not the sole criterion, and depends on the presence or absence of rebutting circumstances.—*Bai Mativahoo v. Purshotam Dayal*, 29 B. 306. (26 C. 227, P. C. referred to).

Again the word "assets," in s. 295 of the old Code, was held to mean the proceeds of the sale of property, which is sold in execution of a decree (See *Ramanathan v. Subramania*, 26 M. 179). The correctness of the meaning of the word "assets," in the above Madras Case, has not as yet been questioned. On the other hand, the said decision seems to have been followed both in Bombay and Madras (see 29 B. 529; 34 M. 25; 35 M. 588) on the question that the purchase-money becomes assets of the judgment-debtor only when the balance is received and not when the deposit is made. If that be the true meaning of the word "assets," then monies paid into Court by the judgment-debtor under Or. XXI, r. 55, Or. XXI, r. 89, or for any other particular purpose are not included within the meaning of the expression "assets held by the Court."

**Court to which and the mode in which Application for Rateable Distribution should be made.**—In order to take advantage of the provisions of section 73, the judgment-creditor must make application to the Court by which assets of the judgment-debtor are held and the application must be in the form prescribed by Or. XXI, r. 11; *Krishna Shankar v. Chandra Shankar*, 5 B. 198, 201; *Katam Sahiba v. Hajee Badsha*, 38 M. 221. See also *Pallonji v. Jordan*, 12 B. 400. Where money stands to the credit of one suit, the plaintiff in another suit having an interest in it, by reason of his being an attaching creditor or mortgagee or otherwise, must, in order to transfer the fund to the credit of his suit, apply in the suit to whose credit the money stands; *Kumar Krishna v. Amulya Charan*, 19 C. W. N. 395. A mere application for rateable distribution which does not comply with the requirements of Or. XXI, r. 11, cannot be treated as an application for execution within the scope of this section; *Aruna Chellam v. Hajee Rowther*, 8 M. L. T. 226 p. 227; *Ramjua Agarwala v. Guru Charan*, 11 C. L. J. 69: 14 C. W. N. 396. So also an application to the superior Court for the transfer of an execution case to itself from an inferior Court cannot be treated as an application for execution to the superior Court within the meaning of s. 73, C. P. Code; *Krishna Kumar v. Pasupati*, 25 C. W. N. 740.

The important question that arises in this connection is whether, where property of the same judgment-debtor is attached in execution of more Courts than one, and the property is sold by the Court of the highest grade, the holders of decrees of inferior Courts are bound, in order that they may be entitled to rateable distribution, to have their decrees transferred to the Court of the highest grade and make a fresh application to that Court. The Bombay High Court in *Nimbaji v. Vadia*, 16 B. 683, has held that the holders of decrees of inferior Courts must in such a case apply to the Court of the highest grade for rateable distribution, that being the Court by which assets are held. On the other hand, it has been held by the High Courts of Calcutta and Madras that it is not necessary to make a fresh application to the Court of the highest grade, because the Court of the highest grade is to determine, under s. 63, all claims relating to the attached property and such claims include claims for rateable distribution: *Bijoy v. Hukum*, 29 C. 773; *Girindra v. Kedar*, 29 C. W. N. 575: A. I. R. 1925 C. 961; *Narasimhachariar v. Krishnamachariar*, 26 M. L. J. 406.

**Applications for the Execution must be made before the Receipt of such Assets.**—A decree-holder applying for rateable distribution must apply for execution of his decree to the Court by which assets are held and he must do so prior to realization. The section does not require that

**Benamidar's Right to Sue.**—*See notes under Or. 1, r. 1 under the heading "Suit in the name of benamidar."*

**Right of Benamidar to Execute Decree.**—When a decree is transferred (really or nominally) by assignment in writing, and the ostensible transferee executes the decree with the permission of the Court, the proceedings taken and the application on which they are based, are in accordance with law as between such transferee and the transferee, though he may be merely a *benamidar*, and such proceedings are sufficient to keep the decree alive.—*Balkish v. C. 388*. (9 C. 633, distinguished, 5 C. L. R. 253, referred to; 4 B. L. R. Ap. 40; and 14 B. L. R. 425-note; 19 W. R. 255, followed). But see *Gour Sundar v. Hem Chunder*, 16 C. 355 where it has been held that an application for execution by a *benamidar* is not an application in accordance with law so as to prevent the operation of the law of limitation.

**Right of Beneficial Owner to Apply to Set Aside a Sale.**—Where immoveable property has been sold in execution of a decree against the ostensible owner as his property, a person claiming to be the beneficial owner is entitled to come in under Or. XXI, r. 90, and to object to the sale; *Abdul Gani v. Dunne*, 20 C. 418. It is competent to a Court to set aside the sale finally and conclusively as against a beneficial owner, although his *benamidar* only, and not he, is made a party to the proceeding.—*Baroda Kanta v. Chunder Kanta*, 29 C. 682; 6 C. W. N. 706.

**Sale for Arrears of Rent—Purchase by Benamidar for Judgment-Debtor.**—Where a sale takes place under the Bengal Tenancy Act, in execution of a decree for arrears of rent, and the purchaser is found to be mere *benamidar* for the judgment-debtor. Held, that under section 173, Bengal Tenancy Act (VIII of 1885), the sale was only voidable and not absolutely void.—*Gopal Chunder v. Ram Lal*, 21 C. 554. See *Azgar Ali v. Asaboddin*, 9 C. W. N. 184.

Where the auction-purchaser is a *benamidar* for the judgment-debtor, in an application to set aside a sale under section 173 of the Bengal Tenancy Act (VIII of 1885), and 311 Civil Procedure Code, a second appeal lies from the order made on the application, as the application is one under section 244, Civil Procedure Code, (s. 47)—*Chand Monee v. Santo Monee*, 24 C. 707; 1 C. W. N. 534.

**87. (1)** The Local Government, with the previous sanction of the Governor-General in Council, may, by notification in the local official Gazette, make rules for any local area imposing conditions in respect of the sale of any class of interests in land in execution of decrees for the payment of money, where such interests are so uncertain or undetermined as, in the opinion of the Local Government, to make it impossible to fix their value. [S. 327.]

(2) When on the date on which this Code came into operation in any local area, any special rules as to sale of land in execution of decrees were in force therein, the Local Government may, by notification in the local official Gazette, declare such rules to

Power for Local Government to make rules as to sales of land in execution of decrees for payment of money.



Where immoveable property is sold in execution of a decree in separate parcels, the sale-proceeds are not deemed to be realized until the entire amount of the purchase money in respect of all the parcels is paid into Court; *Ramanathan v. Subramanian*, 26 M. 179. The same view was taken by the Calcutta High Court in *Barendra v. Martin & Co.*, 33 C. L. J. 7, 12: 62 I. C. 167, but in a recent case, the same High Court has held that where property is sold in separate parcels, the sale-proceeds are deemed to be realized on the several dates on which they are received by the Court; *Girindra v. Kedar*, 29 C. W. N. 575: A. I. R. 1925 C. 966.

A debt due by a third party to the judgment-debtor when paid into Court under a prohibitory order under Or. XXI, r. 46, is realized, so that it becomes liable to rateable distribution amongst those who applied for execution before payment into Court. But one who applies after payment is not entitled to rateable distribution; *Srinivasa v. Seetharamayyar*, 19 M. 72: 5 M. L. J. 151.

An attachment does not create any charge in favour of the attaching creditor as against other creditor. This section draws a sharp distinction between attachment and realization and clearly shows that the Legislature did not intend to treat the debt as paid until the money has found its way into the hands of the creditor.—*Shoobul Chunder v. Russick Lall*, 15 C. 202.

**Dismissal of Execution.—Right to apply for Rateable Distribution.**—Dismissal of an application for execution for want of prosecution does not affect the decree-holder's right to share in rateable distribution; *Byomkesh v. Jatindra*, 18 C. W. N. 1311.

A decree-holder is not entitled to rateable distribution if the application for execution is dismissed or time-barred or the decree is satisfied; *Gopal Chandra v. Hari Mohan*, 21 C. L. J. 624; *Ranganatha v. Seetharama*, 7 M. L. T. 110.

**Priority of Attachment Whether Confers Preferential Treatment.**—The application for execution must be made before the receipt of assets under s. 73 (1). The date of receipt of assets is the date of sale of the property. The creditors are not entitled to preferential treatment by reason of priority of attachment; *Thakurda Motilal v. Josep Iskunder*, 44 C. 1072: 21 C. W. N. 887.

**Meaning of the Word "Assets" and "Realization".—When Assets Become Distributable.**—The omission of the words "realized by sale or otherwise in execution" and the substitution of "assets held by the Court" must have been deliberate and the intention of the legislature was that the term "assets" should now include any assets held by the Court irrespective of the manner in which they came into possession of the Court. The scope of the section has been deliberately enlarged; *Haricharan v. Birendra Nath*, 35 C. L. J. 327.

The word "assets" means the proceeds of the sale of the property which is sold in execution of the decree; and the assets are realized when the whole, and not a portion of the same, are paid into Court.—*Ramanathan v. Subramania*, 26 M. 179.

Assets must be realized by some process of Court in execution and can apply only to a sale by the Court and not to a private sale by the

**70.** (1) The Local Government may make rules consistent  
 Rules of procedure. with the aforesaid provisions—

(a) for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same, and for retransmitting the decree from the Collector to the Court; [S. 320 para. 2.]

(b) conferring upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector;

(c) providing for orders made by the Collector or any gazetted subordinate of the Collector, or orders made on appeal with respect to such orders, being subject to appeal to, and revision by, superior revenue-authorities as nearly as may be as the orders made by the Court, or orders made on appeal with respect to such orders, would be subject to appeal to, and revision by, appellate or revisional Courts under this Code or other law for the time being in force if the decree had not been transferred to the Collector. [S. 320, para. 3.]

(2) A power conferred by rules made under sub-section (1) upon the Collector or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, shall not be exerciseable by the Court or by any Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the Court. [S. 320, para.4.]

## COMMENTARY.

**Jurisdiction of Collector and of the Civil Court.**—Sections 69 and 70 of the C. P. Code, 1908 give authority to the Collector for the purpose of enabling him to determine the best mode of satisfying the decree, whether it is to be satisfied by management by the Collector himself of the land attached in execution of the decree, or whether it is to be by its sale or letting. So far, therefore, as the machinery necessary for the satisfaction of the decree is concerned, the Collector is the sole authority. The discretion is his and no Civil Court can interfere with that discretion. But that discretion does not extend to any jurisdiction in the Collector to determine whether the decree itself has been satisfied or not. The latter jurisdiction is in the Civil Courts. It is that Court alone which is competent to determine the question judicially: *Bhurchand v. Vira Champa*, 37 B. 32: 14 Bom. L. R. 787.

The word "realized" means converted into cash or into a form whereby it becomes available for immediate distribution, and there is nothing in the word itself which requires that process should take place as the result of any ulterior proceeding in the course of execution.—*Moni Lal Umedram v. Nanabhai*, 29 B. 264. See also *Sewdat Ray v. Sree Canto*, 33 C. 639; 10 C. W. N. 694. *Folld.* in *Butloo Khan v. Gomani Singh*, 18 C. W. N. 1177.

Moneys paid into Court by sale or otherwise in execution of a decree are assets from the moment of their payment into Court and are available for rateable distribution only amongst decree-holders who have applied for execution prior to that time.—*Vistra Nath v. Virchand*, 6 B. 16. See also *Srinivasa v. Seetharamayyar*, 19 M. 72; *Jadu Rai v. Misri*, 8 P. W. R. 1920; *Surjan Singh v. Pragdas*, 33 P. R. 1918.

Rents of property under attachment realized by a Receiver appointed at the instance of a decree-holder, are assets realized by a process of execution.—*Fink v. Maharaja Bahadur*, 26 C. 772; 4 C. W. N. 27. In *Sorabji Edulji v. Gorind Ramji*, 16 B. 91, it has been held that the money paid to the Sheriff under the order of a Court must be regarded as assets realized by sale, or otherwise in execution of a decree. See also *Noor Mohamed v. Bilasiram*, 47 C. 515, where it has been held that rateable distribution should be limited to the amount of the decrees and cannot be extended to the costs of application for execution unless, prior to the receipt of the money, there was an order that such costs are to be added to the amount of the decree.

Money paid to a bailiff under Or. XXI, r. 55, to avert the levy of an attachment of moveables is payable only to the attaching creditor and is not available for rateable distribution (86 B. 156 *folld.*; 28 M. 380; 28 B. 264; 38 M. 221; 27 M. 346 *refd. to*); *Nath Mal v. Maniram*, 21 Bom. L. R. 975; *Sorabji v. Kalu Raghunath*, 86 B. 156.

Moneys paid by the judgment-debtor under Or. XXI, r. 48, are assets held by Court available for distribution among the judgment-creditors who have made previous applications for execution and ought not to go in entirety to the attaching creditor; *Indaji v. Cooverjee*, 29 B. L. R. 237; 93 I. C. 852; A. I. R. 1926 B. 242.

Money paid by a judgment-debtor under arrest in satisfaction of the decree against him are not assets realized by sale or otherwise.—*Purshotam Dasa v. Mahanant*, 16 B. 588. Approved in *Prosonomoye v. Sreenath*, 21 C. 809. See *Kanappa v. Annamali*, (1913) M. W. N. 649; 20 I. C. 919; *Dost Mahomed v. Subramaniam*, 8 Bur. L. T. 22. *Ebbji Umersey v. Graham & Co.*, 19 Bom. L. R. 274; *Mahbub Bux v. Buksh Ellahi*, 14 S. L. R. 164; 61 I. C. 424. In *Gopal Dai v. Chuni Lal*, 8 A. 67, it has been held that where, after attachment of property, the judgment-debtor paid into the Court the sum due under the decree, it could not be regarded as assets by sale or otherwise in execution. See, however, *Sorabji Edulji v. Gorind Ramji*, 16 B. 91.

This section does not apply to deposit made by the judgment-debtor either under section 174, Bengal Tenancy Act, or under Or. XXI, r. 80. The money paid under either of the above sections is not realized by process of execution.—*Bihari Lal v. Gopal Lal*, 1 C. W. N. 695; *Hari Sundari v. Sashi Bala*, 1 C. W. N. 195. Followed in *Roshun Lal v. Ram Lal*, 80 C. 262; 7 C. W. N. 341; 41 C. 619.

sold in execution of a decree, a suit to set aside the sale is not maintainable, *Farhat-un-nissa v. Sundari Prasad*, 18 A. L. J. 124.

**Suit to set aside Order of Collector.**—A suit lies in Civil Court for confirmation of a sale held in execution of a decree by the Collector, and to set aside an order passed by him cancelling the sale.—*Bandi Bibi v. Kalka*, 9 A. 602 (5 A. 314, referred to: 3 A. 554 followed); *Shiam Behari v. Roop Kishore*, 20 A. 379, F. B. (18 A. 437 overruled). Followed in *Mathura Das v. Jamna Prasad*, 2 A. 355. But see *Chulhi Upadhya v. Badri Upadhya*, 19 A. L. J. 232. The period of limitation for such a suit is one year.—*Raghunath Prasad v. Kaniz Rasul*, 24 A. 467. (25 B. 337, P. C., and 22 A. 168, referred to, 25 C. 179, distinguished; and 3 M. 82, declared to be ineffectual). In *Mathura Das v. Panna Lal*, 19 B. 216, it has been further held that the rules framed by the Government under these sections only restricted the powers of the Court to interfere with the procedure of the execution of decrees transferred to the Collector. They did not come in the way of a party bringing a civil suit to establish his purchase.

The Collector has no jurisdiction to set aside the sale after he had confirmed it and re-transmitted the decree to the Civil Court, and the validity of that order, so far as it affects the title vested in the auction-purchaser, can be legitimately questioned by the party concerned in a Civil Court; *Nandkishore v. Badam Singh*, 24 A. L. J. 637; 95 I. C. 576; A. I. R. 1926, A. 575.

**Suit to set aside a Sale held by the Collector.**—A suit to set aside a sale held by the Collector, on the grounds that the property was not ancestral, and therefore could not be legally sold by the Collector, and that the real purchaser was the decree-holder himself who had not obtained the leave of the Court to bid, is barred by s. 47.—*Daulat Singh v. Jugal Kishore*, 22 A. 108; *Bhatilay Chunnilal v. Chakkirpan*, 44 A. 380.

A suit will lie at the instance of one who is interested in the property, to set aside the sale of that property held by the Collector on the ground of fraud alleged to have been committed jointly by the judgment-debtors, the decree-holders, the auction-purchaser and pre-emptors; *Bhagwan Das v. Suraj Prasad*, 47 A. 217.

After transfer and during the pendency of the execution proceedings before the Collector, the judgment-debtor privately sold the property and the purchasers paid over the price to the decree-holder and such payment was certified to the Civil Court which passed the decree. The decree-holder did not give any intimation to the Collector, who in due course sold the property. Held that the remedy of the purchaser at a private sale was by an application to the Civil Court under s. 244, C. P. Code, 1882 (s. 47) and not by a separate suit.—*Sadho Chaudhri v. Abhenandan Prasad*, 26 A. 101 (24 A. 239, referred to). Referred to in 5 N. L. R. 121, p. 123.

**Appeal against Orders of Collector under this and the following Sections.**—Orders by a Collector in the exercise of the powers conferred under s. 320, C. P. Code, 1882, (ss. 68, 70, 71) and the following sections, relating to the execution of a decree of a Civil Court, are not appealable to the High Court.—*Madho Prasad v. Hanasa Kuar*, 5 A. 314; *Manchuji v. Thakurdas*, 7 Bom. L. R. 682.

A decree-holder who has attached a fund in Court belonging to the judgment-debtor should not be made to wait for other creditors, who have not obtained a decree. The decree-holder who first attaches the fund has to be paid first out of the fund in priority (38 M. 221 *not foll.*; 26 M. L. J. 364 *foll.*). A fund in Court requires no realization and the moment it is attached it can be paid to the attaching creditor; *Umma Venkataratnam v. Methavala Adamji Usman & Co.*, 42 M. 692 (*dissented from* in 44 M. 100 (F. B.)).

"Against the same judgment-debtor."—It is essential that the decrees should have been passed against the same judgment-debtor. This is made clear by the introduction of the word "passed" which did not occur in the Code of 1882; *Balmer Lawrie & Co. v. Jadu Nath*, 42 C. 1: 19 C. W. N. 1202.

S. 73, C. P. Code, is imperative and does not imply that an application for execution is necessary to obtain the benefit of it. It is not necessary that all the judgment-debtors in the several decrees should be identical and the fact that in one there is an extra judgment-debtor does not make the section inapplicable. The addition of the word "passed" has not restricted the application of the section; *Mussammat Inderbas v. Satnarain Singh*, 4 Pat. L. T. 373: A. I. R. 1923 Pat. 216: 74 I. C. 626.

A person who has obtained a decree against two only of the judgment-debtors, is entitled to come in and share rateably with a person who has obtained a decree against those two judgment-debtors and other persons—*Ganesh Das v. Siva Lakshman*, 30 C. 583, F. B.: 7 C. W. N. 414, F. B. (12 C. 294 *overruled*). Followed in *Gatti Lal v. Bir Bahadur Singh*, 27 A. 158. See also *Maharajah of Burdwan v. Apurba Krishna*, 14 C. L. J. 50: 15 C. W. N. 872. This section governs where the first decree is against three judgment-debtors and the decree on which the petitioner relies is against one of those three.—*Chhotalal v. Nabibhai Mianji*, 29 B. 528: 7 Bom. L. R. 567. See, however, *Chattrapat Singh v. Jadukul Prosad*, 20 C. 673; and *Nimbaji Tulsiram v. Vadia Venkata*, 16 B. 683.

Two decrees were obtained against the estate of the deceased testator, each obtained against two out of three executors. One of these two executors was common to two suits. Each decree was *prima facie* capable of execution against the estate, *held*, that the decree-holders were entitled to rateable distribution of the assets under s. 73; *Nilmani v. Hiralal*, 27 C. L. J. 100.

If the fund in Court is the joint property of two persons, one of whom is the judgment-debtor under one decree and both of them are judgment-debtors under another decree, the former decree-holder is not entitled to rateable distribution; *Muthiah Chetty v. Alagappa Chetty*, 24 M. L. T. 179: (1918) M. W. N. 520 (33 M. 465: 12 C. 294: 16 B. 683: 22 M. 241 *relied on*).

Where a property belonging to A has been attached under a decree, and decree-holders other than the attaching creditor have applied before realization of assets to participate in the sale-proceeds, and amongst them a creditor who has obtained a decree against A and B, such latter creditor is entitled under s. 73 to share in the proceeds of the sale of B's property.—*Shumbhoo Nath v. Lucky Nath*, 9 C. 920. Approved in *The Delhi and London Bank v. The Uncovenanted Service Bank*, 10 A. 35. In *Grant v.*

exhausted all the power of execution conferred upon him, then any matters requiring to be done, must be done by the Civil Court which made the decree (31 B. 207 *referred to*).

A sale of certain property by the Collector in execution of a decree was set aside by the Collector on the application of the decree-holder, and a re-sale took place at which the decree-holder purchased the property. Subsequently on the application of a third party who offered to pay a higher value, the Collector set aside the sale and ordered a re-sale, and the re-sale accordingly took place. *Held* that the re-sale by the Collector was a nullity and that the question with regard to the confirmation of the previous sale should be dealt with by the Sub-Judge, as if the Collector had issued no orders on the subject.—*Bai Amathi v. Madhav*, 15 B. 694, (15 B. 322 *followed*).

When a decree is sent to a Collector for execution, the Civil Court ought not to control his proceedings, unless it is set in motion by one of the parties to the execution proceedings.—*Hargovan v. Hira Haribhai*, 8 B. 301.

After transfer of a decree under ss. 68, 70, 71, application under Or. XXI, r. 2, about part payment of the decretal amount should be made to the Collector as being, within the meaning of Or. XXI, r. 2, "the Court whose duty it is to execute the decree."—*Mahammad Said v. Payage Shahu*, 16 A. 228. Followed in *Khusalchand v. Andram Sahabram*, 35 B. 516.

Where a decree has been sent to the Collector for execution, he holds any money which may be realized in execution of such decree at the disposal of the Civil Court by which the decree has been sent to him for execution and he is not competent to distribute such money in contravention of an order from the Civil Court.—*Tapesari Lal v. Deoki Nandan*, 16 A. 1.

Where a Collector gives a sale-certificate to a purchaser after a sale in execution, and when the purchaser applies to the Court which passed the decree for delivery of possession, the Court has jurisdiction to determine what actually passed by the sale.—*Sundar Das v. Mansaram*, 7 A. 407 (5 A. 374 *referred to*).

"Shall be deemed to be acting judicially."—Though a Collector executing a decree shall be deemed to be acting judicially within the meaning of this section, he is not a Court; *Bhagawan Das v. Suraj Prasad*, 47 A. 217.

72. (1) Where in any local area in which no declaration under section 68 is in force the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the decree may be made within a reasonable period by a temporary alienation of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share.

Where Court may authorize Collector to stay public sale of land.

**Rent Decree.**—An ordinary judgment-creditor holding a money-decree is not entitled under this section to claim rateable distribution of assets realized by sale of the judgment-debtor's house or building, under a decree obtained by another creditor for rent due to him in respect of the said house or building.—*Manik Lall v. Lakha Mansing*, 4 B. 429.

**Transfer of Decree to the Court where Assets are held, if necessary for Rateable Distribution.**—On this point there is still divergence of judicial opinion. In several cases it was held that to entitle a decree-holder to rateable distribution the transfer of the decree to the Court where the process of realization takes place, is necessary. But in several other cases, it was held that transfer is not necessary. The question is still unsettled as will appear from the following cases.

To enable rival decree-holders to share in the rateable distribution of the assets, they must either apply to the same Court for execution or their applications must be transferred to the same Court.—*Muttalangi v. Muttayyar*, 6 M. 357. See also *Gopee Nath v. Achcha Bibee*, 7 C. 553; 9 C. L. R. 395; *Jetha Madhavji v. Najeralli*, 4 B. 472; *Krishnashankar v. Chandra Shankar*, 5 B. 198; *Nimbaji Tulsiram v. Vadia Venkati*, 6 B. 683; *Jaynarayan v. Ismail*, 20 B. 377; and *Dattatraya v. Rahimtullah*, 18 B. 456. In *Ram Chandra v. Latchman*, 7 Bur. L. T. 277, it has been held that it is illegal for a Court to attach money lying in the hands of a Court in another district. The proper procedure is to have the decree transferred to the Court in that district for execution. But see *Clark v. Alexander*, 21 C. 200, where it has been held that the practice of the Calcutta High Court in favour of the principle of rateable distribution amongst all the attaching creditors, is without any such condition as the transfer of the execution proceedings to the superior Court. (7 C. 553; and 12 C. 33, referred to; 6 M. 357; and 16 B. 683 not folld.). The same principle has also been followed in *Har Bhagat Das v. Anandaram*, 2 C. W. N. 126. See also *Mohun Lal v. Humayun*, 13 O. C. 291; *Arimuthu v. Vyapuri*, 21 M. L. J. 505; 9 M. L. T. 121; 35 M. 588.

The original Court can entertain an application for rateable distribution at the instance of the decree-holder even without any formal re-transfer or a certificate from the second Court under ss. 38, 39, 41, C. P. C., 1882. (Or. XXI, rr. 4, 5). Upon such application being made, the Court to which the decree had been transferred should be called upon to certify (ss. 38, 39, 41, Or. XXI, rr. 4, 5), what portion, if any, of the decree has been satisfied, and upon obtaining such certificate, the assets may be rateably distributed.—*Baij Nath v. Holloway*, 1 C. L. J. 315. The Court to which the decree is transferred for execution has no power to entertain the transferee's application for rateable distribution; such application can only be entertained by the Court which passed the decree.—*Tameshar Prasad v. Thakur Prasad*, 25 A. 443.

The Judge of a Court of Small Causes, vested with the powers of a Sub-Judge, is not one and the same Court but two different Courts. Held, therefore, that the holder of a decree made in the capacity of Sub-Judge, who had applied to such Judge acting in that capacity for execution of his decree, was not thereby entitled to share rateably under s. 295, C. P. Code, 1882 (s. 73), assets subsequently realized by sale in execution of a decree made by such Judge in the capacity of Judge of such Small Cause Court.—*Himalaya Bank v. Hurst*, 3 A. 710. See also *Chella Narasiah v. Sontan*, 25 M. L. J. 601; 21 I. C. 800. But see *Malhari v. Naiso*, 9 B. 174;

refused to accept on the ground that under the terms of the decree the property must be sold. The Chief Court held this view erroneous and the District Judge again referred the case to the Collector for execution. *Held*, that he could do so and was not bound by the recommendation of the sub-divisional officer as he is not a Collector within the General Clauses Act; *Guranditta v Rustomji*, 27 I. C. 630; 9 P. L. R. 1916.

As to power of Assistant Collector, see *Emperor v. Bhajan Tewari*, 37 A. 334.

**Power to Propose Temporary Alienation.**—A member of agricultural tribe was a judgment-debtor under a decree of Civil Court and his land was attached in execution. The executing Court asked the Collector to intervene. *Held*, that the Collector had, under s. 72 of the Code, jurisdiction to make a proposal for temporary alienation of land notwithstanding the provisions of s. 16 (1) of the Punjab Alienation of Land Act; *Saleh Mahomed v. Meher Singh*, 1 P. R. (Rev.) 1919: 51 I. C. 399; *Guranditta Mal v. J. Rustomji*, 9 P. L. R. 1915; 27 I. C. 630; *Sardarni v. Ram Rattan*, 1 L. A. 192 F. B.; *Sani Ditta v. Nur Ahmad*, 4 Lah. L. J. 476: 74 I. C. 194.

"Sections 69 to 70 shall apply so far as applicable."—The section does not apply to a decree which directs the sale of land or of a share in land, in pursuance of a contract specifically affecting the same. The Court, therefore, cannot authorize the Collector to stay the sale in such a case under this section.—*Bhagwan Prasad v. Sheo Sahai*, 2 A. 856.

Possession cannot be given to an usufructuary mortgagee of the property, while the property is in the management of the Collector. For instance, where money having been advanced, a contract was made to secure re-payment of it by a usufructuary mortgage of land, with possession to be given to the lender, which, however, had then already been attached under a decree, and had been taken under the Collector's management under s. 326, C. P. Code, 1882 (s. 72). To perform the contract by delivery of possession of the land having thus become impossible, it was held that the lender of the money was entitled to compensation, the damages being the amount of the advance with interest thereon.—*Seth Jaidoyal v. Ram Sahai*, 17 C. 432. Followed in 16 M. 325.

**Limitation.**—Where the immoveable property of the judgment-debtor is placed under the management of the Collector under this section, limitation against the judgment-debtor does not run so long as the property remains under such management.—*Giridhar Das v. Harshankar*, 20 A. 383.

## DISTRIBUTION OF ASSETS.

73. (1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons :

Proceeds of execution-sale to be rateably distributed among decree-holders.





portant change made in this section, is the substitution of the words "*assets are held by a court*" for the words "*assets realized by sale or otherwise in execution*," which occurred in the old section.

The next change made in the section is that the words "*before the receipt of such assets*" have been substituted for the words "*prior to the realization*."

Another change made in the section is that the words "*interest in*" in cl. (b) have been substituted for the words "*right against*."

"The effect of the above alterations will be separately considered under different headings and sub-headings.

"The Committee have slightly altered the wording of this clause in order to bring it into line with the Transfer of Property Act, 1882, section 96."—See "Notes on Clauses."

**Object of the Section.**—Under the Code of 1859 (s. 270), where there were several decree-holders against the same judgment-debtor or debtors, those who first attached the property had a preferential claim over the sale-proceeds to the exclusion of other decree-holders who attached the property subsequently. This gave rise to unnecessary multiplicity of execution proceedings; and in order to prevent this and to secure an equitable distribution of the sale-proceeds amongst the several decree-holders by placing them upon an equal footing and to make the sale-proceeds rateably divisible amongst all of them, instead of giving priority to one decree-holder over the others, that this section was enacted in the Code of 1882, and now in the present Code this section has been recast with such additions and alterations as were rendered necessary according to the rulings of the High Courts. The object of this section is to provide for the rateable distribution of assets, upon which two or more persons are considered to have equal claims. The test of the application of this section is not whether the decrees have been passed against the same judgment-debtor, but whether the applicants, for rateable share, have applied for execution against the same judgment-debtor; and if the words "against the same judgment-debtor" are literally construed, then, in many cases, the object of the section will be defeated and grave injustice will result. The words must be read referring more to the property which he represents than to the person against whom execution is sought (*Abadi Begum v. Sha Ara Begam*, 8 Oud. Cas. 86). The purport of the section is not to alter or limit the rights of the parties arising out of contract, but simply to determine questions between rival decree-holders, standing before the Court on the same footing and in respect of whom there is no rule for otherwise determining the mode in which the proceeds of property sold in execution shall be distributed; *Hasoon Ara Begum v. Jawadoonnissa*, 4 C. 29. In *Ramjus Agarwala v. Guru Charan*, 11 C. L. J. 69; 14 C. W. N. 396, Mookerjee, J., said "Section 295 of the C. P. Code of 1882, deals with the question of the rateable distribution of the proceeds of the execution sale among decree-holders. As was observed by Strachey, C. J., in *Bethal Das v. Nand Kishore*, 23 A. 106, the object of the section is twofold. The first object is to prevent multiplicity of execution proceedings, to obviate in a case, where there are many decree-holders competent to execute their decrees by attachment and sale of a particular property, the necessity of each and everyone separately attaching and separately selling that property. The other object is to secure an equitable administration of property."

Code, 1882 (s. 73), did not prejudice the rights of the unsatisfied mortgagee, or discharge his incumbrance.—*Janoky Bullabh v. Jahiruddin Mahomed*, 10 C. 567. (4 C. 29 referred to).

S. 73 (1) (b) applies only to a mortgagee whose charge is valid against the executing decree-holder. When he holds a money decree apart from his mortgage, he can apply for rateable distribution; *Babu Bishun Mohan v. Narayan Prasad*, 74 I. C. 140.

**Proviso (c).**—"Where immoveable property is sold in execution, for discharge of an incumbrance thereon."—The meaning is that when immoveable property is sold in execution of decrees ordering its sale for the discharge of incumbrances, the sale-proceeds are to be applied in satisfaction of incumbrances according to their priority.—*Sahai Ram v. Shib Lal*, 7 A. 379. To read the words "an incumbrance" as an "incumbrance or incumbrances" would be to defeat the intention of the Legislature as expressed in this section, and also in section 80 of the Transfer of Property Act.—*Mitthu Lal v. Kishan Lal*, 12 A. 546.

The categories included in 73 (1) (c), C. P. Code, are arranged in order of priority but the third category refers to such subsequent encumbrances alone as are entitled to take precedence over the money-decree holders mentioned in the fourth category. The encumbrances enumerated in the third category are not such encumbrances as are created by the judgment-debtor during the pendency of an attachment by a money decree-holder. When a subsequent encumbrancer invokes the aid of the third category u. s. 73 (1) (c), C. P. Code and claims the benefit of the priority conferred thereby, the Court is bound to satisfy itself that he is in law entitled to precedence over the holders of decrees for the payment of money mentioned in the fourth category; *Barendra v. Martin and Co.*, 33 C. L. J. 7.

**Mortgage—Sale by first mortgagee—Arrears of rent—Lien—Claim by puisne mortgagee on proceeds of sale.**—*Held* that the second mortgagee was entitled to recover the sum claimed in preference to the first mortgagee's claim for arrears of rent.—*Sivaram v. Subramanya*, 9 M. 57.

As between registered and unregistered mortgagees, the registered mortgagee, though his mortgage is subsequent in date, will have priority over the unregistered mortgagee in the distribution of sale-proceeds, but the holder of an unregistered mortgage will have priority over the holder of money-decrees in the distribution of sale-proceeds under this section.—*Padmanath v. Khemu*, 18 B. 684.

This section does not apply where the amount due on the mortgagor's incumbrance had not been ascertained, and where no steps had been taken to have the same ascertained, the Court executing the decree was not in a position after defraying the expenses of the sale and prior incumbrances, to apply the surplus proceeds in discharging the interests and principal money due on plaintiff's mortgage; *Barham Deo Prasad v. Tarachand*, 83 C. 92; 9 C. W. N. 989. Affirmed in 41 C. 654, P. C.: 18 C. W. N. 345.

The provisions of section 73 (c) operate, as the earlier part of the section shows, only where the litigant concerned has himself obtained a decree and applied for rateable distribution in execution thereof; *Nathan Sao v. Mrs. Annie Besant*, 19 C. W. N. 535; 10 I. C. 226 (83 C. 92 referred to).

above alteration any material change has been made in the law. No doubt, the words of the present section are wider than the words of the old section but it seems that by the above alteration no material change has been made in the law. The present Code is divided into sections and rules, and as has been pointed out in *Nabinchandra v. Pran Krishna*, 41 C. 108, p. 111, the sections only lay down general principles, and the rules provide the means by which they can be applied. The result is that the rules restrict the application of the provisions contained in the sections. That being so, the general terms of this section are to be construed subject to the provisions contained in the rules. Now we find that section 73 provides in general terms "*the assets held by the Court*" but those general words are to be applied according to the restriction contained in the rules. The Bombay High Court in *Sorabji v. Kala*, 36 B. 156, has held that moneys paid into Court under Or. XXI, r. 55, are not assets *held by the Court* within the meaning of this section. The same Court in *Ganesh v. Vitthal*, 37 B. 387 and the Calcutta High Court in *Harai Saha v. Faizlur Rahman*, 41 C. 619; 18 C. L. J. 144; 17 C. W. N. 636 and the Madras High Court in *Veera Raghavan v. Mannadissier*, 23 M. L. J. 585; 17 Ind. Cas. 920, have held that money paid into Court under Or. XXI, r. 89, of the C. P. Code, 1908, cannot be rateably distributed under section 73. In both the Bombay and Calcutta cases, the cases reported in 81 C. 262; in 1 C. W. N. 195 and 695 and 28 M. 280 decided under the old Code have been followed. Similar view of the change in s. 73 of the present Code has also been taken in *Jetha Bhima v. Lady Janbai*, 37 B. 138. In *Gouri Dutt v. Amar Chand*, 15 C. L. J. 49, it was held that money paid out of Court by judgment-debtor to one of the decree-holders is not assets within the meaning of s. 295 of the C. P. Code, 1882. In *Thiru Vengadiah v. Thiru Vengadiah*, 26 M. L. J. 364, it has been held that the fact that a fund in Court is attached by a Court does not constitute the fund, "assets held by" that Court within the meaning of this section. Therefore the first attaching creditor in point of time is entitled to be paid in full out of the fund and the other attaching creditors are not entitled to rateable distribution.

It would thus appear that the alterations made in section 73 do not alter the effects of the provisions of the rules contained in Schedule I. It cannot therefore be laid down as a general proposition, that the words "*assets held by the Court*," in the present section, include all assets of a judgment-debtor, whether realized by sale or otherwise in execution of a decree or not. The words do not include monies paid into Court by a judgment-debtor for a particular purpose, under the provisions of the rules contained in Schedule I of the Code. If the intention of the Legislature is that the above words include any kind of assets of the judgment-debtor whether realized by sale or otherwise in execution or not, then the section will nullify the express provisions of the rules contained in Schedule I, Or. XXI.

In *Katum Sahiba v. Hajee Badsha*, 88 M. 221, p. 224 Bakewell, J., said: "The employment in s. 73 of the word "*assets*" instead of the property of the debtor, and the references to the costs of realizations, and to the sale of property subject to an incumbrance appear to me to show that the section contemplates the case where property of judgment-debtor has been realized in execution, and that it is not therefore applicable to the present case" (where money was paid in satisfaction of the decree).

such price has come as such person's rateable share of the assets of the judgment-debtor under s. 73. He is not limited to the procedure in the execution department.—*Kishun Lal v. Muhammad Safdar Ali*, 13 A. 383. (5 A. 577, followed).

**Rival Decree-holders—Right of One Decree-holder to Impeach Decree of Rival Decree-holder.**—In the absence of fraud on Court or collusion as between the decree-holder and judgment-debtor, it is not open to one decree-holder to attack a decree obtained by another decree-holder against the same judgment-debtor seeking rateable distribution as not creating a valid debt and entitling the decree-holder to share in the distribution of the assets under s. 73. The mere fact that the decree was obtained *ex parte* or on perjured evidence is not enough to vitiate it; *Venkatarama Iyer v. The South Indian Bank Ltd.*, 43 M. 881; 38 M. L. J. 109.

Where there are two decree-holders of one judgment-debtor and the objection of the judgment-debtor that the property was not transferable against one is disallowed and against the other it is allowed, the latter is entitled to rateable distribution of the sale-proceeds on execution by the former; *Gopal Chandra v. Hari Mohan*, 21 C. L. J. 624.

An executing Court when rateably distributing the proceeds of a sale in execution cannot go into the question whether the decree under which distribution is claimed has been obtained by fraud; *Dattatraya Govindaseth v. Purshottam Narayanseth*, 46 B. 635.

The act of distribution under s. 73 is a ministerial Act and therefore where the first decree-holder objects to rateable distribution on the ground that the second decree-holder's decree was collusive and urges for judicial decision on the point; held that his prayer should be disallowed; *Bibi Unsa Habiba v. Mt. Rasoolan*, 5 Pat. 445. A. I. R. 1926 Pat. 497.

**Jurisdiction of Court to Determine whether the Claimant is a bona fide Creditor or a Sham Decree-holder or that His Decree is Time-barred.**—Under s. 73 of the C. P. Code it is competent to the Court to investigate whether any of the decree-holders who claim rateable distribution is a bona fide or a fictitious decree-holder and is a *benamidar* for the judgment-debtor; *Puran Chand v. Surendra Narain*, 16 C. L. J. 582; 17 C. W. N. 326. See also *In re Sundar Das*, 11 C. 42, *Chhaganlal v. Fazarali*, 13 B. 154; *Katum Sahiba v. Hajee Badsha*, 38 M. 221. In *Peary Lal v. Peary Lal*, 18 C. L. J. 646; 19 C. W. N. 903, it has been held that under s. 73 of the C. P. Code the Court has jurisdiction to hold a summary enquiry as to the fraudulent character of the decree itself obtained by one of the decree-holders claiming rateable distribution. This conflicts with the view expressed in 31 M. 221. See also *Venkatarama Iyer v. South Indian Bank Ltd.*, 43 M. 881.

Where a personal decree is passed against a judgment-debtor in collusion with a decree-holder, another decree-holder may prove collusion and corrupt nature of the bargain between them and rateable distribution will be refused if the Court is satisfied of the collusion and corrupt bargain; *Suryanarayana v. Gopala*, 23 M. L. J. 699; 12 M. L. T. 660.

Where property had been attached in execution of decree, it is competent to a rival decree-holder to show that the attachment should not issue, as the decree under which it issued was barred by limitation; and the Court, if satisfied that the decree is so barred, is competent to see that the

such decree-holder must also apply for attachment of the assets; *Indra Chandra v. Ghaneshyam*, 9 C. L. J. 210, *see also Ramjus v. Guru Churn*, 11 C. L. J. 69; 14 C. W. N. 396.

Creditors who have applied for execution of their decrees prior to realization are alone entitled to participate, and not those who have subsequently obtained attachments; *Fink v. Maharaj Bahadur*, 26 C. 772; 4 C. W. N. 27. *See also Surendra v. Kartick*, 62 I. C. 857.

An application for rateable distribution is maintainable when the sale is going on, as it has been made before the receipt of assets within the meaning of the section; *Musst. Hurnoozi Begam v. Musst. Ayesha*, 5 Pat. L. J. 415; 57 I. C. 421.

An application for an execution must not only have been made before the assets came into the hands of the Court, but must also be on the file and undisposed of, to entitle a decree-holder to share rateably in the assets realized by another decree-holder in execution of his decree against the same judgment-debtor.—*Tiru Chittambala v. Seshayyengar*, 4 M. 883. The decree-holder seeking rateable distribution must, prior to the realization, apply to the Court by which the assets are held for execution of his decree; *Chunni Lal v. Jugal Kishore*, 27 A. 132. Such application must be in the form prescribed by Or. XXI, r 11 (2) C. P. Code; *Dwarkadas v. Ghasi Ram*, 64 I. C. 53. *See also Chella Narashia v. Sontan*, 25 M. L. J. 601; *Ramjus Agarwala v. Guru Charan*, 11 C. L. J. 69; 14 C. W. N. 396; *Madhu Sudan v. Rashmohan*, 21 C. L. J. 614.

The circumstance that the petition of one of several decree-holders in applying for execution requires amendment, because of the list of the property being incomplete, is no ground for declaring such application to be superseded by a late application made before the completion of the necessary amendment by another co-decree-holder for execution.—*Ahmed Chowdhury v. Khatoon*. 7 C. L. R. 537.

Section 73 of the Code is applicable only if an application for execution of the decree in the prescribed form had already been made before the receipt of the assets and the fund out of which rateable distribution is asked for is one, realized in execution; *Katum Sahiba v. Hajee Badsha*, 38 M. 221.

Where in pursuance of an order passed by a superior Court, assets realized in execution of a decree of a subordinate Court are transferred to the superior Court, the assets are deemed to be received within s. 73 by the transferee Court when they are actually received by that Court; *Godavaribai Govindrao v. Du Kappa*, 29 Bom. L. R. 319; A. I. R. 1927 B 247.

The condition essential to attract the operation of s. 73 is that the application to the Court for execution of decrees should be made before the receipt of the assets which have to be rateably distributed. Such assets are received when the whole and not one-fourth of the purchase-money is deposited; *Maharaja of Burdwan v. Apurba Krishna*, 14 C. L. J. 50; 15 C. W. N. 872; *see Hafex Mahomed v. Damodar*, 18 C. 242; *Ramanathan v. Subramania*, 26 M. 179; *Arunachellan v. Haji Sheikh*, 34 M. 25; *Arimuthu v. Vyapuri*, 21 M. L. J. 505; 9 M. L. T. 121; 35 M. 588; *Byomkesh v. Jatindra*, 18 C. W. N. 1311; *Barendra v. Marten & Co* 33 C. L. J. 7.

not a decree, as all the conditions enumerated in s. 47 are not present, and consequently is not appealable; *Balmer Lawrie & Co. v. Jadunath*, 42 C. 1: 19 C. W. N. 1202 (36 C. 130 *folld.*; 36 B. 156, *distinguished*); *Varada v. Venkatanatnam*, 42 M. L. J. 473: A. I. R. 1922, M. 99; 87 I. C. 546. See also *Venkataperumal v. Venkata Reddi*, 17 M. L. T. 427: (1915) M. W. N. 334; *Magan Lal v. Bhogi Lal*, 12 B. L. R. 365; *Jagadish v. Kripa-nath*, 36 C. 130; *Pungalur Chennamma v. Minor Raja of Karvetinagar*, 1 L. W. 234: 23 I. C. 422.

No appeal will lie from an order under s. 73 dismissing on the ground that the decree was barred by limitation, a decree-holder's application to share in the assets realized under another decree against the same judgment-debtor. Such an order cannot be regarded as a decree under s. 47—*Kashiram v. Mani Ram*, 14 A. 210. Referred to in *Ram Chunder v. Hamiran*, 11 C. W. N. 433: 6 C. L. J. 437.

**Revision.**—An order under this section is subject to revision; see *Jagadish v. Kripa Nath*, 36 C. 130; *Sri Krishna v. Chandook*, 32 M. 334: 19 M. L. J. 307; *Indra Chand v. Ghaneshyam*, 9 C. L. J. 210; *Maharaja of Burdwan v. Apurba Krishna*, 14 C. L. J. 50: 15 C. W. N. 872; *Ghimlal v. Todarmul*, 26 C. W. N. 169.; *Dwarkadas v. Jadab*, 51 C. 761: 78 I. C. 731: A. I. R. 1924 C. 801. But revision was refused in the following cases; *Hari v. Birendra*, 35 C. L. J. 327: 70 I. C. 541; *Kanpaga v. Vania*, 48 M. L. J. 459: A. I. R. 1925 M. 587: 87 I. C. 390.

**Rights Created by this Section: Not Affected by Insolvency.**—An order made under this section for rateable distribution is not affected by the insolvency of the judgment-debtor subsequent to the making of the order. But the order will be confined in its operation to assets of the judgment-debtor realized up to the date of the vesting order; assets realized after the date of the vesting order will vest in the official assignee; *Howatson v. Durant*, 27 C. 351; *Official Receiver of Tanjore v. Venkatarama*, 42 M. L. J. 361: A. I. R. 1922 M. 31: 68 I. C. 512.

## RESISTANCE TO EXECUTION.

**74.** Where the Court is satisfied that the holder of a decree for the possession of immoveable property or that the purchaser of immovable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property. [S. 330.]

This section corresponds to section 330 of the C. P. Code of 1882, with some additions and alterations, and it should be read with the provisions of Or. XXI, r. 98, where the procedure, to be followed in case of resistance to delivery of possession to decree-holder or purchaser, has been laid down and cases bearing upon the section are noted.

judgment-debtor of properties attached. The assets are not realized by the attachment but by the sale. The realization must be by sale by the Court in execution or by one of the other remedies prescribed by the Code of Civil Procedure. The fact that money is paid into Court in satisfaction of the attaching creditor's debt does not make such money assets realized under this section.—*Vibudhapriya Tirthaswami v. Yusuf Sabib*, 28 M. 880: 15 M. L. J. 202. See also *Kunni Moosa v. Makki*, 23 M. 478; *Sew Bux Bogla v. Shib Chunder*, 13 C. 225; *Prosonno Moyi v. Sree Nath Roy*, 21 C. 809, (6 B. 588, and 18 C. 225 approved). When the permission is granted under Or. XXI, r. 83, to raise money by private alienation, such money if paid into Court is assets. Money paid into Court by one of the modes mentioned in Or. XXI, r. 55, of the C. P. Code, is assets held by the Court within s. 73 of the Code; *Thiraviam Pillai v. Lazmana Pillai*, 41 M. 616: 35 M. L. J. 150.

The Court has no power to rateably distribute under this section money deposited in Court under Or. XXI, r. 89, with a view to setting aside a sale of immoveable property in execution of a money-decree; *Harai v. Faizlar*, 40 C. 619: 19 C. W. N. 1125: 18 C. L. J. 144. *Gotatai Vigneswarudu v. Venkata Suryanarayanamurthi*, 7 L. W. 573: 45 I. C. 782; *Murugappa Chettiar v. Palaniyappa Chetty*, 42 I. C. 507. Nor can money deposited in Court under Or. XXXVIII, r. 2, on the arrest of defendant before judgment be rateably distributed among other decree-holders as the plaintiff had a lien after deposit.—*Dost Mahomed v. Subramanian*, 8 Bur. L. T. 22; 29 I. C. 714 (36 B. 156 followed).

While this section gives special rights to judgment-creditors as distinguished from simple creditors, it is an essential condition precedent to the exercise of that right that there should be a sale in execution, and that its result should appear in assets realized by sale; and, therefore, until the sale takes place, no such right can be enforced.—*Ganga Din v. Kushali*, 7 A. 702.

The receipt of purchase money by the person nominated by parties and ordered by Court as auctioneer is a money received by Court under s. 73 (1); *J. C. Galstaun v. Woomesh Chandra*, 44 C. 789: 25 C. L. J. 303.

Where at an auction-sale the highest bidder pays in the 25 per cent. deposit but fails to pay the balance and on a re-sale loss occurring, the decree-holder attaches the 25 per cent. deposit, it becomes assets within the meaning of s. 73 and other decree-holders are entitled to share in it; *Mahant Prayaga Doss v. Raja of Kalahasti*, 49 M. 570: A. I. R. 1926 M. 372: 97 I. C. 83.

In a money suit certain property of the defendant was attached before judgment and then released on two persons standing sureties for the amount of the claim. The suit was ultimately decreed and the decree-holder applied for execution, whereupon the sureties deposited the decretal amount in Court. On that very day just before the deposit was made, the petitioner who also held a money decree against the judgment-debtor applied for execution of his decree and the Court ordered the same to be rateably distributed. Held, that the amount was not to be rateably distributed under s. 73. *Chisulal Agarwalla v. Tadar Mull Agarwalla*, 26 C. W. N. 169.



**77.** In lieu of issuing a commission the Court may issue a **Letter of request.** letter of request to examine a witness residing at any place not within British India. [New.]

**78.** The provisions as to the execution and return of **Commissions issued by foreign Courts.** missions for the examination of witnesses shall apply to commissions issued by—

- (a) Courts situate beyond the limits of British India and established or continued by the authority of His Majesty or of the Governor-General in Council, or
- (b) Courts situate in any part of the British Empire other than British India, or
- (c) Courts of any foreign country for the time being in alliance with His Majesty. [S. 391.]

### COMMENTARY.

The general powers of Courts in regard to commissions have been summarised in the above sections and the detailed procedure of commissions to examine witnesses, for local investigations, to examine accounts and to make partitions have been placed in the First Schedule, Or. XXVI rr. 1 to 18. All the rulings regarding commissions have been collected under the rules above referred to. S. 77 is new; it has been introduced, following the English practice.

*For the rulings relating to commissions, see notes under Or. XXVI, rr. 1 to 18.*

Or. XVI, r. 19, lays down the limitations as to distances and other conditions under which a witness should not be ordered to attend.

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In an execution proceeding, when the Collector sells the property and receives the whole of the money agreed to be paid at the sale, he holds the proceeds as assets received; *Dattatrya Durgappa v. Pandik*, 22 Bom. L. R. 1001.

The operation of this section is not confined to cases where property actually sold and realized belongs to the judgment-debtor. It also applies where the attached property is a decree in favour of the judgment-debtor against others and money is realized in execution of such decree by the sale of property belonging to such others; *Veerayya v. Anamalachetty*, 31 M. 502.

This section has no application to a case where a fund in Court is attached by several decree-holders. They are entitled to be paid in the order of their attachments; *Tiruvengadiah v. Tiruvengadiah*, 23 M. L. J. 364; 24 I. C. 617.

Money attached and retained under a temporary injunction under Or. XXXIX, r. 1, is liable to rateable distribution in execution of decrees against the same defendants; *Ram Chandra v. Latchman*, 7 Bur. L. T. 277; 26 I. C. 941.

Money paid into Court under a prohibitory order does not become the property of the creditor at whose instance it was issued without a further order directing payment to him. Till then it is assets available for rateable distribution; *Amba v. Bay Nath*, 167 P. W. R. 1917.

Salary of Government officer is assets within the meaning of this section; *Velchand v. Messon*, 14 Bom. L. R. 633. Where moneys were realized on a personal decree and in execution, they are assets realized under this section; *Seetharama v. Kristna*, (1912) M. W. N. 407; 15 I. C. 407. Money paid out of Court by judgment-debtor to one of the decree-holders is not assets within the meaning of this section; *Gouri Dutt v. Amar Chand*, 15 C. L. J. 49; see also *Jetha Bhima v. Lady Janbai*, 37 B. 188; 14 Bom. L. R. 904; *Khusal Chand v. Nandram*, 13 Bom. L. R. 977. See however, *Bibi Miyakhan v. Gulabchand*, 13 B. L. R. 1189.

Property given as security under Or. XLI, r. 5 (8), C. P. Code, by the judgment-debtor is not assets and not liable to rateable distribution, *Subramania Chettiar v. Rajeswara*, 41 M. 327.

Compensation money paid by Government into Court for apportionment among claimants in a land acquisition case, is "assets" held by Court for the purposes of s. 73; *Sait Siva Protapa v. A. E. L. Mission*, 49 M. 38; 97 I. C. 496; A. I. R. 1926 M. 307.

**Fund in Court—Rateable Distribution.**—Where a fund in the Court is attached by another Court in execution of a decree, it is the duty of the former Court to hold the fund subject to the directions of the executing Court and to transfer it to that Court. The funds as soon as it is transferred to the execution Court becomes "assets held by that Court" within s. 73. All decree-holders who have applied for execution to the executing Court before the receipt of such assets are entitled to rateable distribution; *Visvanathan v. Arunachellam*, 44 M. 100 (F. B.); 39 M. L. J. 608.

State can only be sued in respect of those matters for which the East India Company could have been sued, *viz.*, matters for which private individuals or trading corporations could have been sued or in regard to those matters for which there is express statutory provision; and no suit will lie against the Secretary of State in Council in respect of acts of State or acts of sovereignty. This section does not in any way affect the provisions of the Government of India Act, 1858, but is subject to the provisions contained in that Act.

The material words of section 65 of the Government of India Act, 1858, enact that " the Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings against the Secretary of State in Council for India as they could have done against the said company " (*i.e.*, East India Company). See 40 C. 391 P. C pp. 399-400

Section 65 of the Government of India Act, 1858, does not constitute the Secretary of State for India, a body corporate but simply lays down that that officer and department are to be sued as a body corporate. Such a suit is not really against any person or any real body corporate, but is allowed to be brought against the Secretary of State as a nominal defendant to enable the plaintiff to obtain the remedy secured to him by section 65: *Doya Narain v Secretary of State*, 14 C. 256. See also 6 Bom. L. R. 131. The effect of s. 65 of the Government of India Act of 1858 was to debar the Government of India from passing any Act which would present a subject from suing the Secretary of State for India in Council in a Civil Court, in any case he could have similarly sued the East India Company: *Secretary of State v. Moment*, 40 C. 391 P. C.: 17 C. W. N. 169: 11 A. L. J. 49: 24 M. L. J. 459: 17 C. L. J. 194: 15 Bom. L. R. 27: 7 L. B. R. 10: 6 Bur. L. T. 1

**Local Jurisdiction to entertain Suits against Secretary of State.**—As to jurisdiction of Courts which can entertain suits against Secretary of State, see 40 C. 308: 18 B. 290: 8 C. 678, and other cases noted under s. 20, in which the expressions " carry on business " and " personally works for again " have been explained.

The question as to what are and what are not Acts of State, has been discussed in several cases, and the cases below are given by way of illustration.

S. 79, C. P. Code recognises the powers conferred by s. 111 of the East India Company's Act 1813. *Advocate-General of Bombay v. Hajj Esmail Hassam*, 12 Bom. L. R. 274.

**Sub-section (2).**—The power of Advocate-General to exhibit informations in the nature of actions at law or bills in Equity was expressly declared by section 111 of the East India Company Act, 1813 and that power has been kept alive by subsequent statutes: the last of which is the Government of India Act, 1858 (21 and 22 Vict. C. 10). By section 22 of the India Councils Act, 1861 (24 and 25 Vict. C. 67) the Governor-General in Council is debarred from passing any Act which would affect the provisions of the Government of India Act, 1858. This sub-section has been added in order to avoid possible doubt which arose with regard

*Subramanian*, 22 M. 241, where the judgment-debtors in one decree were father and son, and in another the son alone after his father's death, it has been held that the judgment-debtor in both the decrees was the same within the meaning of this section. See also *Ramanathan v. Subramania*, 26 M. 179; *Sarat Chunder v. Doyal Chand*, 3 C. W. N. 368; and *Rati Ram v. Chiranjil Lal*, 3 A. 579. But see *Gorind Abaji v. Mohoniraj Vinayak*, 25 B. 404, where one decree was against the judgment-debtor and subsequent decree against his legal representative. Followed in *Srinivasa Aiyangar v. Kanthimathi*, 33 M. 465; 7 M. L. T. 917; see also *Jhandu Mal v. Faiz Ali*, 55 P. L. R. 1913. *Toola Ram v. Abdul Gafoor*, 7 Bur. L. T. 67; 24 I. C. 476; *Balmer Laurie & Co. v. Jadunath*, 19 C. W. N. 1202; 42 C. 1.

A decree against the heir, as representing the estate of the deceased, is not against the same judgment-debtor as in a decree against the same person for his own debt; *Bhola Nath v. Magbulunnissa*, 26 A. 28.

An attaching creditor of the judgment-creditor is not entitled to apply for rateable distribution, as his decree is not against the same judgment-debtor, but against decree-holder of the judgment-debtor; *Ellusha v. Rangayyan*, 18 M. L. J. 562; 7 M. L. T. 126.

"Decrees for payment of money."—Persons holding decrees for payment of money are alone entitled to rateable distribution under this section. The following are illustrations of decrees for payment of money:—

As to what is and what is not a money-decree within the meaning of this section, see *Surja Kumar v. Pramada*, 17 C. W. N. 1039, where all the cases on the point have been referred to and discussed (11 C. 711 commented on, and 25 C. 580; 26 C. 166; 27 C. 285, 10 A. 632, 20 M. 107; 28 M. 478 *referred to*). See also *Laldhari v. Manager of Court of Wards*, 14 C. L. J. 639.

Every decree by virtue of which money is payable is to that extent a "money-decree" within the meaning of this section even though other relief may be granted by the decree. Thus the holder of a mortgage-decree, which directs that the amount be realized from the mortgaged-property and from the mortgagor personally, is entitled to claim rateable distribution.—*Hart v. Tara Prosanna*, 11 C. 718. Followed in *Kommachi v. Pakker*, 20 M. 107. See also *Vaidhinadasamy v. Somasundram*, 28 M. 473, F. B. (20 M. 107, 11 C. 718 *referred to*; 24 M. 412 *overruled*). But a mortgagee who does not obtain a decree has no right to claim rateable distribution of the sale proceeds of the mortgaged property; *Mg Tate v. Mg. Nyin*, 26 I. C. 278.

The decree-holder for unascertained mesne-profits, who has applied to the Court to ascertain the amount thereof and to attach immoveable property, comes within the purview of this section and is entitled to share rateably with the attaching creditor in the assets realized.—*Viraragava v. Farada*, 5 M. 123.

Where there is no direction in a mortgaged decree that a person should pay any money at all, and his share in the mortgage property is alone declared to be answerable and he is expressly exempted from personal liability, such a decree is not a money-decree; *Suryanarayana v. Gopala*, 23 M. L. J. 699; 12 M. L. T. 660, see also 14 C. L. J. 639, noted above.

directly or by implication, ratifies the excess.—*Collector of Mo v. Cavalry Venkata*, 2 W. R. 61, P. C. : 8 M. I. A. 529.

The Government is liable for mesne-profits and damages for t during which certain immoveable property, belonging to plaintiff, in wrongful attachment under s. 88, Criminal Procedure Code (1898), as property of an absconding offender in a criminal proc *Secretary of State v. Jagat Mohini*, 28 C. 540: 6 C. W. N. 175. *Shibavanjan v. Secretary of State*, 28 B. 314.

A suit for compensation for invasion of rights of private Government is maintainable.—*Ram Gobind v. Magistrate of Guz N. W. P.* 146. See, however, *Collector of Pabna v. Ramanath*, 1 Sup. Vol. 630: 7 W. R. 191.

The Collector of Malabar levied a certain import duty on t imported, in the belief that he was so authorized by law, and his act ratified by Government. Held, that, assuming the Collector's act illegal, a suit to recover the amount so levied as import duties w against the Secretary of State,—*Hari Bhanji v. Secretary of State* 344; on appeal, 5 M. 273.

A suit for refund of income-tax illegally assessed upon a is maintainable against the Government.—*Collector of Furidpore v. Das Roy*, 11 W. R. 425.

A suit to recover tax illegally levied under the Bombay Abkari A of 1878) is maintainable.—*Narayan Venku v. Sadharam*, 11 B. 519.

A suit for damages for misappropriation of Government prom notes by subordinate treasury officers, owing to the negligence o treasury officer, is maintainable against the Secretary of State.—*Secr of State v. Sheo Singh*, 2 A. 756.

For further cases, see the cases noted under s. 9.

**80.** No suit shall be instituted against the Secretary of S Notice. for India in Council, or against public off in respect of any act purporting to be done by such public off in his official capacity, until the expiration of two months n after notice in writing has been, in the case of the Secretary State in Council, delivered to, or left at the office of a Secreta to the Local Government or the Collector of the district; ar in the case of a public officer, delivered to him or left at his offi stating the cause of action, the name, description and place residence of the plaintiff and the relief which he claims; and t plaint shall contain a statement that such notice has been delivered or left. [S. 424.

## COMMENTARY.

**Changes in the Section.**—This section corresponds to section 424 o Act XIV, of 1892. The changes introduced are merely verbal and no alteration has been made in the meaning. The other provisions as to suits by or against the Government which mainly relate to procedure are to be found in Order XXVII, rules 1 to 8.

*Dharma Das v. Vaman Govind*, 9 B. 237; *Pitamber v. Dhondu*, 12 B. 486; and *Krishna Velji v. Bhai Mansaram*, 18 B. 61.

**Courts of two different Grades—Receipt of Assets by one of such Courts—Court of higher grade to determine Claims for Rateable Distribution.**—Two decrees were passed against the same defendant in the Court of Munsif and on the Small Cause Court side of a Sub-Judge's Court in the same district respectively. The decree-holder in the Small Cause Court suit attached and brought to sale the property in a benefit fund. The other decree-holder applied for his decree having been transferred to the Court of the Sub-Judge had inherent jurisdiction to set aside the order for rateable distribution was right.—*Kelu v. Vikrisha*, 15 M. 345

When a property attached in the Court of a Sub-Judge is sold in an execution proceeding pending in the Court of a Munsif, the Court of the Sub-Judge is the only Court competent to determine any claim for rateable distribution of the assets realized by the sale.—*Bhugwan Chunder v. Chundra Mala*, 29 C. 773; 1 C. L. J. 97; *Somasundaram v. Alagappa*, U. B. R. 1910, 3rd qr. 53; 8 I. C. 1176.

Where the same property is attached in execution of decrees by Courts of different grades, the decree-holder in the inferior Court, who had attached prior to realization, may apply to the superior Court for rateable distribution; *Arimuthu v. Vyapuri*, 35 M. 588. 21 M. L. J. 505. Rival holders of money-decrees are entitled to share in the rateable distribution on application to the Court of the highest grade though their decrees have not been transferred to that Court; *Ma Nyein v. Maung Gyi*, 29 I. C. 21; 8 Bur. L. T. 201.

**Decree-holders or Persons Holding Decrees for Money.**—The words "decree-holders" or "persons holding decrees for money against the judgment-debtor" signify *bona fide* decree-holders. A Court is bound, in cases falling within this section, to satisfy itself whether the claimants are *bona fide* decree-holders within the meaning of the section; and where it is unable to satisfy itself as to the *bona fides* of the claim, it should exclude such claimant from the distribution of assets.—*In re Sunder Das*, 11 C. 42. Followed in *Chhaganlal v. Fazarali*, 13 B. 154. Referred to and doubted in *Raghunath v. Rai Chatrapat Singh*, 1 C. W. N. 633. See also 16 C. L. J. 582; 17 C. W. N. 326. 18 C. L. J. 646; 19 C. W. N. 903.

The term "decree-holder" in s. 311, C. P. Code, 1882, is not limited to the decree-holder who instituted the execution proceedings, but may include a decree-holder who is entitled to come in and share in the proceeds under s. 295, C. P. Code, 1882 (s. 73).—*Ajudhia Prasad v. Nand Lal*, 15 A. 318; *Lakshmi v. Kuttunni*, 10 M. 57; *Bejoy Singh v. Hukum Chand*, 29 C. 548; and *Chatrapat Singh v. Jadukul Prasad*, 20 C. 673. See also *Athappa Chetti v. Rama Krishna*, 21 M. 51. But see *Matungini v. Monmotha Nath*, 4 C. W. N. 542, where it has been held that the term "decree-holder" means the decree-holder who brings the property to sale and not an attaching-creditor or any other decree-holder (10 M. 57; 15 A. 318; and 16 B. 91, *dissented from*; 20 C. 673. 21 C. 200, 2 C. W. N. 126, *distinguished*).

**Right to Rateable Distribution.**—Where a Court permits a decree-holder to bid at an auction sale and to set off the purchase money against his decretal amount, the rights of the rival decree-holders under s. 73 are

relief is claimed as against him on that ground, the suit is not bad because the notice has not been served on him within the prescribed time.—*Raghubans Sahai v. Fulkumari*, 1 C. L. J. 542: 32 C. 1130.

**Waiver of Notice.**—It is competent to the Secretary of State to waive the notice, and he may be estopped by his conduct from pleading the want of notice at a late stage of the case; *Bholanath v. Secretary of State for India*, 40 C. 503: 17 C. W. N. 64. See also *Manindra Chandra v. Secretary of State*, 34 C. 257: 5 C. L. J. 148.

**Sufficiency of Notice.**—The term "cause of action" in this section should not be construed in a narrow sense, the object of the section being merely to inform the defendant substantially the ground of complaint. The notice is not invalid on the ground that it was given by only two out of three plaintiffs.—*Secretary of State v. Pernal*, 24 M. 270: 25 A. 187. But see *Bhola Nath v. Secretary of State*, 40 C. 503: 17 C. W. N. 64 where a notice which contained the names, descriptions and places of residence of two out of sixty-three plaintiffs, was held insufficient. The principle being that though s. 80 does not require that a notice shall be signed by all the plaintiffs, it is essential that it should state the names, descriptions, and places of residence of all the plaintiffs.

The object of the notice is merely to inform the defendant substantially of the ground of complaint. The notice need not set out all the details and facts of the case which the plaintiff intends to prove. It must be considered sufficient if it substantially informs the defendant of the nature of the suit intended to be filed; *Venkataramakrishnaiyar v. Secy. of State*, 23 L. W. 464: A. I. R. 1926 M. 408: 91 I. C. 368.

A notice under this section is sufficient if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed.—*Jehangir v. Secretary of State*, 27 B. 189.

It is only where notice is not given that the suit is liable to be dismissed. The suit, however, may be proceeded with if notice has been given in the manner prescribed, and subsequently the plaint is amended in order to state that fact.—*Bholaram v. Administrator-General*, 8 C. W. N. 913; *Gangadas v. Secretary of State*, 20 C. W. N. 636.

Where notice of action pointed to a suit based on negligence, and the original plaint proceeded upon that basis, the plaint cannot be amended by setting up a cause of action based on nuisance; *McInerny v. Secretary of State*, 38 C. 797.

A notice under s. 80 is not a proper notice if the case set up in the plaint is different from the case stated in the notice. A suit instituted upon such notice cannot be maintained; *Abdul Wahab v. Secretary of State*, 32 I. C. 235.

**Objection as to Sufficiency of Notice.**—An objection as to the sufficiency of a notice under this cannot be taken by any defendant other than the Secretary of State for whose benefit the notice is intended.—*Raghubans Sahai v. Fulkumari*, 32 C. 1180: 1 C. L. J. 540; *Bhola Nath v. Secretary of State*, 40 C. 503 p. 510: 17 C. W. N. 61.

An objection as to want of notice can only be taken by the Secretary of State and cannot be taken by a transferee from him.—*Bindeshuri Singh v. Pandit Balraj*, 10 Oudh Cases 49.

sold, subject to a mortgage, and where the transaction is such that the purchaser is buying only the equity of redemption; it did not apply to a case where there is merely the right by law in the mortgagee to enforce his mortgage against the purchaser.—*Fakeer Buz v. Chutterdharee*, 12 B. L. R. 513-note; 14 W. R. 209; *Fateh Ali v. Gregory*, 6 W. R. Mis. 18; *Joy Chunder v. Ram Narain*, 12 W. R. 43; *Purmessure v. Nobin Chunder*, 24 W. R. 805.

Where property subject to a mortgage is sold in execution of the mortgage-decree, and there were other decree-holders, who prior to the realization attached the property, the sale cannot be stopped as soon as the mortgage-decree was realized; the sale must continue after realization of the mortgage-decree for the realization of the other decrees.—*Venkataram v. Mangalathammal*, 17 M. L. J. 80.

If a mortgagee receives any money out of the surplus sale-proceeds of a share in the property mortgaged to him, sold in execution of a decree on a prior mortgage from some of the mortgagors to whom the share belonged and against whom the decree was obtained, he is bound to apply the money to the satisfaction of his mortgage-debt only in case he receives it by virtue of his security and not otherwise, although the payment might be made to him by the said mortgagors in satisfaction of other debts due to him from them.—*Ganga Ram v. Jaiballav Narain*, 80 C. 953.

A mortgagee held several mortgages over properties A and B, and also a usufructuary mortgage over property B. Held that the mortgagee was not entitled to bring to sale the property covered by his simple mortgages free from the usufructuary mortgage and to participate in the proceeds of the sale both in respect of his simple mortgages and of his usufructuary mortgage.—*Bhagwan Das v. Bhawan*, 26 A. 14.

First and second mortgagees obtained decrees for sale, and the mortgaged property was sold in execution of the decree of the second mortgagee. The first mortgagee subsequently brought a suit for a re-sale of the property in satisfaction of his decree. Held that this was the only course open to him, and he could not have enforced satisfaction of his decree under s. 295, C. P. Code, 1882 (s. 73) inasmuch as the first and second provisos to that section refer only to sales in execution of simple money decrees.—*Jagat Narain v. Dhundhery Rai*, 5 A. 566. See also *Gur Sahai v. Ram Dial*, 7 N. W. P. 91.

Proviso (b).—"Where any property liable to be sold in execution is subject to a mortgage or charge."—A mortgagee who does not obtain a decree on his mortgage or charge has no right to obtain, by an order in execution or by application, payment of any part of the sale-proceeds of the property over which he claims his mortgage or charge and a suit lies against him to refund the amount, if paid to him; *Maung Ta Te v. Maung Nyin*, 26 I. C. 273; *V. P. T. Reddyar v. V. R. M. Arunachalam*, 13 Bur. L. T. 210.

Where two mortgagees in execution of their decrees attached the same property, of which a moiety without further specification was respectively mortgaged to each, and subsequently the property was sold in execution of one of the decrees—held that the purchaser took one of the moieties, subject to the lien of the unsatisfied mortgagee, and the omission of the executing Court to give a specific direction as provided by clause (b) of s. 295, C. P.



notice under s. 80; *Beni Madhab v. Upendra Chandra*, 24 C. W. N. 138.

Where a damage suit is to be brought against any police officer for some acts done in the exercise of his powers under the Cr. P. Code, the provisions of s. 42 Police Act do not apply, and notice under this section is necessary; *Bachcha v. Jafar*, 13 A. L. J. 788.

The plaintiff sued the defendant (a public officer) to recover damages for wrongful arrest and trespass and claimed one lump sum as damages for both the acts. *Held* that notice was necessary and the suit was not maintainable as it was instituted before the expiry of two months from the date of delivery of notice.—*Jogendra Nath v. Price*, 24 C. 584 (7 C. 499 distinguished).

In a suit against a police officer to recover articles seized by him during a search, in his capacity as a police officer apparently under s. 165 of the Cr. P. Code, *held* that the suit is not maintainable without notice.—*Bakhtawar Mal v. Abdul Latif*, 29 A. 567: A. W. N. (1907), 170.

A public officer is entitled to notice under s. 80, though he acts, *mala fide* in the discharge of his duties. The word "purporting" covers a profession by acts, by words or by appearance of what is true as well as of what is untrue; *Reddi v. Pothuri Subbiah*, 41 M. 792: 34 M. L. J. 494.

Notice is necessary in a suit against a public officer to restrain him from the act of eviction; *Bhavanishankar v. Talukdari Settlement Officer*, 16 B. L. R. 766, even when the relief claimed is an injunction and irreparable injury is likely to be caused if a rule *nisi* for an injunction is not at once granted; *The Superintending Engineer v. Ramakrishna Iyer*, 39 M. L. J. 151. But see, *Muradally Shamjee v. Lang*, 21 Bom. L. R. 980.

**Notice given Before Death—Fresh Notice by the Representatives is Necessary Before Institution.**—Where a person intending to institute a suit against the Secretary of State died after serving a notice under this section, *held* that the notice served did not ensue for the benefit of the representatives of the deceased so as to entitle them to institute a suit without giving fresh notice.—*Bachchu Singh v. The Secretary of State*, 25 A. 187.

**Notice to be Delivered to the Collector of the District.**—A notice under this section must be served to the Collector of the district in which the suit is to be instituted. A suit brought in the Court at Sealdah, after notice served on the Collector of Purneah is not in compliance with the section. Such a notice is required even in a case arising out of contract; *Ratan Chand v. Secretary of State*; 18 C. W. N. 1340.

**Notice in Suits for Injunction.**—There has been a marked difference of opinion between the High Court of Bombay on the one hand and all the other High Courts in India on the other, as to the necessity of giving notice under s. 80 of the Civil Procedure Code in the case of suits for injunction. *Held* in the case of *Shankar v. ...* reporting to be done in discharge of their duties, that the relief claimed is a perpetual injunction. The High Courts of Calcutta, Madras and Allahabad have held that s. 80 is to be strictly complied with

**CI. (2)—Suit for refund of Assets paid to a Wrong Party.**—The scheme of this section is rather to enable the Judge as matter of administration to distribute the price, according to what seems at the time to be the right of the parties, and does not import a conclusive adjudication in those rights which may be re-adjusted subsequently by a suit.—*Shankur Sarup v. Mejo Mal*, 5 C. W. N. 649, P. C.: 23 A. 818: 8 Bom. L. R. 718.

Where the assets are not liable to be rateably distributed s. 73 (2), C. P. Code, has no application; *Varada Ramaswami v. Umma Venkataratnam*, 42 M. L. J. 478: 67 I. C. 546. The cause of action given by the penultimate para. of this section does not arise until the money has been actually paid over to the person who is alleged not to be entitled to receive the same; a mere order to pay the moneys does not give rise to cause of action.—*Hart v. Tara Prasanna*, 11 C. 718; *Ramachandra v. Raghunath Saran*, 16 A. L. J. 530. But after an order for rateable distribution has been made it is open to one of the decree-holders to maintain a suit for a declaration that a decree of a rival decree-holder is collusive and that he is not entitled to share in the sale-proceeds by way of rateable distribution.—*Trailakya Nath v. Pulin Bchary*, 9 C. L. J. 385 (11 C. 718 distinguished).

In a suit by the plaintiff for his share of the sale-proceeds of certain property, in which the defendants contended that a set-off having been allowed to them, the plaintiff was not entitled to any rateable distribution.—*Held* that the fact of the set-off being allowed in the exercise of the power given in Or. XXI, r. 72, instead of actual payment into Court, did not alter the substantial nature of the transaction so as to render the purchase-money less applicable to the satisfaction of the debts of other attaching creditors.—*Toponidhi v. Mathura Lall*, 12 C. 499.

A suit is maintainable for refund of a share of sale-proceeds against a person to whom it was wrongfully paid; *Somasundaram v. Alagappa*, U B. R. (1910), 3rd gr. 58: 8 I. C. 1176. *Ram Narayan v. Brij Bankeylal*, 39 A. 322: *Somasundaram v. Thirunarayan*, (1914) M. W. N. 788. In *Gopal Chandra v. Harimohon*, 21 C. L. J. 624: 30 I. C. 49, it has been held that the High Court has inherent power to refund of money paid to a wrong party owing to an erroneous order of a Subordinate Court.

The plaintiff as purchaser of the equity of redemption of mortgagor, brought the present suit to set aside an order under this section passed in favour of another decree-holder and to recover the surplus sale-proceeds from him.—*Held* that the order under s. 73 was one coming under s. 47, and the present suit was not maintainable.—*Hurdwar Singh v. Bhawani Pershad*, 2 C. W. N. 429.

S. 73 (2) does not imply that an execution sale by virtue of which assets have been made available for rateable distribution can be attacked in a separate suit. The cause of action under cl. (2) arises out of a wrong distribution of assets and is entirely without relation to the manner in which those assets were obtained, *Lakhmi Chand v. Chatoorbhuj*, 65 I. C. 230.

Where an auction-purchaser seeks for return of purchase-money paid by him for property sold in execution of a decree, on the ground that the judgment-debtor had no saleable interest therein, it is competent to proceed by way of a regular suit against the person into whose

The phrase "act purporting to be done" in s. 80 is confined to past acts completed, or begun but incomplete, and does not include threatened or future acts. Where therefore the suit was for a perpetual injunction restraining the Official Receiver from selling certain properties in dispute in the suit, it was held that the suit was sustainable without the two months' notice; *Arunachalam v. David*, 51 M. L. J. 671: 24 L. W. 730.

When the Official Receiver sued for establishing and realizing a charge over moveable and immoveable property of a debtor and when plaintiff does not allege any act or omission on the part of the Receiver, no notice under s. 80 is necessary, *Skippers v. David*, 48 A. 821: 24 A. L. J. 1067: A. I. R. 1927 A. 132.

**Whether Suit can be Filed Before Expiry of Period of Notice.**—The view that plaintiff can bring his suit before the two months' time prescribed has expired in the case of suits against officials for acts purporting to be done in discharge of their duties, when part or whole of the relief claimed is an injunction, is not correct; *Bhagchand and others v. Secretary of State for India*, A. I. R. 1927 P. C. 176. This recent decision of the Judicial Committee overrules the Bombay High Court decisions in *Secy. of State v. Gajanan*, 35 B. 362, *Naoinlal v. Official Assignee*, 37 B. 243 and *Secy. of State v. Gulam Rasul*, 40 B. 392, where it was held that if the immediate result of the act would be to inflict irremediable harm, s. 80 does not compel the plaintiff to wait for two months before bringing his suit.

**"Public Officers."**—A Collector, as the agent of the Court of Wards in respect of the estate of a disqualified person, is a public servant within the meaning of this section and consequently, when sued for acts done in that capacity, is entitled to the notice of suit.—*Collector of Bijnor v. Munwar*, 3 A. 20; and *Narasingrao v. Luxumanrao*, 1 B. 318. But see *Anantharaman v. Ramasami*, 11 M. 317: and *Bhau Balapa v. Nana*, 13 B. 343: followed in *Sardar Singji v. Ganpat*, 14 B. 395.

The Official Trustee is a "public-officer" within the meaning of this section.—*Shakunsha Begum v. Ferguson*, 7 C. 499: and *Abdul Lateef v. Doutre*, 12 M. 250. An Official Assignee is a public officer, and is, therefore entitled to the notice prescribed by this section.—*Joosab Haji v. Kemp*, 26 B. 809: 4 Bom. L. R. 929. An Administrator-General is public officer within the meaning of this section.—*Bholaram v. Administrator-General*, 8 C. W. N. 913.

The talukdari settlement officer acting as manager under Act XXI of 1881 is a public officer within the meaning of this section; *Sardar Singji v. Ganpat Singji*, 14 B. 395. See also 14 Bom. L. R. 577.

A cantonment committee constituted under the Indian Cantonments Act, is a public officer; *Gray v. Cantonment Committee of Poona*, 34 B. 583: 12 Bom. L. R. 615.

A village headman is a public officer within the meaning of ss. 2 and 80 C. P. Code and consequently notice of a suit for damages for false imprisonment alleged to have been effected by him in his official capacity must be given in compliance with the provisions of s. 80; *Maung Sanya v. Maung Ngwe Hla*, 2 Bur. L. J. 29; 1923 Rang. 250.

**Liability of Public Officers in Actions for Damages.**—See the cases noted under section 9.

decree-holder who took out execution does not share in the distribution of the sale-proceeds.—*Radha Gobind v. Oozeer*, 15 W. R. 210.

**Jurisdiction of Small Cause to Entertain Suits for Refund of Sale-proceeds.**—A suit under s. 73 to compel refund of assets paid in execution of a decree to a person not entitled thereto, is not cognizable by a Court of Small Causes. See *Grish Chunder v. Doorga Das*, 5 C. 494; *Sahai Ram v. Shib Lall*, 7 A. 378; *Gouri Dutt v. Amar Chand*, 15 C. L. J. 40. But see *Harihara v. Subramanya*, 9 M. 250; and *Mala Prasad v. Gouri*, 3 A. 59.

**Limitation for a Suit for Refund of Sale-proceeds.**—A suit for refund of money paid to the defendant under an order of Court made under s. 73, on the ground that the plaintiff was entitled to it in preference to the defendant, is governed by 3 years' limitation under Art. 62 of the Limitation Act.—*Shankar Sarup v. Mejo Mal*, 5 C. W. N. 640, P. C.; 23 A. 313, P. C. (15 B. 438, approved). *Baijnath v. Ramadoss*, 39 M. 62; 27 M. L. J. 640. This decision impliedly overrules the case reported in 13 C. 159. See also *Vishnu Bhikaji v. Achut Jagannath*, 15 B. 438, *Taponidhi Horanand v. Mathura Lall*, 12 C. 499, p. 503; *Sivarama v. Subramanya*, 9 M. 57.

**Step in Aid of Execution.**—Where upon application made by a decree-holder, an order for rateable distribution was passed without fixing the amounts due to the several decree-holders and then on later date the decree-holder applied for an order to withdraw the monies to which he was entitled upon such distribution.—*Held* that the order passed after considering the claims of rival decree-holders was a judicial one. The application therefore was an application to take some step in aid of execution.—*Baij Nath v. Ghanshyam Das*, 8 C. W. N. 382.

**"Nothing in this section affects any right of Government."**—A debt due to the Crown is entitled to preference; *Secretary of State v. Bombay Landing Co.*, 5 H. C. R. 23.

In pauper suits the Government is entitled to be paid first, out of the sale-proceeds, the price of the Court-fee stamps in preference to all other creditors including lien-holders.—*Collector of Moradabad v. Muhammad Diam*, 2 A. 196; *Ganpat Pataya v. Collector of Kanara*, 11 B. H. C. 7; and *Gulzari Lal v. Collector of Bareilly*, 1 A. 596.

**Co-operative Society.**—Under this section the claim of a Co-operative Society cannot be enforced unless they have a decree or charge under section 20 of the Co-operative Societies Act (II of 1912), though under s. 19 of that Act, the Society might have raised an objection to the attachment by reason of the other sections of the C. P. Code; *Abdul Quadir v. Shahbazpur Co-operative Bank*, 42 C. 377; 18 C. W. N. 1140.

**Appeal and Revision.**—An order made under this section is not appealable unless all the conditions enumerated in s. 47 are present; *Musannimat v. Musammam*, 5 P. L. J. 415; 571 C. 421. One of those conditions is that the question decided by the Court should be one which arose between the parties to the suit, that is, between the judgment-debtor on the one hand and the decree-holder on the other. *Jagadish v. Kripanath*, 36 C. 180, *Dwarkadas v. Jadhav*, 51 C. 761; 78 I. C. 731; A. I. R. 1924 C. 801.

An order, refusing rateable distribution under s. 73 of the C. P. between two rival decree-holders, is an order in execution proceeding

Notice of claim for goods lost in transit given to Ry. Co. A, with whom they were originally booked is not sufficient notice to Ry. Co. B, on whose line the goods were subsequently lost.—*Tilak Chand v. The E. I. Ry. Co.*, 12 C. W. N. 165.

The Traffic Superintendent is not the Manager's agent, and notice to him is not notice to the Railway Administration within section 77 of the Indian Railways Act (IX of 1890).—*Secretary of State v. Dip Chand*, 24 C. 306.

When goods are booked through over the lines of two or more Railway administrations and are lost or damaged in transit, either of the two Railway administrations may be sued for damages and notice under section 77 of Act IX of 1890, is to be given to the Railway administration which the plaintiff seeks to render liable.—*Bombay, Baroda and Central India Ry. Co. v. Santi Lal*, 26 A. 207. But where the suit is brought against both, notices must be served upon both the Railway administrations.—*E. I. Ry. & Co. v. Jethmull*, 26 B. 669.

As to mode of service of notice, see 14 C. W. N. 888.

**Limitation.**—Where notice to Government is necessary under s. 80 the period of two months is excluded from the prescribed limitation; *N. W. Ry. v. Ramdhanshib*, 52 P. R. 1917; 42 P. W. R. 1917.

**81.** In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity—  
Exemption from arrest and personal appearance.

(a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and, [S. 425.]

(b) where the Court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person. [S. 428.]

The first part and clause (b) of this section correspond with section 423 of Act XIV of 1882. Clause (a) is somewhat similar to s. 425 of the old Act but material changes have been made in it. According to cl. (a) the defendant shall not be liable to arrest, nor his property shall be liable to attachment otherwise than in execution of a decree, that is, he will not be liable to arrest nor his property shall be liable to attachment *before judgment*. (See proviso to Or. XXVII, r. 8.) This section must be read with the following section (s. 82), in which the procedure has been laid down for execution of a decree against the Secretary of State or against a public officer.

**82.** (1) Where the decree is against the Secretary of State for India in Council or against a public officer in respect of any such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied; and, if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the Local Government.

## PART III

### INCIDENTAL PROCEEDINGS.

#### COMMISSIONS.

75. Subject to such conditions and limitations as may be prescribed, the Court may issue a commission—  
Power of Court to issue Commission.

- (a) to examine any person;
- (b) to make a local investigation;
- (c) to examine or adjust accounts;
- (d) to make a partition.

[New.]

#### COMMENTARY.

**Judicial Functions of Court not to be Delegated.**—The power of a Court to issue a commission is defined in section 75. Where it is not necessary to make any local investigation or to examine or adjust accounts, the Court has no power to issue a commission and to delegate its judicial functions to the Commissioner for trial on the merits; *Raja Ram Narain Singh v. Odindra Nath*, 17 C. W. N. 369; 15 C. L. J. 17. As to issue of commission in criminal cases see the article in 16 C. W. N. 232n.

**S. 75, and Order XXVI.**—S. 75, C. P. Code defines clearly the circumstances under which a commission may be issued and does not authorize a Court to delegate to a Commissioner the trial of any material issue which the Judge is bound to try. (16 M 350 *folld.*). Or. XXVI does not in any way amplify the scope of s. 75; *Sawan Mal v. Raunaq Mal Chuni Mal*, 3 L. 209; (1922) L. 47

76. (1) A commission for the examination of any person may be issued to any Court (not being a High Court) situate in a province other than the province in which the Court of issue is situate and having jurisdiction in the place in which the person to be examined resides.  
Commission to another Court.

(2) Every Court receiving a commission, for the examination of any person under sub-section (1) shall examine him or cause him to be examined pursuant thereto, and the commission, when it has been duly executed, shall be returned together with the evidence taken under it to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order.  
[New.]

and it makes no difference that he was interned at the time; *Abdul Quader Khalifa v. Fritz Kaff*; 40 C. 1140: 20 C. W. N. 691.

An alien enemy who has been licensed to trade in British India has a right to bring suits in Indian Courts; *M. Meyor v. Mrs. C. Lea*, 9 Bur. L. T. 51.

Nationality is not the test for determining whether a person is an "alien enemy" within s. 83, C. P. Code. A British subject voluntarily residing or carrying on business in enemy country will be treated as an alien enemy. If a person resides in a hostile country for a substantial period of time, he acquires the disability attaching to an enemy during that period unless such residence is with the consent of the Crown; *Firm Haji Ali Khan v. Abdul Jalil Khan*, 1 L. 276: 55 I. C. 324.

**Limitation.**—Where the right of alien enemies to sue is suspended by the order of the Government, the period during which the right is suspended is not to be excluded from the time prescribed by the Limitation Act for the suit; *Deutsch Asiatische Bank v. Hira Lall*, 46 C. 526.

#### 84. (1) A foreign State may sue in any Court of British India :

When foreign States may sue.

Provided that such State has been recognized by His Majesty or by the Governor-General in Council :

Provided, also, that the object of the suit is to enforce a private right vested in the head of such State or in any officer of such State in his public capacity.

(2) Every Court shall take judicial notice of the fact that a foreign State has or has not been recognized by His Majesty or by the Governor-General in Council. [S. 431.]

### COMMENTARY.

**Sub-section (1), Proviso (2).**—In the corresponding section (s. 431) of the old Code of 1882, the second proviso was worded as follows: "Provided that the object of the suit is to enforce the private rights of the head or of the subjects of the foreign state."

A foreign State may sue in any Court of British India, subject to the conditions mentioned in the provisos.

**Private Rights.**—The "private rights" spoken of in this section mean those private rights of the State which must be enforced in a Court of Justice as distinguished from its political or territorial rights, which must, from their very nature, be made the subject of arrangement between one State and another. They are rights, which may be enforced by a foreign State against private individuals, as distinguished from rights, which one State in its political capacity may have as against another State in its political capacity. The rule laid down in this section is only an enactment of that which prevails in England (see *Emperor of Austria v. Day*, 30 L. J. Ch. 690: 2 Giff. 628; *United States of America v. Wagner*, L. R., 2 Ch. App 582).—*Hajon Manik v. Beer Singh*, 11 C. 17.

## PART IV

### SUITS IN PARTICULAR CASES.

#### SUITS BY OR AGAINST THE GOVERNMENT OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY.

79. (1) Suits by or against the Government shall be instituted by or against the Secretary of State for India in Council. [S. 416.]

(2) Nothing in this section shall be deemed to limit or otherwise affect any information exhibited by the Advocate-General in exercise of the power declared by section 111 of the East India Company Act, 1813. [New.]

#### COMMENTARY.

**Alterations made in the Section.**—Clause (1) of this section exactly corresponds to section 416 of Act XIV of 1892; clause (2) is new. The provisions of sections 417, 418, 419, 420, 421, 423, 426 and 427, C. P. Code, 1882 which contained the detailed procedure relating to suits by or against Government, have been placed in the First Schedule; see Order XXVII, rules 1 to 8.

**Object and Scope of the Section.**—In India, until 1858, the Government was vested in the East India Company. That Company exercised different functions. It was partly a trading company with the rights and liabilities of an ordinary commercial body. It also exercised sovereign powers delegated to it by the Crown. In respect of its acts in the former capacity it could be sued. For its acts in the latter capacity it could not.

In 1858 the East India Company came to an end and since then India has been governed directly by the Crown. By Statute 21 and 22 Vict. c. 106, sections 1 and 2, the territories and the revenues of India were transferred to the Crown. In order, however, that no one should be deprived of any right or claim, which he might have had against the East India Company, section 65 of that Statute provided that the Secretary of State in Council as a body corporate (not personally, see section 68) might be sued in all cases in which the Company might have been sued. Thus the Secretary of State in Council now stands in the position of the Company and can be sued in cases in which the Company would formerly have been sued. But it could not have been sued in respect of acts done by it as a sovereign power, but only in respect of acts which could not fall within that category.

It is thus clear, that the liability of the Secretary of State for India in Council to be sued is co-extensive with the liability to which the East India Company was subject at the date of Government of India Act of 18<sup>71</sup> (21 and 22 Vict. c. 105, ss. 65 and 67). In other words, the Secreta



**86:** (1) Any such Prince or Chief, and any ambassador or envoy of a foreign State, may, with the consent of the Governor-General in Council, certified by the signature of a Secretary to the Government of India, but not without such consent, be sued in any competent Court.

**Suits against Princes, Chiefs, Ambassadors and Envoys.** (2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, ambassador or envoy may be sued; but it shall not be given unless it appears to the Government that the Prince, Chief, ambassador or envoy—

(a) has instituted a suit in the Court against the person desiring to sue him, or

(b) by himself or another trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immoveable property situate within those limits and is to be sued with reference to such property or for money charged thereon.

(3) No such Prince, Chief, ambassador or envoy shall be arrested under this Code, and, except with the consent of the Governor-General in Council certified as aforesaid, no decree shall be executed against the property of any such Prince, Chief, ambassador or envoy.

(4) The Governor-General in Council may, by notification in the *Gazette of India*, authorize a Local Government and any Secretary to that Government to exercise, with respect to any Prince, Chief, ambassador or envoy named in the notification, the functions assigned by the foregoing sub-sections to the Governor-General in Council and a Secretary to the Government of India, respectively.

(5) A person may, as a tenant of immoveable property, sue, without such consent as is mentioned in this section, a Prince, Chief, ambassador or envoy from whom he holds or claims to hold the property. [S. 433.]

### COMMENTARY.

This section corresponds to section 433 of Act XIV of 1882; the only changes introduced in this section are, that the words "*it appears to the Government that*" have been added after the word "*unless*" in the latter part of clause (2), and the words "*a Secretary*" have been substituted for the words "*one of the Secretaries*" in clause (1).

to section 416 of the old Code, which, it was thought, excluded informations exhibited by the Advocate-General. It was to remove this doubt that sub-section (2) has been enacted.

With regard to this sub-section the Select Committee in their Report said.—" Clause 70 (2)—*This saving was accepted by the Select Committee of 1903, and we think it desirable to have it in the Bill in order to avoid possible doubt.*"

**Act of State for which Government is not Liable.**—The Secretary of State can only be sued in respect of those matters for which private individuals or trading corporations can be sued or in regard to those matters for which there is express statutory provision. No suit lies against the Secretary of State in respect of acts of State or acts of sovereignty. The plaintiff was a public officer (Deputy Collector), whose employment was one which could only be given to him by the sovereign or the agents of the sovereign. Such public servants hold their offices at the pleasure of the sovereign and are liable to dismissal at his will and pleasure. The power of dismissal includes all other powers (e.g., of reduction or censure). It is open to Government by resolution or otherwise to censure or reprimand an officer, for which no suit is maintainable against the Secretary of State, for damages for defamation.—*Jehangir M. Cursetji v. Secretary of State*, 27 B. 189; 5 Bom. L. R. 30. In this case all the English and Indian cases on the subject have been referred to, discussed and explained. In *Nobin Chundar v. Secretary of State*, 1 C. 11; 24 W. R. 309, it has been held that a suit against the Secretary of State is not maintainable in respect of acts done by the Government in the exercise of sovereign powers; but a suit for acts done in the conduct of undertakings which might be carried on by private individuals without sovereign powers is maintainable. See also, *Kishen Chand v. Secretary of State*, 3 A. 829; *Ross v. Secretary of State*, 37 M. 55 and *Shivabhanjan v. Secretary of State*, 28 B. 814.

The Secretary of State is not liable for damages for any illegal and wrongful act of a Municipal Corporation.—*Corporation of Town of Calcutta v. Anderson*, 10 C. 445.

For further cases, see notes under s. 9.

**What are not Acts of State—Liability of Government.**—The Secretary of State is liable for damages occasioned by the negligence of servants in the service of Government, if the negligence is such as would render an ordinary employer liable.—*Peninsular and Oriental Steam Co. v. Secretary of State*, Bourke, A. O. C. 166; 5 B. H. C. 1.

A suit for wrongful dismissal by one of its servants will lie against the Government. The Government would not be allowed to exercise its power capriciously or to the damage of the servant. An indefinite hiring in India does not mean a hiring for a year. The mere payment of wages monthly is not enough to show that a hiring is a monthly hiring.—*Huges v. Secretary of State*, 7 Bom. L. R. 688.

The acts of a Government officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or, if he exceeds that authority, when the Government, in fact or in law,

Where the plaintiff after obtaining sanction under this section to institute a declaratory suit, subsequently amended the plaint by adding a prayer for recovery of possession. *Held* that after amendment of the plaint a fresh sanction is necessary; *Maharaja of Cooch Behar v. Maharaja Manindra Chandra Nandi*, 17 C. W. N. 1242.

The provisions of s. 86 of the C. P. Code do not apply to a defence put forward by way of set off. Such a defence can be put forward in answer to a claim by a Ruling Chief without the consent of the Governor-General; *Sukhder Singh v. Hazura Mal Gobind Ram*, 62 I. C. 778.

**Waiver of Objection to Want of Consent.**—If the suit is instituted against a Sovereign Prince, without the consent of the Governor-General in Council, and the plaint is admitted, and if the defendant does not object to the institution of the suit on the ground of want of consent until it is ripe for hearing, he will be deemed to have waived the objection as to jurisdiction because it is a case of irregular exercise of jurisdiction; *Chandu Lal v. Awad Bin Umar*, 21 B. 351. Applications for adjournment made on behalf of a Ruling Chief amount to a waiver of his privilege and disentitle him from raising any objection as to want of jurisdiction; *Maharaj Bahadur v. Sivsaran*, 6 Pat. L. J. 185: 69 I. C. 989.

**Jurisdiction of British Courts over the Rajah of Tipperah.**—Save in respect of his zemindary in British territory, the Raja of Tipperah is not subject to the jurisdiction of the Courts in British India, except in the cases mentioned in clauses (a), (b) and (c) of s. 86.—*Bir Chunder v. Ishan Chunder*, 3 C. L. R. 417.

The Raja of Tipperah being a foreign power, the British Civil Courts have no jurisdiction to try the question of succession to the Raj of Tipperah. But where a zemindary lying within British territory, and not shown to be an appendage of the Raj, formed the subject of a suit, *held* that the British Civil Courts had jurisdiction to deal with the title to the latter.—*Rajkumar Nobodip v. Bir Chundra*, 25 W. R. 404.

The Courts in British India have no jurisdiction to decide a question as to who is entitled to succeed to the Raj of a foreign Sovereign State or to any immoveable property, which goes with the Raj, although situated in British territory.—*Samarendra Chandra v. Birendra Kishore*, 35 C. 777 F. B.: 12 C. W. N. 777 (9 C. 535 approved and 12 M. I. A. 523 distinguished).

**"A tenant of immoveable property or money charged thereon."**—In a suit for maintenance against the Maharaja of Hill Tipperah, which is an independent Sovereign State, it appeared that, in a former suit tried in British India in respect of the same claim, the Court had ordered the amount of the maintenance for which he gave a decree to be paid by the defendant Maharajah and from his estate of R, which was in British India. *Held* that the suit not being a suit for immoveable property within the meaning of clause (c), s. 86 would not lie.—*Bir Chunder v. Ishan Chunder*, 12 C. L. R. 473.

A suit for maintenance which seeks to have the maintenance made a charge on immoveable property is not a suit for immoveable property within the meaning of clause (c), s. 483, C. P. Code, 1882 (s. 86).—*Beer Chunder v. Rajcoomar Nobodip Chunder*, 9 C. 535: 12 C. L. R. 465

34 I. C. 300. The object of a notice is to give the Government and to public officers time and opportunity of making amends before the matter is brought into Court. When therefore, relief is claimed on the ground of fraud, but no fraud is charged against the Secretary of State and no

The other provisions of the interpleader-suits, contained in sections 471, 472, 473, 474, 475 and 476 of Act XIV of 1882, have been placed in the First Schedule. See Order XXXV, rules 1 to 6. See notes and cases noted under Or. XXXV, rr. 1-6.

**Nature of Interpleader-suit.**—A person consigned some goods to a firm at Bombay, and delivered them to the plaintiffs for carriage to Bombay. While the goods were in transit to Bombay, the consignor ordered the plaintiffs to deliver them to his agents instead of to the consignee. Before the delivery of the goods, another firm claimed them, alleging that they had been consigned to them by the original consignee. The plaintiffs therefore, filed the present suit, praying that the defendants should be required to interplead, and that they should be restrained from suing the plaintiffs in respect of the said goods. Held that the suit was properly instituted by the plaintiffs as an interpleader-suit so as to entitle them to their costs.—*Bombay, Baroda, and Central India Railway Co. v. Satoon*, 18 B. 231.

Land having been compulsorily acquired under the Land Acquisition Act for railway purposes, the compensation was fixed at Rs. 468. A conflict having arisen as to the right to receive the compensation, an interpleader-suit was brought by the Secretary of State in the Court of the District Munsif. Held that the suit was rightly brought in the District Munsif's Court, and that the Small Cause Court had no jurisdiction to try the suit.—*Tirupati Raju v. Vissam Raju*, 20 M. 155.

Where a defendant in a suit for rent, pays money into Court, with the request that it should be paid out to the party really entitled to the rent, such suit may be treated as being in the nature of an interpleader proceeding under s. 470, C. P. Code, 1882 (s. 89). See the observations of Muttusami Ayyar, J., in *Kasim Saib v. Luis*, 17 M. 82 (85). See also *Nanji Koer v. Umatul Batul*, 13 I. C. 40. See, however, *Koylash Chunder v. Goluck Chunder*, 2 C. W. N. 61.

Against the plaintiff, rent decrees were obtained both by the defendant No. 1 and also by L and M defendants, and the object of the present suit was to have it determined as between those sets of defendants, which of them was the plaintiff's landlord. Admittedly L and M were the zemindars of the land but the defendant No. 1 claimed to hold under them a *jamai* right and that within that holding the plaintiff's land was included. Held that the plaintiff is not debarred from bringing a suit in order to compel the defendants to interplead one another.—*Gopal Das v. Hanuman Charan*, 5 C. L. J. 34-n (2 C. W. N. 61 distinguished).

Where a party in the position of a mere stakeholder is made a defendant in a suit, his proper course, under the Civil Procedure Code, is to pay the money into Court, and ask that the parties really interested may be substituted for himself as defendants.—*Assaram Burtoah v. Commercial Transport Association*, 2 I. J. N. S. 113.

An interpleader-suit is not improperly instituted merely because one of the defendants does not claim the whole of the subject-matter.—*Secretary of State v. Mahomed Hossein*, 1 M. H. C. 360. See also 14 B. 498.

The deposit of rent in the Court under section 61 of the Bengal Tenancy Act (VIII of 1885) is in the nature of an interpleader proceeding.

**Notice to Secretary of State.**—Where a suit is proposed to be instituted against the Secretary of State, notice to him should be given in all cases, whether the act in respect of which the suit is brought purports to be done by him in his official capacity or not; *Secy. of State v. Kale Khan*, 87 M. 118: 16 I. C. 947; *Secy. of State v. Ghulam Rasul*, 40 B. 892; *Secy. of State v. Rajluckhi*, 25 C. 230 (242).

**Any Act purporting to be done by such Public Officer in his Official Capacity.**—If the act was one such as is ordinarily done by the officer in the course of his official duties, and he considered himself to be acting as such public officer and desired other persons to consider that he was so acting, the act clearly purports to be done in official capacity, *Abdul Rahim v. Abdul Rahman*, 46 A. 884: A. I. R. 1924 A. 851

**Notice is Necessary Only when a Public Officer is Sued in respect of an Act Done in Official Capacity.**—A public officer is entitled to notice of suit under s. 80 even if in the discharge of his duty he has acted *mala fide*, that is, maliciously and dishonestly. It is not permissible to read the words in s. 80, C. P. Code, as if they were "in respect of any act purporting to be done by such public officer *bona fide* in his official capacity"; *Dakshina Ranjan v. Omar Chand*, 50 C. 992: 28 C. W. N. 10: 33 C. L. 104. In *Jogendra Nath v. Price*, 24 C. 584, where the plaintiff sued a public officer (District Magistrate) for damages for illegal and malicious arrest and trespass, it was held that though the act was said to be done maliciously, notice was required to be given under this section, the Judges observing: "The section does not seem to us to warrant the drawing of a distinction between acts of this kind done inadvertently or otherwise." See also the following cases: *Abdul Rahim v. Abdul Rahman*, 46 A. 884: A. I. R. 1924 A. 851: 89 I. C. 72; *Dakshina v. Omarchand*, 50 C. 992: 75 I. C. 173: A. I. R. 1924 C. 145, in which it was held that a notice to the public officer was necessary even in cases where he acted *mala fide*. It has been held in the following cases, however, that no notice is necessary where the act is done *mala fide*: *Raghubans v. Phool Kumari*, 32 C. 1130; *Peary Mohun v. Weston*, 16 C. W. N. 145; *Muhammad v. Panna Lal*, 26 A. 220; *Shahibadee v. Fergusson*, 7 C. 499. Where the suit is founded upon tort, notice must be given whether the relief sought is for damages or for a declaration that the act is illegal, being against the provisions of law; *Chhaganlal v. Collector of Kaira*, 35 B. 42: 12 Bom. L. R. 825.

A public officer is entitled to notice of suit in those cases only where he is sued for damages for some wrong *inadvertently* committed by him in the discharge of his official duties. *Shashunshah Begum v. Ferguson*, 7 C. 499. Followed in *Sardar Singhji v. Ganpat Singhji*, 14 B. 895.

A suit against a Toll-Collector for refund of money alleged to have been exacted by him improperly under Act IX of 1871, B. C. is not maintainable without previous notice.—*Ram Pitam v. Shoobal Chander*, 15 C. 259.

A suit against a Bench clerk for damages resulting from the loss of a record in Court through his negligence cannot be brought without giving notice under s. 80; *Nga Meik v. Nga Gya*, 11 Bur. L. T. 95.

A suit for accounts against a common Manager appointed under s. 95 of the B. T. Act cannot be maintained without the service of t

## PART V.

### SPECIAL PROCEEDINGS.

#### ARBITRATION.

**89.** (1) Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule.

(2) The provisions of the Second Schedule shall not affect any arbitration pending at the commencement of this Code, but shall apply to any arbitration after that date under any agreement or reference made before the commencement of this Code. [New.]

#### COMMENTARY.

**Arbitration.**—"Two questions of importance have arisen in connection with this subject (1) Should any of the sections of the Arbitration Act of 1899 be incorporated in the Code? (2) Should the right of appeal, as now existing, be altered and, if so, in what direction? We are of opinion that the best course would undoubtedly be to eliminate from the Code all the clauses as to arbitration, and insert them in a new and comprehensive Arbitration Act. There are, perhaps, difficulties as to this at present. We have determined therefore, to leave the arbitration clauses such as they are in the present Code (Act XIV of 1882); but we have placed them in a Schedule in the hope that at no distant date they may be transferred into a comprehensive Arbitration Act."—*See the Report of the Special Committee.*

All the provisions relating to arbitration contained in section 506 to 526 of Act XIV of 1882, have been relegated to the second Schedule.

**Indian Arbitration Act IX of 1899.**—The provisions of this Act apply to private arbitration only, that is to say, "arbitration by agreement without the intervention of a Court of Justice." Section 2 of the Act provides that the Act "shall apply only in cases where, if the subject-matter submitted to arbitration, were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency town." In order that the provision of the Arbitration Act may be applicable to an agreement to refer matters in dispute to arbitration, it is necessary (a) that there should not be any suit pending in any Court in respect of those matters, and (b) that if those matters were the subject of a suit, the suit could be instituted in a Presidency town; *Ramjidas v. House*, 35 C. 199; *Peruri v. Gullapudi*, 34 B. 372. In all other cases the provisions of Sch. II, paras. 17, 19 and 20 will apply.

and are applicable to all forms of action and all kinds of relief; *Secy. of State v. Rajlucky*, 25 C. 239, *Dakhina v. Omarchand*, 50 C. 992. A. I. R. 1924 C. 145; *Secy. of State v. Kale Khan*, 37 M. 113; *Kotreddi v. Subbiah*, 41 M. 792; *Bacchu Singh v. Secy. of State*, 25 A. 187; *Abdul Rahim v. Abdul Rahaman*, 46 A. 891. In Bombay, on the other hand, it was held in the cases of *Secy. of State v. Gajanan*, 35 B. 362; *Naginlal v. Official Assignee*, 37 B. 243 and *Secy. of State v. Gulam Kasul*, 40 B. 892, that if the immediate result of the act would be to inflict irreparable harm, s. 80 does not compel the plaintiff to wait two months before bringing his suit. This point again came up before their Lordships of the Judicial Committee in the recent case of *Bhagchand v. Secy. of State*, A I R 1927 P. C. 176, when their Lordships held (following the Calcutta, Madras and Allahabad cases and overruling the Bombay cases) that the view that plaintiff can bring his suit before the two months' time prescribed has expired, when part or the whole of the relief claimed is an injunction, is not correct. S. 80 is to be strictly complied with and is applicable to all forms of action and all kinds of relief. The Bombay cases therefore are no longer good law.

**Notice When Not Necessary Under This Section.**—A public officer sued in respect of an act done in bad faith is not entitled to notice, *Pearcy Mohan v. Weston*, 16 C. W. N. 145.

Notice to a public officer is necessary when the suit is in respect of a wrong committed by him in the discharge of his official duties, and no notice is necessary if the suit is founded upon contract; *Sardar Singji v. Ganpat*, 14 B. 395, *Rajmal v. Hanmant*, 20 B. 697; *Bhau v. Nana*, 18 B. 343; or any other cause of action; *Damodar v. Gobindji*, 25 Bom. L. R. 378; A. I. R. 1923 B. 392. 73 I. C. 240; *Shahbajadee v. Fergusson*, 7 C. 499.

This section which requires notice to be given to a public officer before the institution of the suit against him, does not apply where the suit is one *ex contractu*.—*Raj Mal Manickchand v. Hanmant Anyaba*, 20 B. 697 (7 C. 490, and 19 B. 407 referred to). But see *Ratan Chand v. Secretary of State*, 18 C. W. N. 1340.

In a suit against a police officer for damages for wrongful confinement, it was found that the police-officer, did not purport to act in good faith in pursuance of the law, but that he took advantage of his position as a police officer to commit illegal and tortious acts, maliciously and without cause. Held that the defendant was not entitled to notice of suit.—*Muhammad Saddiq v. Panna Lal*, 26 A. 220 (7 C. 499 and 24 C. 584 referred to). But see *Samanthala Koti Reddi v. Pothuri Subbiah*, 34 M. L. J. 494; 41 M. 792, where it has been held that a public officer is entitled to notice though he acts *mala fide* in the discharge of his duties (24 C. 584 approved; 7 C. 499; 26 A. 220 dissented from).

This section relates to the institution of the suit against the Secretary of State. There is nothing in the law to show that in case of any amendment necessitated by alleged discovery of facts previously unknown to the plaintiff, the Secretary of State should have a further notice of two months. Where after institution of suit against the Secretary of State, a Sub-Collector is joined as defendant, who, however, is not sued for any act done by him independently of Government, and no separate relief is asked for against him, no notice under this section is necessary.—*Esra v. Secretary of State*, 30 C. 36; 7 C. W. N. 249. Affirmed by the P. C. in 32 C. 605; 1 C. L. J. 227; 9 C. W. N. 454; 7 Bom. L. R. 422; 2 A. L. J. 771.



" We have inserted a clause to enable actions for public nuisances to be brought, with the consent of the Advocate-General, irrespective of special damage. It has been represented to us that such a power is needed and we concur in that view."—*See the Report of the Special Committee.*

**Public Nuisance.**—The expression " public nuisance " has not been defined in this Act; but s. 3, article (44) of the General clauses Act (X of 1897) provides that " public nuisance " shall mean a public nuisance as defined in the Indian Penal Code.

The following definition of " public nuisance " is given in section 268 of the Indian Penal Code:—

" A person is guilty of a public nuisance who does any act, or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage."

**Remedies for Public Nuisance.**—Where a person commits a public nuisance, three different remedies are available: (1) he can be criminally prosecuted under the Indian Penal Code; (2) a civil action may be maintained against him under this section; (3) he can be sued for damages at the instance of a private individual who suffers *special damage* by reason of the nuisance, that is, damage apart from that which he suffers in common with others affected by the nuisance; *Muhammad Reza v. Muhammad Askari*, 46 A. 470; A. I. R. 24 A. 599; *Manulal v. Ishwarbhai*, 27 Bom. L. R. 421; 87 I. C. 934; A. I. R. 1925 B. 367.

Under the law as it stood before the insertion of this clause, a public nuisance was actionable only at the suit of a party, who had sustained special damage. There is a general concurrence of authorities that there must be some particular damage to the plaintiff more than to the public in order to render an action maintainable. On this point, see the cases reported in 2 B. 457; 17 B. 293; 15 C. 460, F. B.; 22 C. 551; 27 C. 792; 9 M. 463; 14 M. 177; 10 A. 498 and 553; and other cases noted under s. 9 under the headings " OBSTRUCTION TO PUBLIC WAY—RIGHT OF SUIT—SPECIAL DAMAGE.

Under the present section, the Advocate-General or two or more persons, after obtaining the consent in writing of the Advocate-General, may institute a suit either for a declaration, or injunction or for any other relief irrespective of any special damages. As to declaratory suit under this section, see 2 B. 457; 32 M. 478 and other cases noted under section 9.

Persons suing under this section for a public nuisance with the consent of the Advocate-General need not have any personal interest in the subject-matter of the suit. They may sue under this section independently of any such interest or of any special damage.

**Scope of the Section.**—S. 33 of the Calcutta Municipal Act does not control s. 91, C. P. Code. Any two persons may under the latter section, sue for the removal of a public nuisance though situated within a Municipality; *Suray Mal Kharad v. Akshoy Kumar*, 21 C. W. N. 595.

**Notice of Suit Against the Municipality.**—In suits against the Municipality notice of action is necessary in those cases only where the plaintiff claims damages or compensation for some wrongful act committed by the Commissioners or by their officers, in the exercise, or honestly supposed exercise, of their statutory powers. But where the suit is for possession of land brought against the Municipality, no notice of action is necessary.—*Chunder Sikur v. Obhoy Churn*, 6 C. 8 F. B.; *Monohar Ganesh v. Dakor Municipality*, 22 B. 289, F. B. (18 B. 19 overruled); *Kashi Nath v. Gangabai*, 22 B. 283; *Poorna Chunder v. Balfour*, 9 W. R. 535; *Gopee Kishia v. Ryland*, 9 W. R. 279; *Johar Mal v. Municipality of Ahmednagar*, 6 B. 580; *Price v. Khilat Chundra*, 5 B. L. R. Ap. 50; 13 W. R. 461; *Sudhansu Bhusan v. Bejoy Kali*, 3 C. L. J. 376 and 3 C. L. J. 54-n.—In a suit for possession and injunction, notice of action was not necessary, but as regards damages notice was necessary.—*Shidmolapa v. Gokak Municipality*, 22 B. 605; *Pateb Panachand v. Ahmedabad Municipality*, 22 B. 230; *Hari Lal v. Himat*, 22 B. 636; *Mahomahopadhya Rangachariar v. Municipal Council of Kumbakonam*, 29 M. 539; 16 M. L. J. 582.

Notice of action is not necessary in a suit for specific performance of a contract or for damages for breach thereof.—*Municipality of Fairpur v. Manak Dulab*, 22 B. 637. See also *Rancho Das v. The Municipal Commissioner of Bombay*, 25 B. 387; and *Mayandi v. Mcquhai*, 2 M. 124.

Notice is not necessary in suits for a declaration of right to reconstruct a building demolished and for compensation for such demolishment.—*Manni Kasaundhan v. Crooke*, 2 A. 296; *Municipal Committee of Moradabad v. Chatri Singh*, 1 A. 269; *Brij Mohun v. Collector of Allahabad*, 4 A. 839, F. B., and *Greenway v. Municipal Board of Cawnpore*, 28 A. 600; 3 A. L. J. 341.

A person suing a Municipality for refund of money illegally levied from him as a house-tax is bound to serve a previous notice.—*Ranchand Varajh-bai v. Municipality of Dakor*, 8 B. 142. See also *Joashe Kalidas v. Dakor Town Municipality*, 7 B. 399.

A notice of action against the Municipal Commissioners stating the cause of action is absolutely necessary under the Municipal Act.—*Abhoy Nath v. The Chairman of the Krishnagar Municipality*, 7 W. R. 92. See also *Dhondiba Krishnaji v. Municipal Commissioners of Bombay*, 17 B. 307. No cause of action will be allowed to be raised, except that disclosed in the notice of action.—*Ullman v. The Justices of the Peace*, 8 B. L. R. 265. As to the sufficiency of notice of suit against Municipality for damages, see *Eales v. Municipal Commissioners of Madras*, 14 M. 386; *Dwarka Nath v. Corporation of Calcutta*, 18 C. 91.

**Notice of Suit to the Railway Administration.**—Notice of the claim for a refund of excess freight to the General Traffic Manager, was held not to be in compliance with the provisions of the Indian Railway Act, 1890.—*G. I. P. Ry. v. Chundra Bai*, 28 A. 552; See also *G. I. P. Ry. v. Dewast*, 31 B. 534. See also 19 C. W. N. 62.

Service of notice of claim for short delivery upon the Traffic Manager and not on the Agent was held not sufficient under ss. 77 and 140 of the Indian Railways Act, 1890.—*Nadiar Chand v. Wood*, 35 C. 101 (21 C. 306, 26 B. 669 and 28 A. 55 approved; 22 M. 187 dissented from). But see *Woods v. Meher*, 13 C. W. N. 24.

had become unhealthy, insanitary and unfit for residential purposes, was held to be an actionable nuisance.—*Muhammad Mohidin v. Municipal Commissioners of Madras*, 25 M. 118.

Under certain limitations the slaughtering of kine by Muhammadans is not illegal. It is the legal right of every person to make such use of his own property as he may think fit, provided that in so doing he does not cause real injury to others or offend against the law, even though he may thereby hurt susceptibilities of others. The right of Muhammadans to slaughter kine is one to which they are legally entitled irrespective of custom, and it is only when they abuse the right that its existence can be interfered with.—*Shahbaz Khan v. Umrao Puri*, 30 A. 181.

**Some Examples of Public Nuisance under the Penal Code.**—Keeping a gambling house and permitting disorderly people to use it for gambling and thereby causing annoyance to the public, was held to be public nuisance.—*Queen-Empress v. Thanadanarayudu*, 14 M. 364. But see *Sashi Kumar v. Emperor*, 7 C. W. N. 710.

Obstruction to and encroachment upon public highway was held to be public nuisance.—*Queen-Empress v. Virappa Chetti*, 20 M. 433; *Adhar Chunder v. Ambika Charan*, 6 C. W. N. 886; *Queen-Empress v. Kedar Nath*, 23 A. 159; *Rakhal v. Kailash*, 7 C. W. N. 117. Obstruction on tidal navigable river by placing a bamboo stockade across a tidal navigable river for the purpose of fishing, although leaving in such a stockade a narrow opening for the passage of boats, was held to be a public nuisance.—*In re Umesh Chander Kar*, 14 C. 656. See, however, *Jugal Dass v. Queen-Empress*, 20 C. 665.

Erection of bund in a river, the effect of which was to render it unfordable at a place where the stream had been fordable throughout the year, was held to be public nuisance.—*Zaffar Nawab v. Emperor*, 32 C. 930.

Slaughter of kine by Mahomedans in a public street or on their own property, when amounts to public nuisance and when does not.—*Queen-Empress v. Zakinddin*, 10 A. 44 (7 M. 590 referred to). See also *Shahbaz Khan v. Umrao Puri*, 30 A. 181.

Existence of houses of prostitutes by the roadside when amounts to public nuisance.—*Basanta v. Emperor*, 5 C. W. N. 566.

In all these and such other cases a suit may be brought under the provisions of this section.

**92.** (1) In the case of any alleged breach of any express or constructive trust created for public purposes of charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in

Public charities.

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report. [S. 429.]

This section corresponds to section 429 of Act XIV of 1882. No material change has been made in this section.

### SUITS BY ALIENS AND BY OR AGAINST FOREIGN AND NATIVE RULERS.

83. (1) Alien enemies residing in British India with the permission of the Governor-General in Council, and alien friends, may sue in the Courts of British India, as if they were subjects of His Majesty.

(2) No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts.

*Explanation.*—Every person residing in a foreign country the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of His Majesty's Secretaries of State, or of a Secretary to the Government of India, shall, for the purpose of sub-section (2), be deemed to be an alien enemy residing in a foreign country. [S. 480.]

### COMMENTARY.

This section exactly corresponds to section 430 of Act XIV of 1882.

**Alien Enemy.**—An alien enemy can be sued or proceeded against in Courts in British India. Section 83 of the C. P. Code only precludes the right of an alien enemy to sue unless he is residing in British India with the permission of the Governor-General in Council; *Hussenie v. Messrs. Weichers Kaiser and Levy Ltd.* 8 S. L. R. 329.

Under s. 83, an alien enemy residing in British India may sue in British Courts with the permission of the Governor-General in Council. An application by an alien enemy for summons of a suit for Judicial Separation filed in British India to be sent to the Probate, Divorce and Admiralty Division of the High Court of Judicature in England for transmission to the Foreign Office for service upon the respondent residing in enemy country, should not be refused though the respondent is the subject of a country which is at war with Great Britain; *Reiffstock v. Reiffstock*, 89 A. 377.

Whether the cause of action arose before or after war, an alien enemy can be sued in British Indian Courts and would have every right to prosecute his case before the Courts in accordance with the laws of procedure,

about charities in the *Mofussil*. Because on account of the occurrence of the words "High Court" in the old section, suits relating to charities in the *Mofussil* could be instituted in the original side of the High Court. The Indian Legislature has, no doubt power, under clauses 11 and 44 of the Letters Patent, of altering the local limits of the ordinary original jurisdiction of the High Court. But clear and unambiguous words are necessary to extend the original jurisdiction of the High Court to any particular class of suits in the *mofussil*; on account of the omission of the words "High Court" in the present section, no suit under this section about charities in the *mofussil* can be instituted in the original side of the High Courts. See *The Advocate-General of Madras v. Arunachellam*, 20 M. L. J. 387: 7 M. L. T. 292: 5 I. C. 729.

(5) Another important change has been introduced in this section by inserting the words "or in any other Court empowered in that behalf by the Local Government," etc. By the above change any other subordinate Court will be competent to try suits under this section, when specially empowered by the Local Government.

(6) Sub-section (2) is new; it has been added to make the provisions of this section mandatory. See notes under sub-section (2), *post*.

**Report of the Special Committee.**—"The suggestion has been made on high authority that some express reference should be made in the Code to the power of the Court to apply the *Cy-près* doctrine in the settling of schemes. But this power would appear to exist already within its proper limits (*Mayor of Lyons' Case*, L. R. 3 I. A. 32) and we do not think it necessary to make express reference to it.

"It has been represented to us by more than one gentleman whose opinion is entitled to weight, that the power to enquire into the affairs of the public charities should be made more extensive. The clause, as it stands, gives sufficient powers to Courts to direct accounts and to frame schemes when once a suit has been instituted, but it is said that members of the public interested in any public charity ought to have the means of calling for and inspecting accounts without undertaking the burden of a suit, at least in the first instance. We are told that revenues derived from charitable trusts are in some cases very large in amount: that no accounts of their expenditure are ordinarily rendered, and that there is good ground for believing that a considerable portion is misspent or squandered on useless objects.

"On the above grounds the Legislature was asked to insert a clause empowering any two or more persons having the like interest and having obtained the like consent to apply to the Court for directing any trustee of charity to file in Court a detailed account of the receipts and disbursements in connection with the trust property. But the clause was not inserted on the ground that public opinion of the communities interested should first be obtained."

**Cy-près Doctrine.**—Although there is no express provision in the Code for the application of the *Cy-près* doctrine, it is clear that in settling scheme, the Court has power to adopt the rule laid down in the *Mayor of Lyons' case* of which a short note is given below.

The doctrine of *Cy-près* as applied to charities rests on the view that charity in the abstract is the substance of the gift, and the particular

**85.** (1) Persons specially appointed by order of the Government at the request of any Sovereign Prince or Ruling Chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India, or at the request of any person competent, in the opinion of the Government, to act on behalf of such Prince or Chief, to prosecute or defend any suit on his behalf, shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief.

(2) An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Prince or Chief.

(3) A person appointed under this section may authorize or appoint persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto. [S. 432.]

## COMMENTARY.

This section corresponds to section 432 of Act XIV of 1882. No change has been introduced in it.

**Persons Specially Appointed by Order of the Government.**—This is an enabling section and does not prevent the institution by an independent prince of a suit in a Court in British India in his own name, and through a recognized agent other than one appointed under that section.—*Beer Chunder v. Ishan Chunder*, 10 C. 136; *Maharaja of Bharatpur v. Kacheru*, 19 A. 510; *Ramesh Chandra v. Maharaja Birendra*, 29 C. W. N. 287; 80 I. C. 100; A. I. R. 25 C. 513.

S. 432, C. P. Code, 1882 (s. 85) applies to suits filed in Revenue Courts. Where a plaint was signed by a person who at the time of signing had not been specially appointed by Government for such purpose, but was subsequently empowered to sign. Held that the plaint was a valid plaint for all purposes.—*Maharaja of Rewah v. Swami Saran*, 25 A. 635.

The Desai of Patadi, a talookdar of the fifth class in the province of Kathiawar, is a ruling chief within the meaning of ss. 432 and 433, C. P. Code, 1882 (ss. 85 and 86) and can only be sued with the consent of the Government in a competent Court not subordinate to the district Court.—*Kambhai v. Himat Singhji*, 8 B. 415.

A political agent unless specially empowered under this section cannot sue on behalf of a Prince; *Venkatrav v. Madharav*, 11 B. 53.

*sami Chettiar*, (1921) M. W. N. 439: 14 L. W. 38. It has no application to suits for the vindication of the rights of management by hereditary trustees or to disputes between such trustees *inter se* as to their turns of management. The addition of sub-section (2) to s. 92 was intended not to alter but to make explicit; *Appanna Poricha v. Narasinga Poricha*, 41 M. L. J. 608: (1921) M. W. N. 833.

**Meaning of the Word "Trust."**—The word "trust" has not been defined in the Code; the following definition of the word "trust" is given in the Indian Trusts Act (II of 1882).

A "trust" is an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner, or declared or accepted by him, for the benefit of another and the owner.

The person who reposes or declares the confidence is called the "Author of the trust."

The person who accepts the confidence is called the "Trustee".

The person for whose benefit the trust is created and the confidence is accepted is called the "Beneficiary." The subject-matter of the trust is called "Trust-property" or "Trust-money."

**"Any express or constructive trust."**—The words "any express or constructive trust" in s. 92 are not confined to what may be called the English Law sense, at all events as regards the words "constructive trust." They mean more than an express or specific trustee taking advantage of his position as such, *e.g.*, to grant leases in his own name or to make profits by means of unauthorized investments of trust property. It embraces all cases where the property is used for the purposes described subject to certain rules and obligations, and a head of a *muti* is one of these cases.

The words "constructive trustees" include a person holding a particular fiduciary position whose doings as such can be enforced in a Court of law. This would include *Mahants*, *Shebaitis*, *Mutwallis*, as their fiduciary positions "would be that of a manager or custodian of properties held for public purposes of a charitable and religious nature." *Case Laws discussed. Nelliappa Achari v. Punnaivanaum*, 52 M. L. J. 415: 25 M. L. W. 461: A. I. R. 1927 M. 614 (*Vidya Varuthi v. Baheswami*, 44 M. 831: A. I. R. 1922 P. C. 123: 48 I. A., 302 referred to).

**"Public purposes of a religious or charitable nature."**—A trust for a Hindu idol and temple is to be regarded in India as one created for public charitable purposes within the meaning of this section. The Hindu Law recognizes not only corporate bodies with the rights of property vested in the corporation apart from its individual members, but also the juridical persons or subjects called foundations. A Hindu who wishes to establish a religious or charitable institution may, according to his law, express his purpose, and endow it, and the ruler will give effect to the bounty or at least protect it. A trust is not required for this purpose as it is by English Law.—*Monohar Ganesh v. Lakshmiram*, 12 B. 247 and 267-note. Approved in *Girijanund v. Sailajanund*, 23 C. 645, in which, upon a review of the Hindu law of endowments, it has been held that where an idol is an ancient one permanently established for public worship, and the offerings made to it are more or less of a permanent character, in the absence of any custom or express declaration of the

**"Any such Prince or Chief."**—The Maharaja of Hill Tiperah is a Sovereign Prince and cannot be sued without the consent of the Governor-General in Council—*Maharaja Radha Kishore v. Gobinda Chandra*, 2 C. L. J. 163; *Beer Chunder v. Rai Coomar Nobadsep*, 9 C. 535. See also *Ramnath v. Thakur Raghobharji*, 25 I. C. 271. So also the State of Travancore; *Gilmore v. State of Travancore*, 23 M. L. J. 605, 12 M. L. T. 406. Sanction is necessary even where the defendant is sued in his representative capacity, *e.g.*, trustee or even if he is a *pro forma* defendant; *Kunhan v. Banerji*, 8 M. L. T. 163. (1915) M. W. N. 640.

The Kurundwad Jagirdars are Ruling Chiefs who cannot be sued without the consent of the Governor-General under s. 86 C. P. Code; *Krishnaji v. The Secy. of State for India*, 21 Bom. L. R. 376. The Maharaja of Benares is a Ruling Chief; *Kanhaiya Lal v. H. H. the Maharaja of Benares*, 46 A. 355, 356; 78 I. C. 559; A. I. R. 1924 A. 422; so also is the Desai of Patadi; *Kambhai v. Himat Sangji*, 8 B. 415.

The defendant who was not a Ruling Chief at the time of the institution of the suit, attains that status during the pendency of the suit, *held* that s. 86 (1) C. P. Code applied and the suit cannot proceed until the required consent of the Governor-General in Council is obtained to carry on the suit to its termination; *Maharaja Bahadur of Rewa v. Shivasaranlal*, 6 Pat. L. J. 185; (1921) Pat. 186.

Section 86 definitely lays down in what cases Municipal Courts have the power to adjudicate upon any matters whatsoever as against Princes, Chiefs referred to in the section. This section is exhaustive and it applies where a Prince or Chief is to be brought on record against his will where he is sued as Prince or Chief or in any other capacity; *Narayan v. Cochin Sircar*, (1918) M. W. N. 977; 25 M. L. J. 621; 14 M. L. T. 486.

**Consent must be Obtained before Institution, Specifying Necessary Conditions.**—Under this section a consent given by the Governor-General in Council after the commencement of the suit against a Ruling Chief—a consent not to the suit being instituted; but to its being proceeded with—is not a sufficient consent. If the consent has not been obtained before the commencement of the suit, the Court should dismiss the suit, or allow the plaintiff to withdraw it with liberty to bring a fresh suit under s. 873, C. P. Code, 1882 (Or. XXIII, r. 1)—*Chandu Lal Khusalji v. Awad Bin Umar Sultan*, 21 B. 815.

Where a Ruling Prince having sovereign powers submits to the jurisdiction of a British Court, no objection can be raised by him, in the appellate Court on the ground that the consent of the Governor-General had not been obtained prior to the institution of the suit; *Birendra Kishore v. Hashmat Ali*, 46 I. C. 558.

The plaintiff obtained the consent of the Governor-General in Council to institute a suit against the Maharaja of Jaipur, for arrears of salary, ostensibly in accordance with the provisions of this section; but, in fact, none of the conditions enumerated in clause (2) of the section existed. *Held* that the suit was not maintainable.—*Maharaj of Jaipur v. Lalaji Sahai*, 29 A. 379; 4 A. L. J. 358; referred to in *Narayan Moothad v. The Cochin Sircar*, 38 M. 685; 21 I. C. 930; 25 M. L. J. 621; 14 M. L. T. 486.



**Constructive Trust by Indirect Dedication.**—Under the Hindu Law an idol may be regarded as a juridical person capable as such of holding property, but no express words of gift to such idol in the shape of a trust or otherwise are required to create a valid dedication; and there may be religious dedications of a less complete character, in which notwithstanding a religious dedication, the property descends to heirs subject to a trust on charge for the purposes of religion.—*Jagadindra Nath v. Hemanta Kanti*, 32 C. 129, P. C.: 8 C. W. N. 899, P. C. (5 C. 438, P. C.: 8 M. L. A. 68 referred to). See also *Bhuggobutty Prasanna v. Goenka Prasanna*, 25 C. 112. (12 B. 247: 8 M. L. A. 68 and 5 C. 488, P. C., referred to). See however, 14 C. 518, p. 522; *Shripat Prasad v. Lakshmidas*, 25 Bom. L. R. 747.

Where the donee received the gift as a gift for the service of the particular idols whose *shetait* he was and where the proceeds of the property have all along been entirely appropriated to that service, held that the property was dedicated for the maintenance of the *sheta* of the idol and was *debutter* property and not personal property of the *shetait*; *Ajibhai Gotwami v. Shyama Churn*, 35 C. 1038 P. C.: 10 C. L. J. 284, P. C.: 14 C. W. N., (reversing 33 C. 511: 10 C. W. N. 788, 3 C. L. J. 86).

**Breach of Trust.**—A trustee who sets up an adverse title of his own to the temple which is a public charitable property, is guilty of breach of trust, and is liable to be removed; *Girdhar Lal v. Narain Lal*, 14 Bom. L. R. 1135.

Any extension or limitation of the scope of a trust, so as to exclude those who were intended to be included or to include those who were intended to be excluded, is a breach of trust; *Sir Dinshaw Manekji v. Sir Jamsetji*, 33 B. 509: 11 Bom. L. R. 85.

It is an universal proposition of law that the law recognizes no purpose as charitable unless it is of a public character, that is to say, a purpose must, in order to be charitable, be directed to the benefit of the community or a section of the community. The distinction between a public purpose and one which is not public is often fine. The principle deducible from the cases seems to be as follows:—If the intention of the donor is merely to benefit specific individuals, the gift is not charitable, even though the motive of the gift may be to relieve their poverty or accomplish some other purpose in reference to those particular individuals which would be charitable if not so confined; on the other hand, if the donor's object is to accomplish the abstract purpose of relieving poverty, advancing education, or religion or other purpose charitable without reference to any particular individuals and without giving to any particular individuals the right to claim the funds, the gift is public charitable. See *Md. Ibrahim v. Ahmad Soli*, 32 A. 503, p. 511.

**Charitable or Religious Trust Must be for Public Purposes.**—The provisions of this section apply only to public trusts and a suit relating to a private trust is not maintainable under this section but is maintainable as an ordinary civil suit; *Abdul Hasan v. Aziz Ahmad*, 25 I. C. 661.

This section applies to a public religious trust, though not a trust for the public at large but only for a portion of community answering a particular description. A suit may be instituted under this section, on behalf of a defined class of the general public, though that class may be composed

Plaintiff held certain land of the Ruling Chief (defendant) without rent. The Chief resumed the *muafi* through Court which assessed rent against plaintiff, who sued for declaration of his heritable right to hold the land free of rent. *Held* that the suit being brought without the Governor-General's sanction as required by law, is not maintainable, because it does not fall under Proviso 5 to s. 86; *Amir Singh v. Jagat Singh*, 58 I. C. 912.

**Notification.**—For notifications issued under the powers conferred by this section in respect of the Governments of Madras, Bengal, the North-Western Provinces and Oudh, the Punjab, the Central Provinces and Assam, see *Gazette of India*, 1889, Pt. I, p. 187; and as to the Government of Bombay, see *Gazette of India*, 1896, Pt. I, p. 322.

**87. A Sovereign Prince or Ruling Chief may sue, and shall be sued, in the name of his State :**

**Style of Princes and Chiefs as parties to suits.**

Provided that in giving the consent referred to in the foregoing section the Governor-General in Council or the Local Government, as the case may be, may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name. [S. 434.]

This section corresponds to section 434 of Act XIV of 1882. No change has been made in this section.

**Sovereign Prince.**—An independent Sovereign Prince is privileged from suit in the Courts of British India. The Thakur of Palitana is an independent Sovereign Prince.—*Ladkunarbhai v. Sarsangi*, 7 B. H. C. 150.

### INTERPLEADER.

**88. Where two or more persons claim adversely to one another the same debt, sum of money or other property, moveable or immoveable from another persons, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made, and of obtaining indemnity for himself.**

**Where interpleader-suit may be instituted.**

Provided that where any suit is pending in which the rights of all parties can properly be decided, no such suit of interpleader shall be instituted. [S. 470.]

### COMMENTARY.

This section corresponds to section 470 of Act XIV of 1882. Some important changes have been made in the language of this section. The words "*same debt, sum of money or other property, moveable or immoveable*," have been substituted for the words "*same payment or property*," and the words "*other than for charges or costs*" have been substituted for the word "*stake-holder*."

Preferential rights of descendant to *mutualiship*—Jurisdiction of Subordinate Judge to exercise functions of a *quadi*—Jurisdiction of District Judge; *Alimannessa Bibi v. Abdul Sobhan*, 20 C. W. N. 113: 22 C. L. J. 577.

**Consent of the Advocate-General.**—The "consent in writing" of the Advocate-General or other officer appointed by the Local Government for the purpose must be a specific permission given to two or more persons by name: a permission given to one applicant by name "and another" is not a sufficient compliance with the terms of the section. *Held* also the "consent in writing" required by this section is a condition precedent to the institution of the suit to which such consent relates. If therefore no valid consent is given before the institution of the suit, the mistake cannot subsequently be rectified.—*Gopal Dei v. Kanno Dei*, 26 A. 162. But see *Ramayyengar v. Krishyyengar*, 10 M. 185, where it has been held that sanction subsequently granted relates back to the institution of the suit, and *Chhabile Ram v. Durga Prosad*, 37 A. 296.

The consent in writing required by this section, is a condition precedent to the institution of the suit to which such consent relates. If therefore no valid consent is given before the institution of the suit, the mistake cannot subsequently be rectified, unless by means of the withdrawal of the suit with permission to institute fresh suit.—*Tricumdas v. Khimji*, 18 B. 623; *Gopal Dei v. Kanno Dei*, 26 A. 162. When sanction is given to the institution of a suit, the suit must be limited to matters included in the sanction; it is not competent to the Court to enlarge the scope of the section and grant reliefs other than those included in the terms of the sanction.—*Sayed Hussain v. Collector of Kaira*, 21 B. 257; *Prem Singh v. Labh Singh*, 83 P. R. 1901; *Nizamal Huq v. Md. Ishag*, 144 P. R. 1919: 51 I. C. 611: 1 Lah. L. J. 74. Although it is desirable that the Advocate-General or Collector before granting sanction should consider whether the trust is a public trust, whether there are *prima facie* grounds for holding that there has been breach of such trust and whether the persons suing are persons who have an interest in the trust, yet his failure to consider these matters does not in any way invalidate a sanction granted by him; *Muhammad Shafi v. Abdul Rahim*, 60 I. C. 570; *Sajedur Raja v. Gour Mohun*, 24 C. 418.

The consent of the Advocate-General is necessary only to suits claiming reliefs specified in sub-section (1) of s. 92 and to suits asking the directions of the Court for the administration of the trust; *M. Cowasji v. Bella*, 11 Bur. L. T. 249: 50 I. C. 509.

Suit instituted by one plaintiff with the consent of the Advocate-General—Amendment of plaint—Substitution of another plaintiff with the consent of the Advocate-General—*Held* that suit, as brought, was defective in a material particular and the requirements of the section were not complied with.—*Darves v. Jainuddin*, 30 B. 603: 8 Bom. L. R. 751. See also *Jan Mohamed v. Syed Nuruddin*, 9 Bom. L. R. 996. So also where a defendant is added, fresh consent is necessary; *Abdul Rahman v. Cassim Ebrahim*, 13 Bom. L. R. 583: 36 B. 168. Consent necessary for striking off a portion of prayer for relief in a plaint, *Ramrup Das v. Mohunt Shivaram*, 12 C. L. J. 211: 14 C. W. N. 939.

A suit relating to a public trust should not be brought except with the consent of the Advocate-General, unless the plaintiffs have a special claim or claim a special interest under and by virtue of the trust; *Girija Prounno v. Becharam*, 85 I. C. 846.

**What is not an Interpleader-suit.**—When a mortgagor was about to pay off the mortgage amount to an assignee of the mortgage, the mortgagee disputed the assignment and also claimed to be paid the mortgage amount. The mortgagor thereupon filed a suit, impleading both the mortgagee and assignee as defendants. The plaint contained, in substance, a claim for redemption; but it also prayed that the defendants should be required to interplead concerning their claims to the mortgage amount and that the mortgagor should be indemnified in consequence of the loss of the original mortgage-deed. Held that it was erroneous to treat the suit as only one of interpleader. Inasmuch as the plaint also contained in substance a claim for redemption, that was the appropriate relief under the circumstances—*Jagganath v. Tulka Kera*, 82 B. 592: 10 B. L. R. 314; (*Vyryan v. Vyryan*, (1861) 4 De G. F. & J. 183 followed)

An interpleader-suit with a prayer for declaration of title of the several sets of defendants in the disputed land, by the tenant against the landlord in whose favour he has executed several *Kabuliyats*, is not maintainable; *Shelley Bonnerjee v. Raj Chandra*, 37 C. 552: 11 C. L. J. 577: 14 C. W. N. 784.

Where the defendants do not claim adversely to one another, nor is the plaintiff admitting the title of one of the defendants or is willing to pay or deliver the property to him, the suit is not an interpleader-suit; *Asan Ali v. Saradacharan*, (1922) C. 138

“Who claims no interest therein other than for charges or costs.”—The plaintiff, in order to be entitled to bring an interpleader suit, must satisfy the Court that he has no claim or no interest in the subject-matter in dispute, and that he does not collude with any of the claimants. If he has in some way identified himself with one of the parties in the sense that it makes a difference to him which succeeds he will be debarred from bringing such a suit, although he will not be refused relief merely because he has a natural affinity for one side rather than the other, *Hari Karmakar v. J. A. Rahim*, 4 R. 465: 99 I. C. 985: A. I. R. 1927 R. 91.

**Addition of Parties in Interpleader-suits.**—The Court may, in the exercise of its direction under s. 82, C. P. Code, 1882 [Or. I, rr 8 (2), 10 (2), (8), (5), 11], add a party claiming to be interested in an interpleader-suit upon his own application.—*Babbaba Khanum v. Noorjehan Begum*, 18 C. 90.

**Appeal in Interpleader-suits.**—An order adjudicating rights of defendants in an interpleader-suit is appealable. The direction as to interpleading is an order and appealable under Or. XLIII, r 1 (p).—*Maharaj Singh v. Chhittar Mal*, 30 A. 22: 4 A. L. J. 683.

An order dismissing an interpleader-suit is a decree within the meaning of s. 2 of the C. P. Code, and is therefore appealable, *Orr v. Chidambaram*, 33 M. 220.

whether the persons suing are persons having an interest in the trust, but also whether that trust is a public trust, and whether there are *prima facie* grounds for thinking that there has been a breach of trust. But where the form of the permission showed that he had omitted to exercise his judgment in the matter, such omission was held to be a mere irregularity not affecting the merits of the suit.—*Sajedur Raja Chowdhuri v. Gour Mohun*, 24 C. 418; *Mahomed Shafi v. Abdul Rahim*, 60 I. C. 570. See also *Suleman Haji v. Shaikh Ismail*, 39 B. 580, where it has been held that the provisions of s. 92 must be regarded as imperative; and conditional consent is defective.

Section 92 is not applicable to a suit by the worshippers at a mosque to set aside an alienation of the *wakf* property by the trustee as the relief claimed is not one of the reliefs mentioned in the section; *Musst. Afman v. Hamiduddin*, 58 P. W. R. 1919: 51 I. C. 799. The mere fact that the trustee was a defendant in the suit did not attract the application of s. 92 of the C. P. Code since no relief was claimed against him, nor was the Court asked to give any direction for the administration of the trust; *Ashraf Ali v. Muhammad Nurejima*, 23 C. W. N. 115: 49 I. C. 855.

"**Having an interest in the trust.**"—The corresponding s. 539 of the Codes of 1877 and 1882 contained the words "a direct interest." That section was amended by s. 44 of Act 7 of 1888 and the words "an interest" were substituted for the words a "direct interest." In making this amendment, the Legislature thought that the limitation of a "direct" interest was not expedient in India; *Vaidyanath v. Swaminathu*, 51 I. A. 282: 47 M. 884: 82 I. C. 804: A. I. R. 1924 P. C. 221. The effect of the substitution of the words "an interest" for the words "a direct interest" has been to widen the scope of the section as regards the class of persons who are entitled to institute a suit under this section — *Shailajananda v. Umeshananda*, 2 C. L. J. 460.

The suit must be filed either by the Advocate-General or by two or more persons having an interest in the trust with the sanction of the Advocate-General or other public officer previously obtained.—*Amritaram v. Ramji*, 10 Bom. L. R. 87: 3 M. L. T. 172. Hence a suit relating to public charity instituted by only one person with the consent of the Advocate-General is defective in a material particular and its amendment by adding one or more person cannot better it; *Darves-Haji v. Jainuddin*, 30 B. 603.

When one of two persons dies, the suit does not abate. The legal representative of the deceased or any member of the public interested may come forward and take his place; *Chabila v. Durga*, 37 A. 379: 13 A. L. J. 296: 28 I. C. 681; *Sivagnana v. Advocate-General*, 28 M. L. J. 174: 27 I. C. 874; *Sanyasayya v. Muthima*, 35 M. L. J. 661: 48 I. C. 740.

When more than two persons have obtained the consent, any two of them cannot sue without the others, but the person authorized to sue are all the persons to whom the consent has been given; *Bagarannarayana v. Perumalla Chrayulu*, 29 M. L. J. 231: 31 I. C. 236. In a suit under s. 92, all the persons authorized to institute the suit constitute are plaintiffs and all must combine to take any material step in the presentation of the suit or appeal; *Muhammad Ishaq v. Muhammad Husain Khan*, A. I. R. 1926 L. 882: 100 I. C. 838.

**Arbitration Without Court's Order.**—Arbitration between the parties to a suit without the Court's order is an arbitration without the intervention of the Court under the Code, and all applications for a decree based on an award, in cases not coming under the Indian Arbitration Act of 1899, should be under Sch. II of the Code only; *Shavaksha Dinsha Davar v. Tyab Haji Ayub*, 40 B. 386.

"Shall be governed by the provisions contained in the second Schedule."—S. 89 (1) C. P. Code read with Sch. II, para. 22 makes the concluding provision of s. 21 of the Specific Relief Act inapplicable to all arbitration agreements and awards governed by Sch. II; *Dinabandhu v. Durga Prasad*, 46 C. 1041: 23 C. W. N. 716.

"Any other law for the time being in force."—The words "any other law for the time being in force" are applicable to Or. XXIII, r. 3; *Harakhbhai v. Jamnabai*, 37 B. 639: 15 Bom. L. R. 340. Dissented from in *Amar Chand v. Banwari*, 49 C. 608. See notes under heading "submission and award equivalent to adjustment of the suit, by agreement," Or. XXIII, r. 3.

### SPECIAL CASE.

90. Where any persons agree in writing to state a case for the opinion of the Court, then the Court shall try and determine the same in the manner prescribed. [New.]

Power to state case for opinion of Court.

### COMMENTARY.

This section is new. All the sections of Chapter XXXVIII of Act XIV of 1882, which contained the provisions relating to *Proceedings on agreement of parties* have been placed in the Schedule. The corresponding sections of Act XIV of 1882, that is, sections 527, 528 529, 530 and 531 have been inserted in the First Schedule, Order XXXVI, rules 1 to 5.

**Re-opening of Case.**—Where a special case is settled by consent, it is settled practice that it can only be reopened by mutual consent, *Monie v. Scott*, 43 B. 281.

### SUITS RELATING TO PUBLIC MATTERS.

91. (1) In the case of a public nuisance the Advocate-General or two or more persons having obtained the consent in writing of the Advocate-General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

Public nuisance.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions. [New.]

### COMMENTARY.

This section is new, and the object of its insertion in the C. P. Code is clearly explained in the following Report of the Special Committee:—

the plaintiffs should be admitted by the defendant. (1 C. L. J. 104-n followed). In a suit under s. 92, the Court has jurisdiction to make a decree for the removal of the trustee. (17 M. 462, *dissented from*; 24 C. 412, *followed*).—*Shailajananda v. Umeshanunda*, 2 C. L. J. 480.

Every Mahomedan who has a right to use a mosque for purposes of devotion is entitled to exercise such right without hindrance, and is competent to maintain a suit against any one who interferes with its exercise, irrespective of the provisions of ss. 30 and 539, C. P. Code, 1882 [Or. I, r. 8 (1) and s. 92]. *Jawahra v. Akbar Husain*, 7 A. 178 (5 A. 497, *referred to*); *Md. Alam v. Akbar Husain*, 32 A. 631: 7 A. L. J. 797; *Ram Chandra v. Ali Muhammad*, 35 A. 197; *Dasondhay v. Md. Abu Nasar*, 33 A. 660; *Vaidyanatha v. Swaminatha*, 51 I. A. 282, 47 M. 684: A. I. R. 1924 P. C. 22.

A right to worship in a mosque is not equivalent to interest. The interest must be a real or clear interest and not an illusory or fictitious interest. Mere right to worship at the mosque and residence in the locality does not show interest, when it is proved that the person never went for worship to the mosque which was far away from their residence; *Dost Muhamad v. Kadir Batcha Sahib*, 23 L. W. 240: 92 I. C. 950: A. I. R. 1926 M. 466.

Priests residing in a temple and taking part in the worship of the idol, are directly interested in its due performance and its maintenance. Though they may not be trustees, they are clearly among those who, in practice, are benefited by the execution of the trust. They have thus undeniable *locus standi* as relators, and the suit for an account and for appointment of a receiver against the trustees of the temple can proceed at their instance.—*Mansnar Ganesh v. Lakhmiram*, 12 B. 247 and 267-note.

A *pujari* of a temple and other worshippers of the idol are entitled to maintain a suit under s. 559, C. P. Code, 1882 (s. 92), for the removal of the trustee from the management of the temple on the ground of his misconduct and mismanagement of the trust property.—*Jugal Kishore v. Lakshman Das*, 28 B. 659.

It is impossible to define with any degree of accuracy what exactly constitutes an interest as contemplated in s. 92. It need not be a direct interest in the sense that only a beneficiary can institute a suit but it must be a real, substantial and existing interest; *Murlidhar v. Sultan Singh*, 73 I. C. 302.

The interest required to enable a person to sue under this section must be an existing one, and not a mere contingency; the mere possibility of an interest or the mere possibility of succession to the managership of the properties concerning which the suit is brought is not sufficient to give a right to suit.—*Mohiuddin v. Sayiduddin alias Nawab Mean*, 20 C. 810. Followed in *Budh Singh v. Niradbaran*, 2 C. L. J. 431. Distinguished in *Ali Hafez v. Abdur Rahaman*, 42 C. 1135.

The interest in the trust that is required of a plaintiff by s. 92, C. P. Code is a present and substantial interest and not a remote and fictitious or purely illusory interest. The question whether any given person has or has not an interest sufficient for the purpose of s. 92 is a question of fact to be decided by the court having regard to the particular circum

**Advocate-General.**—This section is to be read with s. 93, which empowers the Collector of the District with the previous sanction of the Local Government to exercise the power conferred on the Advocate-General.

The Advocate-General represents in this Presidency, the Attorney-General in England and has all such powers. In case of constructive public nuisance or public nuisance in law, the Attorney-General's special power extend in England. No such power can be derived from s. 91 of the C. P. Code, which in terms is restricted to 'public nuisances' in fact; *The Advocate-General of Bombay v. Haji Ismail*, 12 Bom. L. R. 274: 5 I. C. 218.

"Though no special damage has been caused."—In a suit by a private person for the removal of a public nuisance, he must prove special damage to himself. Special degree of inconvenience suffered by him cannot be said to cause him damages; *Kukhni v. Krisan*, 48 I. C. 88.

"For a declaration and injunction."—Where no relief was sought in respect of the public nuisance, and there was no claim. *Held*, there can be no declaration that the place in suit is a public thoroughfare and has been obstructed as such; *Tirath Ram v. Md. Abdul Rahim*, 78 I. C. 616: 1923 L. 546.

Compare this section with clause (g) of s. 56 of the Specific Relief Act I of 1877, and *see* the cases reported in 8 B. 35; 12 B. 634; 32 C. 697; 9 C. W. N. 612, and 10 C. W. N. 234-n; and also notes and cases noted in the Author's Specific Relief Act.

Relief by injunction may be either preventive or mandatory

**Such Other Relief.**—Besides declaration and injunction, damages and removal of nuisance may be asked for; *Manilal v. Ishvarbhai*, 27 Bom. L. R. 421: A. I. R. 1925 B. 367.

**Sub-section (2).**—This sub-section refers to suits which can be brought by a private individual for removal of obstruction in a public highway, when such individual suffers any special damage in consequence of such obstruction. The cases bearing on this point are noted under s. 9 under the headings "OBSTRUCTION TO PUBLIC WAY—RIGHT OF SUIT—SPECIAL DAMAGE"

**Difference between Public and Private Nuisance—Right of Suit.**—A private action is not allowed for a public injury. The Civil remedy against it is a suit under s. 91 but a private nuisance is actionable by the person injured by it. The general obstruction of a public thoroughfare, unless authorized by law, custom or contract, is a public nuisance for which a private suit is not allowed but to obstruct, annoy, or endanger a particular person or a body of persons only, in his or their use of a public thoroughfare may be a private nuisance for which a private action may lie; *Sheikh Chand v. Lazman*, 12 N. L. R. 130: 36 I. C. 534.

The public at large are not affected by the obstruction of a village pathway which only the villagers can use so that a suit for a declaration of their rights in respect of the pathway is not governed by s. 91, C. P. Code; *Nagendra Nath v. Banwari Lal*, 46 I. C. 970.

**Instances of Actionable Nuisance.**—Opening a burial and burning ground near the plaintiff's bungalow, in consequence of which his . . .



fore has no power to transfer a case under this section pending in his Court, to the Court of a particular Sub-Judge who was empowered by Local Government, to try it, by virtue of such a notification; *Abdul Karim v. Abdus Sobhan*, 39 C. 146: 16 C. W. N. 44. See also *Md. Musa v. Abdul Hassan*, 41 C. 866: 18 C. W. N. 612.

If the assignment of the duties referred to in s. 7 of the Oudh Civil Courts Act has been sanctioned in the manner required by law, suits instituted under s. 92 of the C. P. Code can be transferred for trial by a District Judge to the Court of an Additional Judge; *Gauri Nath v. Ram Narain*, 22 O. C. 93: 52 I. C. 45.

A Sub-judge to whom was transferred by the District Court, a suit under s. 92, being empowered by Government Notification to try suits under s. 92 is not deprived of his jurisdiction by a subsequent modification confining the jurisdiction to a specified local area; *Ganapathi v. Sundaram*, 31 I. C. 897.

An Additional District Judge by virtue of the assignment of all the functions of a District Judge under the provisions of s. 8 (2) of Bengal Act XII of 1887 is empowered to exercise the same powers as the District Judge in suits under s. 92 of the C. P. Code. The expression "any other Court empowered in that behalf by the local Government" in s. 92 of the Code, probably refers to Courts such as the Subordinate Judges' Courts; *Mohabor Rahman v. Hazi Abdur Rahim*, 48 C. 53: 62 I. C. 115.

A District Judge may be assumed to have been authorised to discharge the functions of a *Quadi*. A Sub-Judge has no authority to recall an order made by a District Judge appointing a person a *mutwali* to a public *wagf* and appoint another in his stead; *Atimannessa v. Abdul Sobhan*, 22 C. L. J. 577: 20 C. W. N. 113 (35 A. 98, referred to).

**Court Not Competent to take Action under this Section unless a regular Suit is Filed.**—The C. P. Code gives no powers to the District Judge to take any action in order to protect property forming the subject matter of a public endowment unless and until a regular suit is filed in his Court under s. 92 and when in the absence of such a suit pending before him the District Judge, exercises any of the powers vested in him, under that section, he acts without jurisdiction; *Mohunt Darshan Das v. Collector of Meerut*, 16 A. L. J. 742.

**Clause (a)—Removing any Trustee.**—This clause is new. It has been inserted to set at rest the conflicting rulings of the High Courts. It gives effect to the following rulings of the Calcutta, Allahabad, Bombay and Madras High Courts and overrides certain rulings of the Madras High Court by expressly declaring that a suit for removal of a trustee is maintainable under this section.

A suit for the removal of an old trustee who has committed a breach of trust and for the appointment of new trustees, may be properly brought under this section.—*Girdhari Lal v. Ram Lal*, 21 A. 200 (20 A. 46, approved; and 17 M. 462, dissented from). A *de facto* trustee or a trustee *de son tort* is subject to the same liabilities as a trustee nominated by the author of the trust, and a suit lies against him; *Md. Nasim minor through Nadir v. Md. Ahmad*; 27 I. C. 389: 18 O. C. 38.

The founder of a *wagf* appointed his sister and brother and the male descendants of the latter *mutwallis* in succession after himself. On his

that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree.—

- (a) removing any trustee;
- (b) appointing a new trustee;
- (c) vesting any property in a trustee;
- (d) directing accounts and inquiries;
- (e) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust;
- (f) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged;
- (g) settling a scheme; or
- (h) granting such further or other relief as the nature of the case may require. [S. 539.]

(2) Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section. [NEW.]

### COMMENTARY.

**Alterations Made in the Section.**—This section corresponds to the first part of section 539 of Act XIV of 1882. The following changes have been introduced in this section—

(1) The words "*public purposes of a charitable or religious nature*." have been substituted for the words, "*public, charitable, or religious purposes*" which occurred in the old section, in order to make it clear that the word "*public*" is not co-ordinate or of the same order or rank with the words "*charitable*" or "*religious*" but is sub-ordinate or qualifying them. In other words, the trust either for charitable or religious purposes must be of a public character (*see* 32 A. 503)

(2) The words "*whether contentious or not*" have been added

(3) The words "*High Court*" have been omitted.

(4) Clauses (a) and (d) have been newly added and clause (e), which corresponds to clause (c) of the old Act, has been made more clear by substitution of the words, "*what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust*," for the words "*the proportions in which its objects are entitled*."

The reason for the omission of the words "*High Court*" which occurred in the old section seems to be that the old section by implication extended the ordinary original jurisdiction of the High Courts to "

*pathi Iyer*, (1918) M. W. N. 555: 48 I. C. 897; *Venkatarama v. Damodaram*, 51 M. L. J. 457: 98 I. C. 208: A. I. R. 1926 M. 1150.

In framing a scheme, a Court need not remove trustees already holding office when no misconduct is proved against them; *Muthia Chetti v. Perianan Chetti*, 4 L. W. 228. 34 I. C. 551.

The provisions of this section do not authorize a court to remove a *Sajjadahnashin* from his office, even in case of breach of trust; *Istiaq Ahmad v. Saiyad Hassood*, 6 A. L. J. 632.

The decisions of the Madras High Court in 17 M. 462 and M. 157; 8 M. L. T. 357 have been superseded by clause (a).

**"Trustee."**—A person appointed trustee by the Court, though his appointment may be impeached as being illegal, is a trustee within the meaning of Cl. (a) and not a trespasser; *Saiyid Ali v. Ali Jan*, 35 A. 98: 18 I. C. 573; so also is a trustee *de son tort*, that is, a person who without title chooses to take upon himself the character of a trustee and as such takes charge of the trust property; *Jugal Kishore v. Lakshmandas*, 23 B. 659; *Ram Bilas v. Nityanand*, 44 A. 652: 69 I. C. 990: A. I. R. 1922 A. 542; *Bihari Lal v. Shiva*, 47 A. 17: A. I. R. 1924 A. 884. The *Dharma Karta* of a Hindu temple, *Srinivasachari v. Evalatpa*, 45 M. 565: 49 I. A. 237 and the *Acharya* of a temple are constructive trustees within the meaning of the section; *Shripat Prosad v. Lakshmidas*, 25 Bom. L. R. 747: 84 I. C. 808: A. I. R. 1924 B. 193.

**Clause (b)—Appointing a new Trustee.**—A suit for the appointment of new trustees to a temple on the ground that the defendants are not the lawful trustees, and that the trusteeships are therefore vacant, is a suit under this section being comprised in the words "whenever the direction of the Court is deemed necessary for the administration of such trust"—*Neti Rama Jogiah v. Venkatachariu*, 26 M. 450 (L. R. 15 I. A. 10, *relied on*). Followed in *Kalishwara v. Nata Raja*, 6 M. L. T. 193.

This section has made a change in the language of the old statute, and makes it clear that the Court has power to appoint new trustees; *Veeraraghava v. Srinivasa*, 23 M. L. J. 134: 12 M. L. T. 269.

The Court in sanctioning a scheme may provide for the appointment of additional or new trustees though such appointment may not be in conformity with the original constitution of the trust or, with the rules in force in respect to it. The words "under the trust" which occurred in the corresponding clause of the old Code, had no reference to such original constitution of the rules, *Prayag Doss v. Tirumala*, 28 M. 319: 15 M. L. J. 183.

A suit for appointment of a new trustee must be instituted after obtaining sanction under this section; *Ghulam Ahmad v. Shah Mahomed*, 21 M. L. J. 450: 9 M. L. T. 301.

Where in a suit for the framing of a scheme of management for a temple, the lower Court had by the scheme provided for two members of the committees being additional trustees.—*Held* that there was nothing improper in the appointment of the additional trustees; *Annaswami v. Narayanan Chettiar*, 10 L. W. 494: 54 I. C. 263.

An application was made by a person to the District Judge to be appointed *Mutwalli* of a *waqf* property but the District Judge refused to

disposition merely the mode, so that, in the eye of the Court, the gift, notwithstanding that the particular disposition may not be capable of execution, subsists as a legacy which never fails and lapses. It cannot be laid down as a general principle that the *Cy-près* doctrine is displaced where the residuary bequest is to a charity or that among charities there is anything analogous to the benefit of survivorship, since cases may easily be supposed where the charitable object of the residuary clause is so limited in its scope, or requires so small an amount to satisfy it, that it would be absurd to allow a large fund bequeathed to a particular charity to fall into it: on the failure of a specific charitable bequest, jurisdiction arises to act on the *Cy-près* doctrine, whether the residuary be given in charity or not unless upon the construction of the will a direction can be implied that the bequest, if it fails, should go to the residue. In applying the *Cy-près* doctrine, regard may be had to the other objects of the testator's bounty, but primary consideration is to be given to the gift which has failed, and to a search for objects akin to it. The character of a charity as being for the relief of misery in a particular locality may guide the Court in framing a *Cy-près* scheme to benefit that locality.—*Mayor of Lyons v. Advocate-General of Bengal*, 1 C. 808: L. R. 8 I. A. 92: 28 W. R. 1. See also *Malchus v. Broughton*, 11 C. 591: 13 C. 198 and *Harmashji Framji v. Warden*, 32 B. 214. The meaning of the *Cy-près* doctrine is that when a fund is bequeathed to a specific charitable object and that particular object fails, the Court adopting the *Cy-près* doctrine can apply that fund to some other charitable purpose, which is as near as possible to the object which has failed.

Under s. 92 of the C. P. Code, the Court can sanction a scheme on a *Cy-près* application of a charitable trust; *Muthu Krishna Naicken v. Ramachandra Naicken*, 37 M. L. J. 489: 47 I. C. 611.

**Object and Scope of the Section.**—The object and the scope of the section has been fully discussed and explained and earlier cases referred to and considered in *Rai Buddree Das v. Chuni Lal*, 33 C. 789: 10 C. W. N. 581. Where the plaintiff does not claim any of the reliefs under s. 92 and does not ask the Court to appoint him a *Mutwalli*, but only asks to declare that he is the rightful *Mutwalli*, and where the defendant is not sued for recovery of possession, held that the suit is incompetent; *Abdul Ghafoor v. Altaf Hossain*, 29 I. C. 423 (37 C. 268: 14 C. W. N. 497 *distd*).

The real test whether s. 92 applies or not is whether the suit is fundamentally on behalf of the public for the vindication of a public right or on behalf of a private individual for the vindication of his private rights; *Alagappa Chettiar v. Arunachallam Chetty*, A. I. R. 1927 M. 338: 97 I. C. 480 (A. I. R. 1922 M. 17 F. B.; 33 C. 789 and A. I. R. 1925 M. 820 *fold*), A. I. R. 1925 M. 689 M. and 42 M. 668 *distd*).

The section is intended to enable suits to be brought for the benefit of persons interested in a trust and is not intended to enable persons to gain private ends by putting forward men of straw to institute suits, to put their adversaries or the trust funds to wholly unnecessary and improper expenses; *Narayan Das v. Khunni Lal*, 37 I. C. 897.

S. 92 only governs suits for the vindication of the rights of the public in public charitable trusts and has no application to suits for the vindication of the plaintiff's right of management and getting possession for the purpose of management of the trust properties; *Venku Chettiar v. Dor*

49 I. A. 127; 20 C. W. N. 118; 85 I. C. 80; *Venkatarama v. Damodaram*, 51 M. L. J. 457; 98 I. C. 208; A. I. R. 1926 M. 1150. The relief by way of settlement of a scheme need not depend upon the charges against the trustee in office. It is sufficient if mismanagement is averred and it is alleged that a proper scheme was necessary to render the recurrence of the state of affairs impossible; *Sivagnana v. Adv.-Genl.*, 28 M. L. J. 174. Even where no actual misconduct or mismanagement is proved against the trustees, a scheme may be properly framed, if necessary in order to set at rest questions which might give rise to difficulties in the future and to remove any uncertainty as to the right of management in the temple, *Mutiah v. Perianan*, 4 L. W. 228; 34 I. C. 551; *Lakshi v. Murai* 5 O. L. J. 97. A scheme framed by the Court may be liable to variation for good cause shown; *Prayag Dass v. Tirumala*, 28 M. 319, *Ram Dass v. Hanumantha*, 36 M. 864; 21 M. L. J. 952; but where a scheme is once settled it precludes a subsequent suit to establish a private right in respect of the trust which, if established, would interfere with the scheme settled by the Court; *Ramdoss v. Hanumantha*, 36 M. 364; 21 M. L. J. 952. Before a scheme can be settled for the management of a temple and its funds, an account of the trust property must be taken. Until the trust funds are ascertained, it is impossible to settle any scheme; *Chata Lal v. Monchar*, 24 B. 50; 26 I. A. 199.

Clause (g) seems to include the provisions contained in clauses (e) and (f) as will appear from the Privy Council case of *Prayag Dass v. Tirumala*, 30 M. 138; 11 C. W. N. 442; 17 M. L. J. 236; 9 Bom. L. R. 588. In this case their Lordships framed a scheme providing that only a certain portion of the income of the trust property should be spent for the object of the trust and that no immoveable property of the temple was to be given on lease for more than five years, mortgaged or sold by the trustee without the sanction of the District Court. It would thus appear that the Court in setting a scheme under this section, may make the declarations mentioned in clause (e) and (f).

Clause (g) is wide enough to cover the provisions contained in clauses (e) and (f), it is therefore unnecessary to deal with those two clauses separately.

Under clause (f) the Court can pass a decree authorizing the whole or any part of the trust property to be let, sold, mortgaged or exchanged. The ordinary power of a trustee is very limited and is like that of a manager. Below are some of the cases showing the ordinary powers of a trustee of a religious endowment.

*See notes under "Settlement of Scheme."*

#### **Power of a Trustee of an Endowment to Deal with the Trust Property.**

—A trustee of an endowment has no power except under very special circumstances to create a permanent tenure so as to bind his successors.—*Narasimha v. Gopala*, 28 M. 391. *See also Abhiram v. Shyama Churn* 36 C. 1003 P. C.; 14 C. W. N. 1; 10 C. L. J. 284.

A *debutter* property according to Hindu Law is not absolutely unalienable, it can be alienated for legal necessity.—*Krishna Kishore v. Sukha Sindhu*, 10 C. W. N. 1000. It is not competent to a *shebait* to alienate endowed property by sale or mortgage, but he can deal with the endowed property for its benefit and preservation. The power of a *shebait* is analogous to that of a Hindu widow or to that of a manager of an infant's pro-

donor to the contrary, the offerings are to be taken to be intended to contribute to the maintenance of the shrine with all its rites and ceremonies and charities, and not to become the personal property of the priest.

The expression "Public purpose" includes an object or aim in which the general interest of the community as opposed to the particular interest of individuals, is directly or vitally concerned; *Rajkeshwar v. Basdeo*, 1 P. L. T. 428: 57 I. C. 270; *Ramdas v. Basanti*, 20 A. L. J. 789. The question whether a particular property has been dedicated to public, religious or charitable purposes is not a question of Anglo-Indian Law to be decided in accordance with the principles laid down in English authorities, but a question of fact, pure and simple, and to be decided according to the feelings and sentiments of the religious community to which the parties belong.—*Sarat Das v. Ram Bai*, 264 P. L. R. 1913: 184 P. W. R. 1918: 20 I. C. 295; where there is no express declaration in the deed, the intention of the grantor can be gathered from the surrounding circumstances and if they indicate that the beneficial interest is vested in the public and not in one or more individuals, although the control and management is vested in the members of the family, the Court is entitled to hold that the trust was for public purposes; *Rajeshwar v. Basudeo*, 1 P. L. T. 428: 57 I. C. 270; *Lakishmi Kanwar v. Murari Kanwar*, 5 O. L. J. 97: 45 I. C. 218.

Where it was clearly established by evidence that certain property had been held for very many generations for the purpose of supporting and maintaining *fakirs*, entertaining visitors and for the giving of alms, and there was no evidence that the property was ever held for any other purpose; it was held that the Court ought to presume the existence of a charitable or religious trust within the meaning of this section. And the trust was none the less a trust for a public purpose if its main object was in fact the support of *fakirs* of a particular sect and the propagation of the tenets of that sect; *Mahant Puran Atal v. Darsan Das*, 84 A. 468: 9 A. L. J. 809. See, however, *Gopal Das v. Shiva Das*, 8 A. L. J. 1120: 11 I. C. 808.

Where a number of the public had always used a temple and there was attached to it a *Dharmshala* and the surplus funds not required for the service of the temple would be applied to feeding travellers and maintaining a *sadavart*, it was held that the intention of the founder was to devote the property to public purposes of a religious or charitable nature; *Jugalkishore v. Lakshmandas*, 23 B. 659.

A dedication not substantially for religious and charitable purposes does not constitute a trust for those purposes. There must be complete dedication of property solely to God.—*Bikani Mia v. Sukh Lal*, 20 C. 116, F. B. See *Mahomed Ahanulla v. Amar Chand*, 17 C. 498, P. C.; *Mahomed Israil v. Shasti Churn*, 19 C. 412 and *Alumgir Khan v. Kamrunnissa*, 4 C. L. J. 442; See also *Kuloda Prosad v. Kalidas*, 20 C. L. J. 812. A *mutt* that is otherwise private does not become public simply because some persons are fed when *gurupuja* is performed and a water *pandal* is maintained in the *mutt* during the hot season.—*Sathappayyar v. Periasami*, 14 M. 1 (6-7).

As to the validity of a creation of a trust and bequest in favour of a Hindu deity, see *Bhupati Nath v. Ram Lal*, 87 C. 128 F. B.: 14 C. W. N. 18: 10 C. L. J. 853.

Where the Court finds that a trustee was guilty of misconduct, the Court directed him to execute a surety bond to ensure better management in future.—*Mahomed Athai v. Rajman Khan*, 34 C. 587. Even apart from any question of mismanagement and misappropriation, a Court can settle a scheme if it can conduce to the better management of the trust property; *Lakshmi Kunwar v. Murai Kunwar*, 5 O. L. J. 97.

Where a scheme has once been settled under this section, it would preclude suits between parties to establish a private right, which, if established, would interfere with a charitable scheme settled by Court Scheme once settled cannot be altered except by the Court; *Vemmarapu v. Hanumantha*, 21 M. L. J. 952; 10 M. L. T. 356; 36 M. 364. The proper course to have the scheme modified in a case where it was framed in pursuance of decree made on an award of arbitrators is to bring a suit for the same as such a decree cannot be by the consent of parties without the aid of the Court; *Yegnarama Dikshitar v. Gopala Pattar*, (1918) M. W. N. 595. F. B.

Settlement of a proper scheme is largely a matter of discretion and unless the discretion has been improperly exercised by the Court the scheme will not be interfered with in appeal; *Kripa Shankar v. Manohar*, 24 M. L. J. 199. In a suit under s. 92 the Court has complete discretion in arranging for the management of the trust although it must take into consideration such matters as the wishes of the founder, the past history of and the custom of the institution and the way in which the management was carried on before; *Dharam Das v. Sadho Prakash*, 40 I. C. 177; *Mahomed Waheb v. Abbas Hussain*, 4 Pat. L. T. 326.

A Court which has sanctioned a scheme for the administration of a charitable trust is competent from time to time to vary the scheme if the exigencies of the case require on an application, without the necessity of a fresh suit; *Sadhupadhya Omeshanand v. Ramaneshwar*, 43 I. C. 772; *Manadananda v. Tarakananda*, 37 C. L. J. 281.

A scheme which does not ascertain the income of the properties of the trust, the expenses and the remuneration of the person in charge thereof is an unsatisfactory scheme; *Dost Muhammad Khan v. Nazir Ali*, 6 L. W. 184; 42 I. C. 474.

The facts that a temple is open for public worship, that the rites and ceremonies are such as are observed in public temples and that numerous inam lands have been granted to the temple constitute strong evidence of its public character. A caste or section of a caste can own a temple, but a temple, which is managed by a certain caste may be a public charitable trust and a scheme can be framed for it under s. 92 of the C. P. Code. Even where no actual misconduct or mismanagement is proved against trustees, a scheme may be properly framed if necessary, in order to set at rest questions which might give rise to difficulties in the future and to remove any uncertainty as to the right of management in the temple; *Muthia Chetti v. Periannan Chetti*, 4 L. W. 288; 34 I. C. 551.

The Court can appoint a receiver in a suit for removal of a trustee and settlement of a scheme; *Apaja Natesa Pandara v. Ramalingam*, 24 M. L. J. 658; 20 I. C. 767.

A suit by the Advocate-General for a scheme under this section does not abate by reason of the death of the defaulting trustee when the scheme is not merely auxiliary to the removal of the trustee, but is the

of more or less indefinite number of persons.—*Monmotha Nath v. Harish Chandra*, 10 C. W. N. 807 33 C. 905: (5 A 182, referred to).

In respect of a *debutter* in this country the founder or his heirs may invoke the assistance of a judicial tribunal for the proper administration thereof on the allegation that the trusts are not properly performed; and the case is strengthened when the management would under the terms of the trust vest in the plaintiff as the founder's heir, on a vacancy caused by the removal of the actual incumbent for misconduct; *Manohar Mukerjee v. Peary Mohun Mukerjee* 30 C. L. J. 177 (22 W. R. 97 referred to).

In order that a trust may be for public purposes, it is not necessary that it should be a trust for the benefit of the public at large. It is sufficient to show that it is a trust for the benefit of a section of the public; nor is it necessary in every case to produce definite evidence of the creation or origin of the trust. If such evidence were required in every case, many public trusts would come to an end, *Mahant Pura Atal v. Darshan Das*, 11 I. C. 166.

In a suit by the worshippers of the idol of a Hindu temple for the removal of the trustee of the temple, to which are attached a *dharma-sala* and *sadavari* for feeding travellers and giving alms to the poor, the defendant pleaded that the property attached to the temple was not a public, religious, and charitable trust. Held that having regard to the fact that a certain member of the public had always used the temple, that there was attached to it a *dharma-sala*, and that the surplus funds not required for the service of the temple were to be applied to feeding travellers and maintaining a *sadavari*, the intention of the founder was to devote the property to public, religious, and charitable purposes.—*Jugal Kishore v. Lakshman Das*, 29 B. 659.

Where the temple was built by public donations and subscriptions, held that it was a public temple and not the private property of the priest; *Oeri v. Balmukund Das* 5 S. L. R. 103: 24 I. C. 712.

"Where the direction of the Court is deemed necessary for the administration of any such trust."—The directions, which are referred to in this section are such as are necessary for the carrying out of the trust and as are given to a trustee, either the existing trustee where there is one or the new trustee where one is to be appointed. The nature of the relief expressly mentioned shows what is meant by the words "deemed necessary for the administration of any such trust."—*Rai Budridas v. Chuni Lal*, 35 C. 789: 10 C. W. N. 581. The Court will remove any *mutwalli*, who is guilty of misconduct or whose removal is required for the welfare of the *wakf*, even though the author of the *wakf* should have appointed himself *mutwalli* and even though he should have laid it down as a term of the dedication that the *mutwalli* should not be liable to be removed, and even though the parties themselves by their pleadings do not ask for his removal. The jurisdiction however can only be exercised by way of "directions necessary for the administration" of *wakf* under s. 92; *Md. Ghonur v. Sheikh Moideen*, 18 M. L. T. 48: 29 I. C. 849.

A suit for the appointment of new trustees to a temple on the ground that the defendants are not the lawful trustees, and that the trusteeships are therefore vacant, is a suit under s. 92 being comprised in the words "whenever the direction of the Court is deemed necessary for the administration of such trust."—*Neti Rama Jogiah v. Venkatacharyulu*, 28 M. 460 (L. R. 15 I. A. 10, relied on).



The words " further or other relief " must be constructed to refer to reliefs *ejusdem generis*, and not to reliefs outside those specifically defined under the several heads of the section; *Sir Dinsha Manekji v. Sir Jamsetji*, 33 B. 509: 11 Bom. L. R. 85; The expression " granting further or other reliefs " must be read along with the specified reliefs and those that shall be granted under this clause should be of the character as those expressly mentioned; *Venkataramana v. Kasturi Ranga*, 40 M. 212: 31 M. L. J. 777.

The words " such further or other relief as the nature of the case may require " in s 92 cover every subsidiary order or direction on any matter of detail necessary for carrying out the main purposes of the section; *Dharam Das v. Dharam Das*, 40 I. C. 182 (24 C. 418, *refd to*).

**Provisions of S. 92 are Mandatory.**—The provisions of s. 92 are mandatory and bar a suit for any of the reliefs mentioned in the section except by a suit properly instituted in accordance with the section. It is not merely the right of the plaintiff that has to be looked to but also the nature of the relief which the plaintiff seeks and if the relief asked for is one which is specified in sub-section (1) the direction laid down in the section must be obeyed; *Mussammat Sangto v. Parasram*, 49 I. C. 530

**Suits within the Scope of this Section, and requiring previous Sanction to Institution.**—Section 92 of the C. P. Code provides for a suit for a certain relief in the Court of the District Judge, in a case of an alleged " breach of trust," created for public purposes of a religious or charitable nature, or where the direction of the Court is deemed necessary for the administration of any such trust. Suits relating to disputes between parties as to who is entitled to be the *mutwali* on the ground of family relationship are not within the section. Where no breach of trust is alleged or proved or the necessity for the intervention of the Court is not made out, a suit simply for the removal of the defendant from the office of *mutwali* and for the appointment of a new trustee from the family of the original appropriator is not within this section. Where a person is a *de facto mutwali*, the presumption is that he is *de jure mutwali*, and as such, was entitled to appoint his successor by his will; *Niamat Ali v. Ali Raza*, 37 A. 86: 13 A. L. J. 26

A suit by a trustee against his co-trustee for accounts of management is a suit within s 92 and sanction of the Advocate-General is necessary for the suit; *Govindasami v. Kaliaperumal*; (1922) M. W. N. 83. But see *Ayub Kareem v. Jaffar Ayub*, 6 N. L. J. 209: 74 I. C. 45.

This section is only applicable where there is an alleged breach of trust created for public, charitable, or religious purpose, and the direction of the Court is necessary for the administration of the trust. As against strangers the section does not apply—*Kazi Hassan v. Sagan Balkrishna*, 24 B. 170. Followed in *Budh Singh v. Niradbaran*, 2 C. L. J. 431. See however *Collector of Poona v. Chanchal Bai*, 35 B. 470: 13 Bom. L. R. 690

Four worshippers at a temple, who were also entitled to vote at the election of *dharma kartas*, filed a suit for a declaration that election of certain persons to that office was void. Notice had not been given to the other worshippers, nor had leave of the Court been obtained prior to the institution of the suit. Held that the suit was maintainable notwithstanding that the Advocate-General had not been joined as a party; and

**Breach of trust**—Suit brought with the consent of the Advocate-General—Amendment of plaint by mentioning the particulars of the breach of trust—No consent necessary on account of the amendment.—*Dhanjibhoy v. Meherally*, 9 Bom. L. R. 901.

Where a trust was created for a public religious or charitable purpose, no suit can be maintained for the removal of a trustee save in conformity with the provisions of this section; *Sayed Ali v. Sajjad Hussain*, 35 A. 98.

Suit for removal of the present *Mohant* and appointment of another in his place, on the allegation of breach of trust, is not maintainable without the previous consent of the Advocate-General.—*Dalip Singh v. Iswar Singh*, 78 P. R. (1907). See also *Hemandas v. Chellaram*, 5 S. L. R. 184; 18 I. C. 264, *Sahab Singh v. Phuman*, 198 P. L. R. 1910; *Sheo Ratan Das v. Audhesh Narain*, 18 O. C. 177.

A suit for removal of trustees and for accounts brought under this section was compromised. Subsequently the beneficiaries brought the present suit impeaching the compromise as fraudulent. *Held* that the suit came under this section and the consent of Advocate-General was necessary. The difference between the old and the new section, pointed out.—*Mad. Salay v. Goolam Mahomed*; 7 Bur. L. T. 160; 23 I. C. 111. See, however, *Abdul Karim v. Abdus Sobhan*, 18 C. W. N. 1924, where it has been held that in case of public endowment, a suit under this section cannot be lawfully compromised (8 C. W. N. 404 referred to).

**Form of Sanction.**—Under s. 92, a sanction may be quite general in its terms though the application for such sanction contains only one specific prayer. Where such general sanction is given and a suit instituted, the reliefs need not be confined to those that are asked for in the application for sanction; *Raja Ananda Row v. Ramdas Daduram*, 48 C. 493; 25 C. W. N. 794, P. C.

**Suit Must be Limited to Matters Included in the Sanction**—Court cannot Grant Relief Outside the Sanction.—When sanction is given to the institution of a suit under this section, the suit must be limited to matters included in the sanction. It is not competent to the Court to enlarge the scope of the suit and grant reliefs other than those included in the terms of the sanction.—*Hussein Miyan v. Collector of Kaira*, 21 B. 257. Followed in *Ganga Ram v. Ralla Singh*, 110 P. R. (1907); *Nizam-ul-Haq v. Mahomed Isaq*, 144 P. R. 1919; 50 P. W. R. 1919.

Two worshippers at a Hindu temple obtained sanction to sue for removal of the managers of the temple on the ground of breach of trust and for damages. They sued to remove the managers, but claimed no damages in their plaint. *Held* that, as the suit instituted differed from the one for which sanction was given, the plaint was properly rejected.—*Srinivasa v. Venkata*, 11 M. 148.

It is only where the suit is for one or more of the reliefs in s. 92 (1) that it must be brought under that section. S. 92 is only an enabling section and has not taken away the general power of suit. A suit by the worshippers of a temple for a declaration that certain land is temple land and for an injunction restraining defendant's alienation of the same is not within s. 92, C. P. Code; *Giri Dutta v. Durga Dutta*, 42 I. C. 260.

The Collector in sanctioning a suit under s. 539, C. P. Code, 1892 (s. 92), has to exercise his judgment in the matter and see not

A suit under s. 92 is maintainable against a trustee *de son tort* who has without title chosen to take upon himself the character of trustee; *Ram Bilas v. Niteanund*, 44 A. 652.

This Section has no Application to suits to enforce private and personal Rights in which the Public are Not Interested.—A suit brought not to establish a public right in respect of a public trust, but to remedy a particular infringement of an individual right is not within this section; *Sir Dinshaw Manekji v. Sir Jamsetji*, 33 B. 509: 11 Bom. L. R. 85.

Where a suit is filed not for the purpose of vindicating any rights of the public in a public religious or charitable trust but has been filed only for the purpose of satisfying the personal or individual rights of the plaintiff as trustee, the suit is maintainable without the sanction referred to in this section, though the relief claimed may be those in that section; *Appanna v. Narasinga*, 45 M. 13 F. B.: A. I. R. 1922 M. 17: *Lakshminarayana v. Punneyaya*, 103 I. C. 134: A. I. R. 1927 M. 820.

A purely personal right of worshippers and an infringement of such a right gives them a cause of action to sue without the necessity of impleading any other worshippers or getting sanction under s. 92 of the C. P. Code; one consideration which is relevant in coming to a conclusion whether a personal right has been infringed so as to entitle a party to sue without reference to the other members of the community and without leave under section 92 is whether, apart from the infringement of the right of the general body of worshippers, there is some damage to the plaintiff special to him and in which the other worshippers have no concern apart from the interest of every worshipper to see that a trustee performs his duties properly, *Bashikar v. Thandrinatha*, 52 M. L. J. 541: 38 M. L. T. 288: A. I. R. 1922 M. 55 (*Appana Poricha v. Narasinga*, 45 M. 113 F. B. A. I. R. 1922 M. 17 *folld.*).

Section, 92 only contemplates suits brought in a representative capacity for the benefit of the public and to enforce public rights in respect of an express or a constructive trust claiming one or other of the reliefs mentioned in that section. Suits brought not to establish a public right but to remedy a particular infringement of an individual right are not within the section (33 C 789, *folld.*); *Rajeswar v. Basudeo*, 1 Pat. L. T. 428: 57 I. C. 270.

The scope of this section is very limited. It comes into operation where there is an alleged breach of trust. It contemplates suits brought in the interest and on behalf of the public or the community, and does not apply to suits brought by an individual member to enforce his own personal rights; *Md. Abdul Majid v. Ahmad Said*, 35 A. 459: 11 A. L. J. 673. (33 C. 789: 32 C. 273: 36 B. 29; 33 Bom. 509, *referred to*; 32 A. 503, *distinguished*). See also *Munniswamy v. Murugappa*, 7 M. L. T. 45: 5 I. C. 515; *Ram Chandra v. Ali Muhammad*, 35 A. 197.

The scope of this section is to protect the rights of the public, and it is aimed at the infringement of individual rights. Where an individual right is infringed, a suit may be brought for general administration and removal of trustee, without regard to the provisions of this section; *Venkatarangam v. Venkatasubammah*, 25 M. L. J. 373: 13 M. L. T. 515: 19 I. C. 740. See *Savala Cunniah v. Tiruvengada*, 24 M. L. J. 48: (1918) M. W. N. 363: 18 I. C. 622.

This section does not affect the right of a private individual to institute a suit to enforce the proper observance of a religious endowment. The

It is not every person having some sort of title to or charge on the trust property, who is a person interested in its due administration within the meaning of this section, but only a person who has some sort of right or charge under the terms of the trust itself; *Sarabjit v. Musst. Lagan Dei*, 15 O. C. 202: 4 I. C. 731.

Persons of the same sect and religious persuasion with the founder of the trust are "persons interested" and are entitled to maintain a suit to eject an intruder; *Srinivasa Charlu v. Subudhi*, 23 M.L. J. 848: 17 I. C. 589.

Where a Hindu, who has directed a trust of his property for a religious purpose, dies before giving effect to it, the Hindu Law authorizes his heir to take steps for carrying out his directions after recovering the property from a trespasser; *Ghelabhai v. Uderam*, 36 B. 29; 18 Bom. L. R. 989.

The terms of the section no longer require a direct interest in the temple and the property of the temple.—*Oseri v. Balmukund Das*, 24 I. C. 712: 7 S. L. R. 129. Persons having a right to worship in a temple are within s. 92. Under that section as originally enacted, the words were "having a direct interest in the trust," and the word "direct" has been taken out by Act VII of 1889. The inference is that the Legislature intended to allow persons having the same sort of interest that is sufficient under s. 14 of Act XX of 1883, to maintain a suit under s. 92.—*Sajedur Raja Chowdhuri v. Gour Mohun Das*, 24 C. 418. *Lakshmi Kunwar v. Murari Kunwar*, 45 I. C. 213. Persons who carry on the worship, *pandas* and priests of the pilgrims, have an interest in the trust.—*Shailajananda v. Umeshanunda*, 2 C. L. J. 460 and *Ram Ohurn v. Protap*, 2 C. L. J. 448.

Worshippers devotees of an idol are entitled to bring a suit, complaining of a breach of trust with reference to the funds or property belonging to the idol or appendant to its temple.—*Radhabai v. Oldmasti Bin*, 8 B. 27.

When the interest which the plaintiffs have in a public trust as members of the public is not sufficient to enable them to maintain a suit under s. 92 C. P. Code without the consent of the Advocate-General, they cannot get a sufficient interest to sue, apart from s. 92 by saying that they represent the whole of the Hindu population; *Girija Prasanna v. Braharan*, 35 I. C. 846.

A suit brought by persons claiming to be the worshippers of a shrine and beneficiaries in the property attached thereto for the removal of the trustee thereof falls under s. 92 and if instituted without the consent in writing required by the section, the relief for the removal of the trustee cannot be adjudicated upon; 11 P. W.R. 1918: 44 I. C. 870.

The words of s. 92 contemplate the existence of persons, other than those permitted to sue, who may be affected. The existence of such other persons, or the joinder of some of them as co-plaintiffs does not take away the right of an individual to sue under that section, provided his rights, as contemplated in that section, have been infringed.—*Mac Machi v. Lee Chin*, 9 C. W. N. 594.

It is not essential to the maintainability of a suit under this section, that the existence of the public charitable or religious trust alleged

A suit against a trespasser or alienee for recovery of possession of trust properties is not within the scope of s. 92 of the C. P. Code (2 C. L. J. 431: 24 C. 418, *dissented from*). It is outside the power of a judge to make use of Or. I, r. 2, and Or. I, r. 10, C. P. Code, for joining a purchaser of trust property as a party to the proceedings under s. 92; *Munshi Gulam v Mollah Ali Hafiz*, 28 C. L. J. 4: 47 I. C. 111.

A suit by the disciples of a *Mutt* in a representative capacity to set aside an alienation of *Mutt* properties by the Head of the *Mutt* and for delivery of possession of the properties to the persons lawfully entitled to manage the *Mutt* is maintainable without sanction under s. 92, C. P. Code; *Chidambarathambiran v. Nallasiva*, 41 M. 124: 33 M. L. J. 857.

A suit by a person claiming as the legal trustee of a religious endowment against a trespasser for recovery of possession of trust property does not come within the scope of this section; *Ayatannessa v. Kulfu Khalifa*, 41 C. 749. 13 C. W. N. 234 (33 C. 789: 35 A. 452, *folld*; 24 C. 418, *not folld*.); *Angad Das v. Ghasiti*, 26 I. C. 108.

This section has no application to suits brought by the trustees of a religious endowment to recover the trust property from the outsiders, who are in wrongful possession of trust property.—*Lakshmandas v. Ganpatrav*, 8 B. 365; *Giyana Sambandha v. Kandasami*, 10 M. 375; *Vishu Nath Govind v. Rambhat*, 15 B. 148; *Srinivasa Ayyangar v. Srinivasa Swami*, 16 M. 31, *Muhammad Abdullah v. Kallu*, 21 A. 187; and *Monijan Bibi v. Khadem Hossein*, 9 C. W. N. 151: 32 C. 273. *Malhar v. Nara Singha*, 37 B. 95: 14 Bom. L. R. 941. *Ganga Puri v. Mohan Lal*, 4 L. 295: 73 I. C. 645; *Inayat Husain v. Faiz Mahomed*, 45 A. 335. *See*, however, *Sajedur Raja Chowdhuri v. Gour Mohun*, 24 C. 418, where it has been held that a suit for the dismissal of a trustee and for the recovery of the trust property from the hands of a third party to whom the same has been improperly alienated is within the scope of this section. *See also Eralappa v. Balakrishniah*, 53 M. L. J. 188: 102 I. C. 74: A. I. R. 1927 M. 710, where it has been held that a suit under s. 92 for settling a scheme and appointing a trustee, will lie against a person who repudiates the trust and sets up a right adverse to it.

To bring a case within the purview of this section, it must be a representative one brought for the benefit of the public and to enforce a public right in respect of an express or constructive public trust upon a cause of action alleging breach of such trust or necessity for directions as to its administration against a trustee of such express or constructive trust and whether such trust be *de jure* or *de son tort* and for the particular relief mentioned. Suits brought not to establish a public right but to remedy a particular infringement of an individual right are not within the section. As against strangers such as alienees from the trustee and mere trespassers holding adversely to the trust the section does not apply.—*Rai Budreedas Mukim v. Chuni Lal*, 33 C. 789: 10 C. W. N. 581. Followed in *Ram Das v. Badri Narain*, 29 A. 27: 3 A. L. J. 773: *see also Tikharam v. Ratan Lal*, 19 I. C. 973; *Puttu Lal v. Daya Nand*, 20 A. L. J. 712: 68 I. C. 786.

A suit by the trustees of a religious endowment to eject a trespasser from a portion of the trust property by setting aside a compromise entered into between him (trespasser) and the former trustee, does not fall under s. 92—*Dhundiraj Ganesh v. Ganesh*, 18 B. 721; *Malhar v. Narsingha*, 14 Bom. L. R. 941: 37 B. 95.

stances of each case. The history of legislation on the subject shows that the interest required of a plaintiff by s. 92, C. P. Code need not be pecuniary, direct or immediate or in any way different from that required by ss. 14 and 15 of the Religious Endowments Act for purposes of suits relating to temples and mosques; *T. R. Ramachandra Aiyar v. Parameswaran*, 42 M. 860: 36 M. L. J. 396 (8 C. 32: 24 C. 418: 27 M. L. J. 253, *resd. to*); *Gopala Krishnier v. Ganapathy Aiyar*, (1920) M. W. N. 478: 12 L. W. 722.

The representatives of a testator, who has created trusts for religious or charitable purposes, in which the representatives are not personally interested, can maintain a suit to enforce the trust and for management of the endowment without making the Advocate-General a party.—*Panch Cowri Mull v. Chumroo Lall*, 3 C. 633: 2 C. L. R. 121; *Kali Churn v. Golabi*, 2 C. L. R. 128, *Rup Narain v. Junki Bye*, 3 C. L. R. 112. See also *Brojo Mohun v. Hurro Lall*, 5 C. 706: 6 C. L. R. 58.

A suit to restrain use of a bathing ghat for other than purposes of endowment is maintainable by the descendants of the person who erected the ghat.—*Jaggamoni Dasi v. Nilmoni Ghosal*, 9 C. 75: 11 C. L. R. 502.

The plaintiffs sued as relators under s. 539, C. P. Code, 1882 (s. 92) to have the defendants removed from the management of a religious endowment, on the ground that they had mismanaged and misappropriated the trust funds in their hands. Held that the plaintiffs, being worshippers and devotees of the idol, and being also descendants of the original founder of the endowment, had a direct interest in the trust, entitling them to sue under s. 539, C. P. Code, 1882 (s. 92).—*Chintaman Babaji v. Dhondo Ganesh*, 15 B. 612; *Vaithianatha Aiyar v. Tyagaraja Aiyar*, 41 M. L. J. 20.

The term person in this section is not restricted to persons, *sui juris*, and a suit under this section can be maintained by an infant, who is interested in a public religious and charitable trust, if he is properly represented by his next friend; *Sri Sri Lakshmi Janardan v. Eradutullah*, 6 I. C. 119. But a suit by an idol in his juristic capacity against persons who are interfering unlawfully with his property or with his income is not governed by s. 92, C. P. Code; *Darshan Lal v. Shibji Maheraj*, 20 A. L. J. 977.

"Whether contentious or not."—The above words have been added, in order to give effect to the decision of the Calcutta High Court in *Mohiuddin v. Sayiduddin*, 20 C. 810, where it has been held that this section applies to contentious as well as to non-contentious proceedings. See also *Subbayya v. Krishna*, 14 M. 186: 1 M. L. J. 95.

"In the principal Civil Court of original jurisdiction or in any other Court empowered, etc."—The words "in the principal Civil Court of original jurisdiction" have been substituted for the words "in the High Court or the District Court;" and the words "any other Court empowered in that behalf by the Local Government," have been added to enable subordinate Courts to try cases under this section where empowered by the Local Government.

A notification under this section directed to a particular Judge and purporting to deal with a particular litigation, which was already pending in the Court of District Judge, is *ultra vires*. The District Judge there-

alienations thereof. The representatives of the original settler sued the trustees to have the alienations set aside and for the appointment of new trustees. *Held* that the suit was rightly brought under section 14 of Act XX of 1863, and that s. 92 was not applicable.—*Sheoratan Kunwari v. Ram Pargash*, 18 A. 227. (8 B. 365; and 7 A. 178, referred to; 11 A. 18, overruled).

A suit for the vindication of the right of management which is vested in and actually being exercised by, the plaintiffs and those they represent at the date of the obstruction, does not fall within the scope of s. 92, merely because those who cause the obstruction happen to have been nominated trustees.—*Nauroji Manekji v. Dastur Kharsedji*, 28 B. 28.

**Suit under S. 92 Cannot be Referred to Arbitration.**—A suit under s. 92 C. P. Code does not concern the private rights of the parties thereto and consequently the suit cannot be referred to arbitration; *Ganoba v. Narayan*, 6 N. L. J. 7: 72 I. C. 1016.

**Compromise of Suit for Consideration Whether Lawful.**—In a suit instituted under s. 92 on the allegation that the defendant (the *Mutwali* of two mosques) had misappropriated certain property dedicated for their upkeep and praying *inter alia* that the defendant might be removed from the *mutwaliship* and a new *mutwali* appointed and a scheme for the proper discharge of the trust framed, the parties entered into a compromise whereby the plaintiffs agreed to withdraw from the suit in consideration of certain advantages to be received by them, but the Court refused to record the compromise and pass a decree on its basis. *Held* that until the question whether the agreement of compromise was a lawful one was decided it could not be proved to the satisfaction of the court that the suit had been adjusted by lawful agreement; *Abdul Karim Abu v. Abdus Sobhan*, 18 C. W. N. 1264.

A Court should not sanction a compromise of a suit under s. 92 under which any portion of the trust properties is given to any of the parties; *Muthu Krishna Naicken v. Ramachandra*, 37 M. L. J. 489.

**Sub-section (2).** "Save as provided by the religious endowment act, 1863."—"As a doubt has been expressed, in at least one reported decision, whether s. 539, is or is not mandatory, the committee have thought it desirable, in order to settle this question to introduce sub-clause (2)."—*Notes on Clauses.* Sub-section (2) has been inserted with a view to settle the doubtful question as to whether this section is directory or mandatory—Under s. 539 of the old Code it has been held in the following cases that the section is directory and not mandatory. Under the above section persons interested in a charitable trust could bring suits for the administration of trust and removal of trustee without previous sanction of the Advocate-General; but now such a suit would not lie without such sanction. By the insertion of sub-section (2) the effect of the following decisions, viz., *Sathappayyar v. Perisami*, 14 M. 1; *Takersey Devraj v. Hur Bhup Narsen*, 8 B. 432; *Nellaiyappa Pillai v. Thangama Nachiyar*, 21 M. 406 and *Budreedas v. Chuni Lal*, 33 C. 789; 10 C. W. N. 581, so far as they decide that this section is merely directory and not mandatory, has been rendered inoperative and obsolete. In 33 C. 789; 10 C. W. N. 581, all the conflicting rulings on the point have been referred to and discussed by Woodroffe, J., and the correctness of the views expressed in *Tricumdas Khemji*, 16 B. 626 p. 628 has been recognized.

death, the sister who was the then *mutwalli* mismanaged the *waqf* affairs and in a suit brought under s. 92, the District Judge removed the sister from the office of *mutwalli* and no one of the founder's family being available appointed a stranger—*Held* that the appointment of the plaintiff as *mutwalli* although a stranger was within the jurisdiction of the District Judge; *Narain Das v. Kazi Abdur Rahim*, 24 C. W. N. 690.

In a suit under this section, the Court has jurisdiction to make a decree for removal of the trustee (17 M. 402, *dissented from*: 24 C. 418, *followed*).—*Shailajananda v. Umeshanunda*, 2 C. L. J. 460.

A suit for the dismissal of a trustee and for the recovery of the trust property from the hands of a third party to whom the same has been improperly alienated is within the scope of this section.—*Sajedur Raja Choudhuri v. Gour Mohun*, 24 C. 418. Approved in *Ghasaffar Hussain v. Yamar Hussain*, 28 A. 112: 2 A. L. J. 501: Followed in *Huseini Begam v. The Collector of Moradabad*, 20 A. 46. See also *Subbayya v. Krishna*, 14 M. 186 and *Tricumdas v. Khumji*, 16 B. 628, p. 629.

A suit to remove the trustees of a public charity, and to compel them to account and to make good the losses sustained by the charity, in consequence of their default is a suit which falls within this section.—*Hussein Mian v. Collector of Kaira*, 21 B. 48. See *Budh Singh v. Niradbaran*, 2 C. L. J. 431.

In a suit under s. 92, the Court has power to appoint a receiver *pendente lite* and take the management of the temple out of the hands of the trustees appointed by the Temple Committee; *C. Kuppuswami v. Y. Subramaniam*, 1923 M. 224.

The Courts have jurisdiction to deal with the managers of public Hindu temples, if necessary, for the good of the religious endowment, to remove them from their position as managers. There is however, no hard and fast rule that every manager of a shrine who has arrogated to himself the position of owner, should be removed from his trust; each case must be decided with reference to its circumstances.—*Damodar Bhat v. Bhogi Lal*, 22 B. 493.

A mistake by a hereditary trustee of a *devasthan* as to his true legal position does not of necessity afford a ground for removing him from his post of manager and entrusting it to a new hand.—*Annaji Raghunath v. Narayan Sitaram*, 21 B. 556.

A hereditary trustee is liable to be removed, if his continuance in office is likely to endanger the interests of the institution (2 M. 197, *refd. to*). In cases of positive misconduct, courts of equity have no difficulty in interposing to remove trustees who have abused their trust. It is not indeed that every mistake or neglect of duty or inaccuracy of conduct of trustees which will induce Courts of equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to show a want of honesty or a want of a proper capacity to execute the duties or a want of reasonable fidelity. The Court's duty is to look entirely to the interests of the trust and where the circumstance show that it will not be for the benefit of the institution to allow it to remain under the management of a hereditary trustee, he ought to be removed. Want of capacity to manage the trust properties is a sufficient ground for removal of a trustee. *Raja of Kalahasti v. Gang-*



may be taken under this Act, it is necessary that the provisions of the Regulations specified in the preamble should be applicable to the endowment which is the subject of the suit, and that the nomination of the trustees, etc., should either be vested in or be exercised by the Government at the time of the passing of the Act."

**Distinction between this Section and the Provisions of the Religious Endowments Act XX of 1863.**—A person electing to proceed under the Religious Endowments Act, can be given only such special relief as that special statute says it may grant. If he wishes for any relief beyond that he should proceed under s. 539, C. P. Code, 1882 (s. 92).—*Gyanananda Asram v. Kristo Chandra*, 8 C. W. N. 404.

Section 92 of C. P. Code, 1908, and section 14 of Act XX of 1863, so far as the forms of relief to which they relate are the same, appear to offer a choice to persons interested in the trust. They might proceed under either and are not bound to proceed under both. A suit for removal of a trustee instituted with the Collector's consent given under this section, is good, even though no leave under s. 14 of Act XX of 1863 was not taken from the District Court; *Venkatarama Charlu v. Krishnama Charlu*, 37 M. 184: 24 M. L. J. 697. 14 M. L. T. 44.

**Necessary Party in Suits under This Section.**—In a suit against a trustee for removal on account of breach of trust by alienation, there is no reason why having regard to Or. 1, r. 3, the alienee should not be made a party and in case of decision against the alienee he should not be directed to convey the trust property; *Ali Haffiz v. Abdur Rahman*, 42 C. 1135.

Where a scheme is framed by the Court the rights of trusteeship of persons not parties to the suit will be lost unless saved by the scheme. It is therefore proper that all persons claiming to be trustees should be impleaded as parties to a scheme suit; *Mulukutla Rama Murthi v. Chillera*, 50 I. C. 58.

The lessors of the trust property are not proper parties, but if they choose they can come in as parties; *Asain Raghavalu v. Pebati*, 27 M. L. J. 266.

**Quere.**—Whether alienees of or trespassers on, trust property can be joined as parties in a suit under s. 92; *Chetti Kirlam v. Sriranga Ammal*, 26 M. L. J. 537.

**Abatement of Suit.**—The death of one of the plaintiffs in a suit under s. 92 would not cause the abatement of the suit. Where pending such a suit brought with the necessary sanction, one of the plaintiffs die, the suit does not abate; *Gopi Das v. Lal Das*, 173 P. W. R. 1918: 97 P. R. 1918. The same view was taken by the Madras High Court in *Parameswaran v. Narayanan*, 40 M. 110: 34 I. C. 384; *Sayyed v. Dost*, 47 M. L. J. 745: 85 I. C. 665: A. I. R. 1925 M. 244, where it was held that a suit under this section being a representative suit, there is no question of abatement and the Court has power under Or. 1, r. 10 (2) to add other persons interested in the trust as parties not because they are the legal representatives of the deceased plaintiff, but because they had become parties to the representative by the very fact of its being instituted on behalf of all persons interested in the trust. The Allahabad High Court in *Chhabile Ram v. Durga*, 37 A. 296: 28 I. C. 681, held that where a suit is brought by two persons under this section; and one of them dies pending the suit, the suit

deal with the matter on application on the ground that the petitioner's only course was to proceed by suit under s. 92 of the C. P. Code.—*Held* that it may be conceded that the District Judge has the powers of a *Kazi* but it does not necessarily follow that the petitioner is entitled to proceed by application or that the District Judge has no power to relegate her to a suit (20 C. W. N. 113, *resd. to*); *Jamila Khatun v. Abdur Jalil Meah*, 23 C. W. N. 138

**Clause (c)—Vesting any Property in a Trustee.**—The Courts have power under this section to appoint additional trustees, even though such appointment may involve a departure from the arrangement contemplated in the constitution of the trust. There is no reason for supposing that the Indian Legislature mean to control the power of the Courts in respect to the appointment of new or additional trustees. The words "under the trust," in this section has no reference to such original constitution or the rules; *Prayag Das v. Thirumala*, 28 M. 319 : 15 M. L. J. 183. Modified in 30 M. 138

**Clause (d)—Directing Accounts and Inquiries.**—This clause is new. It gives effect to the following decision of the Bombay High Court and its object will also appear from the Statements of Objects and Reasons:—

"It has been represented to us by more than one gentleman whose opinion is entitled to weight, that the power to enquire into the affairs of public charities should be made more extensive. The clause, as it stands, gives sufficient powers to the Courts to direct accounts and to frame schemes when once a suit has been instituted."

A suit to remove the trustees of a public charity, and to compel them to account and to make good the losses sustained by the charity, in consequence of their default is a suit which falls within the scope of s. 92.—*Husseinian v. Collector of Kaira*, 21 B. 48. See *Budh Singh v. Niradbaran*, 2 C. L. J. 481. The provisions of the section are quite wide enough to entitle the Court to direct an account against a trustee; *Nathumal v. Kishore*, 28 I. C. 886. A relation of the author of a charitable trust cannot maintain a suit for an account against a third person who is not a trustee on the ground that he obtained possession of trust properties from the last surviving trustee. Relators have no *locus standi* against third parties and cannot demand accounts simply to facilitate recovery of the amount, if any, found due by new trustees when appointed. Relators can only claim accounts and enquiries from trustees under cl. (d) of Sub-section (1) of s. 92, C. P. Code; *Tikamdas Mulchand v. Gokuldas Vishimdas*, 35 I. C. 593.

Where the income of the trust property is very small; and the *Mutwali* was a blind man and could not read and write, his failure to keep regular account is not sufficient justification for his dismissal; *Rahim Buksh v. Haji Ahmad*, 16 I. C. 9.

**Clauses (e) and (f).**—See notes under clause (g).

**Clause (g)—Settling a Scheme.**—This section vests a very wide discretion in the Court and in giving effect to its provisions and settling a scheme, the Court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the institution, and the way in which the management had been carried on heretofore in conjunction with other existing conditions that might have grown up since its foundation; *Mohammed Ismail v. Ahmed*, 43 C. "

P. R. 1910. But see *Amdoo Miyan v. Md. Dund Khan*, 24 M. 685, *Sajdur Raja v. Gour Mohan*, 24 C. 418.

The High Court interfered in its revisional jurisdiction and set aside the order of the District Judge suspending a *Mohunt* when there was no suit before him under s. 92 because the C. P. Code gives no powers to a court to take action under s. 92 unless and until a regular suit under s. 92 is filed before him; *Mohunt Darshan Das v. Collector of Meerut*, 16 A. L. J. 742.

An order for dismissal for non-payment of additional court fees, is subject to revision; *Ramrup v. Mohunt Shiya Ram*, 12 C. L. J. 211; 14 C. W. N. 932. It is doubtful whether every interlocutory order made under this section is subject to revision; *Ahmad Hossain v. Abdul Karim*, 16 I. C. 8.

**Court's Power to Add Parties—S. 92 and Or. I, R. 10.**—In a suit for the protection of a trust under s. 92, C. P. Code, the most important questions to be settled are those which relate to the administration of the trust and the Court has power under Or. I, r. 10, to add parties for the effectual adjudication of those qualities; *Ambalavana Pandara Sannadhi v. Advocate-General of Madras*, 38 M. L. J. 201.

Whether in a suit under s. 92, the addition of a party requires the fresh sanction of the Advocate-General depends upon the question whether the scope of the suit has been really enlarged by such addition; *Gopalla Krishnier v. Ganapathy*, (1920) M. W. N. 478.

The Court has ample power under Or. I, r. 20, C. P. Code to add other worshippers as additional parties and the previous sanction of the Advocate-General is not necessary for such addition; *Parameswarem Munpu v. Narayanan*, 40 M. 110; 31 M. L. J. 279.

**Court's Power to Award Costs.**—When a Judge decides that there is no misfeasance, he cannot record a decision that the trust is public nor about costs as his power ends with the first decision; *Brij Behari v. Sheo Nath*, 20 C. W. N. 1354.

**Specific Relief Act, 1877, S. 42.**—Where a suit is maintainable under this section and the plaintiff seeks any of the reliefs specified therein, s. 42 of the Specific Relief Act does not apply.—*Neti Rama v. Venkata Charulu*, 44 A. 622 A. I. R. 1922 All 349; 57 I. C. 659. Where a suit falls under this section, the plaintiffs cannot evade the requirements of the Code by framing the suit as one under s. 42 of the Specific Relief Act; *Mufti v. Fazal*, 44 A. 622 57 I. C. 659; A. I. R. 1922. All. 349; *Innasi Muthu v. Revlutz*, 24 L. W. 286; 97 I. C. 630; A. I. R. 1926 Mad 1029.

**Limitation under This Section.**—Where a person can sue under s. 92 for a declaration against an alleged transferee in breach of trust, the suit must be brought within 6 years of the transfer. The right to sue accrues at the completion of the document and not when plaintiff obtains knowledge of the alienation; *Chetti Kulam v. Sriranga Ammal*, 26 M. L. J. 537; 24 I. C. 369; *Prasanna Venkatachala v. Srirangammal*, 26 M. L. J. 537; 38 M. 1064.

Article 134 of the second schedule of the Indian Limitation Act applies to a suit for the dismissal of a trustee and for the recovery of the trust property from the hands of a third party to whom the same has been

party.—*Hossein Ali v. Bhagwan Das*, 84 C. 240: 11 C. W. N. 261: 6 C. L. J. 442; *Ram Charan v. Protap*, 2 C. L. J. 448 and *Srinath Daivasikamani v. Noor Mahamed*, 81 M. 47.

A *shebait* has no power to alienate the hereditary office of *shebaitship* by will.—*Rajeshwar v. Gopeshwar*, 35 C. 220: 7 C. L. J. 815.

As a general rule of Hindu Law, property given for the maintenance of religious worship and of charities connected with it is inalienable, though the *shebait* can incur debts and borrow money for legal necessity —*Prosunno Kumari v. Golab Chand*, 14 B. L. R. 450, P. C.: 23 W. R. 253, P. C. (Affirming 11 B. L. R. 332: 28 W. R. 86) See also *Shibessuree Dabee v. Mathooranath*, 13 W. R. 18 P. C.: 13 M. I. A. 270: *Vidyapurna Tirtha Swami v. Vidyavidhi Tirtha Swami*, 27 M. 435; and *Mallayappa v. Ambalamana*, 27 M. 465, where all the cases on the subject have been referred to.

The manager of a Hindu temple is by virtue of his office the administrator of the property attached to it. As regards the property the manager is in the position of a trustee. As regards the service of the temple he is rather in the position of the holder of an office or dignity which may have been originally conferred on a single individual, but which in course of time has become vested by descent in more than one person.—*Ramanathan v. Murugappa*, 29 M. 283, P. C.: 10 C. W. N. 825; 4 C. L. J. 189: 8 Bom. L. R. 498: 3 A. L. J. 707: 16 M. L. J. 265

One of the most important duties of a trustee is to keep separate accounts and to keep the trust property separate from his own property; and if that is not done and difficulties in taking accounts thereby arise, every presumption is to be made against the defendant and in favour of a trust. The duty of the trustee is to carry out the directions of the founder and not to encumber the trust property by systematically incurring expenditure beyond the limits of the income of the trust property; *Rajah of Kalahasti v. Ganapathi Iyer*, (1918) M. W. N. 555: 48 I. C. 897.

**Devolution of Trust Property.**—When the worship of an idol is founded, the office of a *shebait* is vested in the heirs of the founder in default of evidence to show that he has disposed of it otherwise. Hence, where a *shebait* appointed by the founder fails to nominate a successor in accordance with the conditions or usage of the endowment, the management reverts to the representatives of the founder, even though the endowment has assumed a public character; *Sital Das v. Protap Chandra*, 11 C. L. J. 2 and the cases therein referred to. See also *Kunjamani v. Nikunja Behari*, 20 C. W. N. 314.

**Settlement of Scheme.**—In a suit instituted for the purpose of having a scheme settled for the management of a Hindu temple and the protection of its funds from waste and embezzlement, the judicial Committee settled an exhaustive scheme of which the details are given in the judgment of their Lordships, and which should be referred to by the Courts in settling a scheme under clause (g) of this section.—*Prayag Das v. Tirumala*, 80 M. 188, P. C.: 11 C. W. N. 442: 17 M. L. J. 236: 9 Bom. L. R. 588, (28 M. 819, modified). In settling a scheme for management, due consideration should be given to the established practice of the institution and to the position of the persons connected with it.—*Balderpuri v. Gopal Das*, 8 Bom. L. R. 753, and to the existing rights of individuals to the transference of the temple; *Feeraraqlhara v. Srinirasa*, 23 M. L. J. 184: 12 M. L. T. 269.

- (e) in the Madras Presidency, by all Collectors, except the Collector of Madras (*see* Madras List of Local Rules and Orders, Ed. 1898, Vol. I, p. 197);
- (f) in the North-Western Provinces and Oudh, by the Legal Remembrancer (*see* North-Western Provinces and Oudh List of Local Rules and Orders, Ed. 1894, p. 114.)

Consent signed by the Assistant Collector who was in charge owing to Collector's illness is not valid consent; *Somchand v. Chhaganlal*, 35 B. 248: 13 Bom. L. R. 207.

A suit instituted with the consent of the Collector is a good suit for all reliefs referred to in s. 92; *Venkatarama v. Krishna*, 37 M. 184

Conditional consent of the Collector is defective; the provisions of s. 92 is imperative; *Suliman Haji v. Saikh Ismail*, 39 B. 580: 17 Bom. L. R. 625: 30 I. C. 17.

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main relief; and in these circumstances his successor may be brought on the record as defendant. Where the income of a temple is in excess of its expenditure, the Advocate-General will be well advised in seeking the aid of the Court for the framing of a scheme for the proper application of the surplus (18 Ch. D. 310, *followed*).—*Sivagnana v. Advocate-General of Madras*, 28 M. L. J. 174: (1915) M. W. N. 185.

**Settling Scheme of Management for a Mahomedan Mosque—Guiding Principles.**—In settling a scheme of management for a Mahomedan Mosque, the Court has wide direction; the wishes of the founder regarding the management if comfortable to the changed conditions and circumstances of the present day as well as the past history of the institution, might be taken into consideration; but the primary duty of the Court is to consider the general interests of the body of the public for whose benefit the trust is created and the Court might vary any rule of management which it finds to be impracticable or unsuited to the best wishes of the institution; *Mahomed Ismail Ariff v. Ahmed Moola Darwood*, 43 C. 1085 (P. C.): 9 Bur. L. T. 141.

Clause (h) "Such further or other relief."—The general clause dealing with "further or other relief" ought to be read with the seven preceding specific clauses and the nature of the reliefs which may be properly granted under it, is of the same character as the reliefs which may be granted under the preceding clauses. The seven specific clauses are not merely illustrative but furnish an indication of the nature of the relief which may be granted in a suit under this section. This clause must be read with what has preceded as referring to the further relief to which they may be entitled, which arises out of the existence of the trust in respect of which the suit is brought.—*Rai Budreedas v. Chunni Lal*, 33 C. 789: 10 C. W. N. 581. The words "granting such further or other relief as the nature of the case may require" must be read with what has preceded as referring to further relief to which the party may be entitled, which arises out of the existence of the trust in respect of which the suit has been brought.—*Jamaluddin v. Muftaba Husain*, 25 A. 631, 635. The words "such further or other relief" have been fully and clearly explained by Stanley C. J. and Burkill, J. in *Ghazaffar Husain, v. Yarwar Husain*, 28 A. 112: 2 A. L. J. 591.

A declaration regarding the validity of an alienation by a trustee comes within s 92 (h). If the result of a declaration is not to produce any effect on the parties but will only be a stepping stone for further litigation, the Court ought not to exercise its discretion and grant a declaration of such a nature; *Mufti Ali Jafar v. Fazal Husain*, 44 A. 622: 20 A. L. J. 557.

Where section 539 (s. 92) expressly provides for a declaratory relief, it cannot be cut down by section 42 of the Specific Relief Act. Where however the case comes within the supplementary provision, as to "such further or other relief as the nature of the case may require," the Court ought to be guided by the provisions, of s 42 of the Specific Relief Act, and to hold that the nature of the case does not require a merely declaratory relief to be given where further relief might have been sought for; *Muniawamy v. Muragappa*, 7 M. L. T. 45: 5 I. C. 515.

Section 92 (h) empowers a Court to grant a decree directing delivery of the trust properties to the new trustees; *Jai Narain v. Banky Lal*, 17 A. L. J. 957: 58 I. C. 566.

**Cl. (c).—**The general powers of Courts to grant temporary injunctions are summarized in clause (c). The details of procedure contained in ss 492 to 497 of Act XIV of 1882, will be found in Or. XXXIX, rules 1 to 5 of Schedule I. *See notes under those rules.*

The Court has not got wider powers under s. 94 in the matter of granting temporary injunction than those conferred upon it by Or. XXXIX. S. 94 is governed by Or. XXXIX which contains the rules prescribed; *Varada Charyulu v. Narasinha Charyulu*, 23 L. W. 85: 92 I. C. 615: A. I. R. 1926 Mad. 258

A Civil Court has no jurisdiction to issue an injunction to a party to a proceeding under s. 40 of the Bengal Tenancy Act restraining him from further proceeding with an application made by him under that section to a Revenue Court; *Bhajan Ahir v. Musst. Ganeshwar Kuar*, 5 Pat. L. J. 71 (1919) Pat 461

The court would not grant an interlocutory injunction restraining proceedings which are null and futile although the same may be vexatious; *Sardarmull v. Agar Chand*, 23 C. W. N. 811.

**Cl. (d).—**The general powers of Courts to appoint a receiver are summarized in clause (d). The details of procedure contained in ss. 503 to 505 of Act XIV of 1882, will be found in Schedule I. Or. XL, rules 1 to 5 *See notes under those rules.*

**"Appoint a receiver."**—Though the appointment of a receiver *pendente lite* is a matter entirely within the discretion of the Court, it must, in the exercise of its discretion, be guided by the circumstances of each particular case; and it has been laid down as a general rule that the appointment of a receiver will be made as a matter of course, on the application of a mortgagee, if the interest payable under the security is in arrear; *The Eastern Mortgage and Agency Co., Ltd. v. Rakea Khatun*, 16 C. W. N. 997.

**Cl. (e).—**The general powers of Courts to make other interlocutory orders are summed up in clause (e). The details of procedure contained in ss. 498 to 502 of Act XIV of 1882, will be found in Schedule I, Or. XXXIX, rules 6 to 10 *See notes under those rules.*

The words "*if it is so prescribed*," refer to the rules which may be hereafter framed under Part X of the Code.

**"Make such other interlocutory orders, etc."**—Where on the plaintiff's application for issue of a temporary injunction restraining the defendant from working mica mines, the Court directed the defendant to furnish security and submit accounts.—*Held*, that the order was an interlocutory order under cl. (e) of this section and not under Or. XXXIX, r. 1 and could not be interfered with in revision.—*Sito Mahlon v. Christian*, 17 C. W. N. 818.

**Quære**—It is a question whether s. 94, cls. (c) and (e), are intended to authorize a Court to grant injunction or to make attachments in cases not provided for by the rules and orders. It may be assumed that s. 94, cls. (c) and (e), were intended to give the Court powers outside the orders and rules in exceptional cases; *Md. Inamullah v. Narain Das*, 18 A. L. J. 565.

that granting of leave under s. 30, C. P. Code, 1882 [Or. I, r. 8 (1)] is not a condition precedent, and may take place after the institution of the suit.—*Srinivasa Chariar v. Ragava Chariar*, 23 M. 28. (8 C. 32, and 8 B. 432, considered).

Two out of five trustees appointed by a will brought a suit against the remaining three trustees for a breach of trust and also for their removal. The consent of the Advocate-General had not been obtained. Held that the suit was one which fell within the purview of s. 92, and consequently in the absence of such consent, was not maintainable.—*Tricumdas Mutji v. Khimji Vullab Das*, 16 B. 626. Followed in *Husaini Begam v. The Collector of Moradabad*, 20 A. 46. See *Budh Singh v. Niradbaran*, 2 C. L. J. 43.

A suit for removal of trustees being compromised, the beneficiaries brought a suit alleging the compromise to be fraudulent and collusive and asking for a declaration that so much of the decree as related to the discharge of the old trustees from their liability to render accounts was void. Such suit is not maintainable without sanction; *Md. Saby v. Muka Goolam*, 23 I. C. 11: 7 Bur. L. T. 160.

The plaintiff used to recover possession as *mutwalli* of certain parcels of land, alleging that they were dedicated *wakf*, and that the profits were "applied to the feeding of wayfarers and travellers, to lighting the mosque and shrine, and to meeting the expenses of repeating prayers on the occasion of *Id* and *Bakrid*." The plaintiff based her right to sue upon the fact that her deceased husband had been *mutwalli*. Held that, as the suit related partly to charitable and partly to religious trust, it was governed by this section.—*Lutifunissa Bibi v. Nazirun Bibi*, 11 C. 33.

A Mahomedan brought a suit against a person in possession of certain property for a declaration that the property is *wakf*. He did not allege himself to be interested in the property further or otherwise than as being a Mahomedan. Held that, inasmuch as no permission had been given to the plaintiff it was not maintainable under this section.—*Wajid Ali v. Dianat Ullah*, 8 A. 31. Approved in *Raghubar Dial v. Kisho Ramanuj*, 11 A. 18, F. B. See also *Nihal Shah v. Malan*, 2 Lah. L. J. 457.

Where the trust is one for public religious purposes, a suit in which the plaintiff asks to have the trust administered by the Court, is within the scope of this section, and is not maintainable without sanction.—*Raghubar Dial v. Kesho Ramanuj*, 11 A. 18 F. B.; See *Saiyad Ali v. Ali Jan*, 35 A. 24: 11 A. L. J. 25: *D'Cruz v. D'Silva*, 32 M. 131: 4 M. L. T. 345; *Sheoratan Kunwari v. Ram Pargash*, 18 A. 227. See also *Sajedur Raja v. Baidyanath Deb*, 20 C. 397, where it has been held that when the suit is based on the existence of a trust for public religious purposes and upon a breach of that trust and for the appointment of a new trustee, the suit is one to which the provisions of this section apply. The mere fact that the trust is denied or that there is no trustee lawfully appointed or *de son tort* is no bar to the maintainability of the suit: *Sri Gadi Cherla v. Nyapathi Subba Rao*, 46 M. 300.

A general trustee of a temple and a worshipper after obtaining leave sued for the removal of certain trustees, for the appointment of others, and for the settlement of a scheme for the management of the trust. Held that the suit was maintainable.—*Narayana Ayyan v. Kumarasawmi Mudaliar*, 23 M. 537. But see *Nellaiyappa Pillai v. Thangama Nachiyar*, 21 M. 406, where the suit was held maintainable without sanction.



of exercising acts of ownership, is entitled to such damages as are necessary and approximate results thereof. *Held* further, that an application under this section may be treated as a plaint.—*Bhut Nath v. Chandra Benode*, 16 C. L. J. 84.

In a suit for damages for attachment before judgment, the plaintiff is bound to prove want of reasonable and probable cause for applying for attachment and malice in fact. The provisions of section 95, which empowers the Court to award compensation when the attachment was applied for on insufficient grounds, are not intended to affect the applicability of the aforesaid rule of law in regular suits brought for compensation; *Nanjappa v. Ganapathi*, 35 M. 598; 10 M. L. T. 365 (1911); 2 M. W. N. 414, *see also* *Kumarasamia v. Udayar Nandan*, 32 M. 170.

Where a Court orders attachment of a defendant's property after it is satisfied that he is about to remove or dispose of it with intent to obstruct or delay the execution of the decree, it must be presumed that there was good and sufficient cause for the plaintiff having moved the Court to do so, even though the suit resulted unsuccessfully; and unless the contrary can be established damages cannot be claimed.—*Dhurmo Narain v. Sreemutty Dassee*, 18 W. R. 440. Referred to in *Mohini v. Surendra*, 18 C. W. N. 1189; 42 C. 550.

Where a suit was for Rs. 3,000, and the plaintiff, who was declared entitled to Rs. 677, without sufficient grounds attached the defendant's property to the amount of Rs. 3,000, the defendant was held entitled to compensation.—*Mahomed Rezooddin v. Hossein Buksh*, 6 W. R. Mis 24.

An order under Or XXXIII, r. 5, where the application has been made on insufficient grounds must necessarily cause damage to the credit and reputation of the party against whom the order is made, and general and special damages are recoverable. *Quære*—Whether it is necessary to prove that the defendant acted maliciously in the above case.—*Palani Kumarasami v. Udayar Nandan*, 32 M. 170; 18 M. L. J. 490.

A defendant was held entitled to compensation for his arrest before judgment when the suit was withdrawn by the plaintiff under Or. XXIII, r. 1 with liberty to bring fresh suit.—*Syed Ali v. Adib*, 15 B. 160.

Compensation may be given for improperly obtaining a temporary attachment though the same is set aside on notice; *Narahari v. Vaithinatha*, 25 M. L. T. 46

Attachment in execution—Claim to attached property disallowed—Suit to declare property attached not liable in execution—Injunction against sale of property pending decision of suit on plaintiff's giving security for interest on the sum representing value of attached property—Subsequent dismissal of suit with costs—Application by defendant in execution of decree for the interest for which security was ordered by injunction—Application disallowed. *Held* that the defendant had his remedy under this section and that remedy was obtainable on application not to the Court in execution, but to the Court which issued the injunction.—*Vanajlal v. Kastur*, 22 B. 42.

An order for compensation, for attachment before judgment on insufficient grounds, is not subject to appeal, but is subject to revision by the Court of appeal.

*See also* *Krishna v. Krishna*, 11 M. L. J. 330.

representatives of the founder of the trust are entitled to institute proceedings for the purpose of rectifying the abuse of trust; *Srinivasa Charlu v. Subudhi*, 23 M. L. J. 848: 17 I. C. 589.

When a person was put in charge as *Pujari* of an idol in a *Dharmasala*, he is a servant and not a trustee and a suit under s. 92 is not maintainable against him; *Baldeo v. Gopalji*, 21 A. L. J. 310.

A suit by a person, who seeks to remedy a particular infringement of his own individual right, is not affected by this section, nor is sanction required where the trust is a private trust; *Gopaldas v. Hassa Singh*, 4 S. L. R. 152: 8 I. C. 926.

A suit for removal of *mutwali*, arising out of disputes between parties as to who is entitled to the *mutwaliship*, is not governed by s. 92; *Niamat Ali v. Ali Raza*, 87 A. 86: 13 A. L. J. 26; *Abdul Ghafoor v. Altaf Husain*, 20 C. W. N. 605; nor a suit relating to private trust; *Abdul Husain v. Aziz Ahmad*, 25 I. C. 661; nor a suit between two individuals each claiming certain rights as *Matwalli* over *wagf* property; *Manijan v. Khadem Hossain*, 32 C. 373; nor a suit between two persons as to which of them is the lawful trustee of a charity; *Budree Das v. Chooni Lal*, 33 C. 789, 808; *Puttu Lal v. Dayanand*, 44 A. 721: 68 I. C. 786: A. I. R. 1922 A. 499; *Ayatunnessa v. Kulfu*, 41 C. 749: 21 I. C. 677. Lands granted as *inam* for support of officers performing services as that of *Acharyapurusha* in a Hindu temple are not held on trust for temple, and a suit for framing a scheme for the administration of such properties does not lie; *Srirangachariar v. Pranatharthiharacharia*, 18 M. L. T. 122; (1915) M. W. N. 531.

It was held by the Allahabad High Court in *Jawahra v. Hussain*, 7 A. 178 that the right of a Mahomedan to use a mosque is not a public but a private right and the provisions of this section do not apply to a suit in respect of such right. The Calcutta High Court in *Mohiuddin v. Sayiduddin*, 20 C. 810 took the same view as the Allahabad High Court, though in two earlier cases (8 C. 32 and 11 C. 33) it took a contrary view.

Where under a will provision was made for a certain charity, the object of which is solely left to the discretion of the trustee for the time being who is always to be a descendant of the testator, the Court should not interfere under s. 92 as the matter is of a family nature, *Official Assignee v. Abdul*, 28 I. C. 116

Section 92 has no application to a suit for a declaration that the plaintiff and the defendant are the *Mutwallis* of a *wagf* property and are entitled to manage it jointly; *Ali Hussain v. Mahomed Hussain*, 52 I. C. 628; see also, *Rugghan Prasad v. Mt. Dhanno*, A. I. R. 1927 A. 257: 99 I. C. 1045.

A suit for a declaration that plaintiff is the only constituted *Mohunt* of a *Mutt* and for recovery of possession and injunction is not one under s. 92 of the C. P. Code; *Ganga Ram v. Ram Saran*, 34 I. C. 502; *Nilakanta v. Ram Krishna*, 23 Bom. L. R. 876

This Section has No Application to Suits Against Trespassers and Against Alienees from Trustees for Recovery of Possession.—In a suit under s. 92 for declaration and possession, it is not competent to grant these reliefs against an alienee of the trust property.—*Rangayya v. Chinnaaswami*, 23 M. L. J. 826 (27 M. L. J. 266, followed).

effected; merely procuring an order for attachment before judgment, however maliciously, is insufficient; *Rama v. Govinda*, 89 M. 952: 32 I. C. 448.

Where the defendant's claim for compensation was refused without enquiring into it, such refusal to award compensation was held no bar to a regular suit for damages.—*Nanda Kumar v. Gauri Sankar*, 5 Bom L R. Ap. 4: 13 W. R. 305.

Where a temporary injunction is wrongfully obtained on insufficient grounds, a suit for damages is maintainable; *Har Kumar v. Jagat Bandhu*, 53 C. 1008: A I. R. 1927 Cal. 248 (16 C. W. N. 540 and 9 W. R. 133 relied on). See also *Mohini Mohan v. Surendra*, 18 C. W. N. 1189: 42 C. 550: 21 C. L. J. 68; *Bishun Singh v. Wyatt*, 16 C. W. N. 540: 14 C. L. J. 515; *Albert Bonnan v. Imperial Tobacco Co.*, 30 C. W. N. 465: 94 I. C. 444: A. I. R. 1928 Cal. 757.

**Award of Compensation under This Section when Bars a Regular Suit.**—It is clear from sub-section (2) that where a compensation is awarded under this section, such an award will bar a regular suit for compensation; *Goburdhun Majhee v. Banee Chunder*, 21 W. R. 375: see also *Nund Kumar v. Gouri Sunkur*, 18 W. R. 305: 5 Bom. L. R. Ap. 4

**Mode of Assessing Damages.**—The principle ordinarily applicable to actions of tort is that the plaintiff is never precluded from recovering ordinary damages by reason of his failing to prove the special damage he has laid, unless the special damage is the gist of the action. Mode of assessing damages in suits for compensation for wrongful attachment pointed out.—*Modun Mahan v. Gokul Dass*, 5 W. R. 91, P. C.: 10 M. I. A. 563. See also *Goburdhun v. Bance Chunder*, 21 W. R. 375; *Bhut Nath v. Chandra Benode*, 16 C. L. J. 34.

**Jurisdiction of Small Cause Court.**—A Court of Small Causes has jurisdiction to award damages, under this section, to a defendant whose property has been attached on insufficient grounds—*Ibrahi Rawthen v. Sangaram Shetty*, 26 M. 504. See also *Karumuru v. Lanka*, 26 I. C. 359; see s. 7, clause (b).

**Appeal.**—No appeal lay under the old Code but s. 104 (1) (g) of the present Code has given the right of an appeal from an order under s. 95.

An appeal lies under s. 104 (1) (g) from an order refusing relief under s. 95 of the C. P. Code as well as from one granting such relief; *Narahari Aiyar v. Vaithinatha Aiyar*, 25 M. L. T. 46: 49 I. C. 88.

When a Court grants an order for compensation purporting to act under this section, the order is appealable under s. 104 (g), but under sub-section of s. 104, no second appeal lies; *C. V. C. T. Frim v. Saya Bya*, 11 I. C. 917.

The order for compensation for unreasonable arrest being an independent order, the right of appeal is also independent of the right of appeal against the decree in the suit and is governed by s. 104 which gives only an appeal and no second appeal; *Kannappa v. Sambasiva*, 21 I. C. 756

In *Ram Narain v. Umrao Singh*, 29 A. 615, the Allahabad High Court held that Art. 29 of the Limitation Act, was applicable to such a suit. In *Surajmal v. Manek Chand*, 6 Bom. L. R. 704, the Bombay High Court held that Art. 36 of the Limitation Act, was applicable. It would thus appear that there is a divergence of judicial opinion on the question of limitation.

When a suit is brought to set aside an alienation made to a stranger, such a suit by the worshipper at a mosque or temple can be maintained, and does not fall within s. 92. As against strangers this section does not apply.—*Kazi Hassan v. Sagun Balkrishna*, 24 B. 170. Followed in *Budh Singh v. Niradbaran*, 2 C. L. J. 481; *Arunachalla v. Muthu Chettiar*, 23 M. L. J. 347; *Ghelabhai v. Uderam*, 36 B. 29; 13 Bom. L. R. 989; *Imami v. Md. Yusuf*, 14 O. C. 65; 10 I. C. 715; *Angad v. Ghasiti*, 26 I. C. 108; *Kalyan Venkataramana v. Kasturi Ranga Aiyangar*, 40 M. 212; 31 M. L. J. 777.

Where a breach of trust is complained of and where the alienee of the trust property denies that the property is the subject of a public trust for religious purposes, he is a proper and necessary party to a suit brought under this section, although no relief can be given as against him by way of a decree in ejectment.—*Collector of Poona v. Chanchalbai*, 35 B. 470; 13 Bom. L. R. 690; *Asam Raghavam v. Pellati*, 27 M. L. J. 266; 16 M. L. T. 178; 25 I. C. 794; *Prasanna v. Srirangammal*, 28 M. L. J. 537; 24 I. C. 369; *Rangasami Naidu v. Chinnaasamy*, 28 M. L. J. 326; 17 M. L. T. 191. But see *Oseri v. Balmukandas*, 5 S. L. R. 103; 24 I. C. 712.

**This Section Presupposes Existence of Trust. It has No Application to Suits for Declaration of Trust, where its Existence is Denied.**—S. 92 regulates suits where there is a breach of an express or constructive trust created for public purpose of a religious and charitable nature; but a suit to establish the existence of the trust itself, where the whole question involved is whether such a trust exists or not is not within the purview of s. 92; *Khursaidi Begum v. Secy. Of State*, 5 P. 539; 94 I. C. 433; A. I. R. 1926 P. 321.

Section 92 presupposes the existence of trust for the administration of which it is necessary to make provision. That section cannot apply to a suit in which the object of the plaintiff is to obtain a declaration that certain property is an endowed property, the fact of the endowment being denied by the other side.—*Jamaluddin v. Muftaba Husain*, 25 A. 631. Explained in *Jafar Khan v. Daudshah M Fakir*, 18 Bom. L. R. 49. See also *Muhammad Alam v. Akbar Husain*, 32 A. 631; 7 A. L. J. 797; *Dasondhay v. Musammad Abu Nazar*, 33 A. 660; 8 A. L. J. 710.

The plaint in this suit was framed under s. 92, and contained, besides a prayer for possession, prayer for declaration that the church, etc., was held on trust for worship according to the faith and discipline of the Church of Rome, and for injunctions against the defendants. Held that the suit not being brought by beneficiaries against trustee, or for any of the purposes mentioned in s. 92, that section had no application.—*Augustine v. Medlycott*, 15 M. 241.

A plaintiff claimed to be a co-trustee of certain *dargas*, and entitled to a share in the management and in the profits thereof, which consisted of certain cash allowance from Government. He sued the defendants for an account and for the recovery of his share. Held that the suit did not come within the purview of s. 92 and did not require sanction.—*Miya Valiulla v. Syed Bava Sahib*, 22 B. 496. (16 B. 537, concurred in).

The founder of a trust assigned certain lands for the maintenance of a temple and appointed certain trustees of the endowment. The trustees dealt with the property in a manner inconsistent with the trust by making

-It cannot be assumed that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by Statute or some authority equivalent to Statute; *Minakshi v. Subramanya*, 11 M. 26 P. C. Followed in *Parasurama v. Seshier*, 27 M. 504; *Damodara v. Kittappa*, 36 M. 16. Right of appeal cannot exist irrespective of statutory authority; nor can a Court entertain an appeal until the jurisdiction to do so is conferred on it by Statute; (*see* 22 P. L. R. 1898 F. B.; 36 P. R. 1902 F. B.). An appeal does not exist in the nature of things. A right of appeal from any decision of any tribunal must be given by express enactment; such a right cannot be implied; *Rangoon Batataung Co., Ltd. v. Collector of Rangoon*, 40 C. 21 P. C., p. 27; 1 C. W. N. 961; *see* *Special Officer v. Dasabhai*, 17 C. W. N. 421.

A right of appeal is a creature of Statute, and where no appeal has been allowed by the legislature, the parties cannot by agreement take matters in controversy to an Appellate Court; *Prayag Narayan v. Sukhdeo*, 17 C. L. J. 605.

In the case of orders, the rule is quite different. The rule is that orders are not generally appealable, unless the right of appeal is expressly given either in the body of the Code or by any other law (*see* section 104).

The words "an appeal" in s. 96 do not exclude the entertainment of a fresh appeal if the dismissal of the first appeal does not bar the hearing of the first appeal; *Surajdeo Narain v. Pratap Rai*, 4 Pat. L. T. 495; 2 Pat. 739.

**Appeal is the Continuation of the Proceedings in the Suit.**—An appeal is only a stage in the suit; it is not a fresh suit, but part of the proceedings in the suit; *Dooly Chund v. Nirban Singh*, 18 W. R. 261 (1869); 9 Bom. L. R. 190 (196). The term "suit" includes the appealable stage; *Samed Sheikh v. Naba Gopal*, 19 C. L. J. 310 p. 312; 19 C. W. N. 359 (360); *see* also *Gagan Chand v. Casperz*, 4 C. W. N. 44; *Batasa Sarkar v. Jaiti Bewa*, 3 C. W. N. 62n.

An appeal is the continuation of the proceedings in the original Court. Those proceedings are removed to the Court of Appeal and the proceedings in appellate Court are in the nature of re-hearing. When a suit has been disposed of by the first Court and an appeal is preferred, the Court of appeal is seized of the cause and has the powers and duties of the first Court; *Veppuluri Atchayya v. Kanchumurti*, 24 M. L. J. 112 F. B.: 1 M. L. T. 60; 18 I. C. 555 (8 B. 28; 26 M. 9; 14 C. W. N. 703; 31 M. 453 referred to), *see* also *Chimakaruppan v. Meyyappa*, 18 M. L. T. 400 (1915) M. W. N. 844; 30 I. C. 753.

"Save where otherwise expressly provided in the body of this Code."—Except where the right of appeal is expressly barred by the provision in the body of this Code, an appeal lies from every decree passed by any Court of original jurisdiction. As for instance, there is no express prohibition in the body of the Code barring appeal against a decree for costs, an appeal therefore lies from such a decree, subject however to the laws on the subject.

held "Or by any other law for the time being in force."—An appeal from a decree or order passed under section 9 of the Special Relief Act I Court expressly barred by that section. There are several other Acts which would then be barred. question of

This sub-section provides that suits of the character mentioned in the section can now be brought only in conformity with the provisions of this section and not otherwise. In other words, no suit in respect of any public charitable or religious trust, claiming any of the reliefs specified in this section shall be instituted except in conformity with the provisions of sub-section (1), and that the provisions of the Religious Endowments Act, 1863, will not be affected by this section.

Section 92 (2) saves the special jurisdiction of the District Court under the Religious Endowments Act, so that a person desirous of suing for removal of a trustee or for such other specific relief as can be given him under that Act can do so without complying with the provisions of s. 92: *Subramania Aiyar v. Venkatachala Vadhya*, (1916) 2 M. W. N. 351: 37 I. C. 688.

A plaintiff may proceed for appropriate relief either under s. 92, C. P. Code or under s. 14 of the Religious Endowments Act and the opening words in s. 92 (2) only mean that if he elects to proceed under the Religious Endowments Act, he is not to be prevented from doing so by s. 92; *Hansraj v. Anant*, 42 B. 742; 20 Bom. L. R. 954.

The object of sub-section (2) was to make it clear that the provisions of the section were mandatory and not permissive; and the object of the saving clause in the sub-section was to make it clear that the Act of 1863 was still in force, *Alapa Natesa Pandara v. Ramalingam*, 24 M. L. J. 658: 20 I. C. 767. See, however, *Chabih Ram v. Durga Prasad*, 13 A. L. J. 379, where it has been held that s. 92 is not mandatory, but is permissive and directory.

**Religious Endowments Act (XX of 1863).**—Compare ss 14 and 18 of Act XX of 1863 with this section. Section 14 provides that any person or persons interested may sue singly in case of breach of trust, etc., and section 18 provides that no suit shall be entertained under the Act without first obtaining the leave of the Court.

The provisions of Act XX of 1863 apply only to such religious establishments as were under the control or superintendence of the Board of Revenue or of local agents under Reg. XIX of 1810, and were transferred to trustees and managers under s. 4 of the Act.—*Delroos Banoo Begum v. Ashgar Ally*, 15 B. L. R. 167: 23 W. R. 453. Affirmed by the Privy Council in 3 C. 324, P. C. As to the applicability of this Act (XX of 1863), see the following observation of the High Court in *Mahomed Athar v. Ram Jan Khan*, 34 C. 587. "The preamble of Act XX of 1863 very clearly defines the objects of the Act, that it was enacted for the purpose of relieving Board of Revenue and local agents from the duties imposed on them by Reg. XIX of 1810, and section 3 of the Act lays down that the provisions of this Act will apply to all cases of every mosque, temple or other religious establishment to which the provisions of either of the Regulations specified in the preamble to this Act are applicable and the nomination of the trustee, manager or superintendent whereof at the time of the passing of this Act is vested in or may be exercised by the Government or any public officer; or in which the nomination of such trustee, manager or superintendent shall be subject to the confirmation of the Government or any public officer, the Local Government shall as soon as possible after the passing of this Act make special provisions as hereinafter provided. From this, it is clear that what section 3 requires is that, in order that any action

Nothing remained to be done in a suit except to hear arguments, for which a time had been appointed. Neither the plaintiff nor his pleader appeared at the appointed time. The Court consequently dismissed the suit. *Held* that the decree was appealable under s. 540, C. P. Code, 1882 (s. 96).—*Raichand v. Mathura Prasad*, 8 A. 292.

In a suit to file an agreement to refer a matter to arbitration, decision was passed refusing a reference on the ground that the agreement to refer was not proved. On the plaintiff appealing against such refusal: *Held* that the decision passed under s. 523, C. P. Code, 1882 (the second schedule) is a decree, and an appeal lies therefrom under s. 540, C. P. Code, 1882 (s. 96).—*Gawdu Magada v. Gawdu Bhagavan*, 22 M. 299.

An order dismissing objections to the execution of a decree for default, is a "decree" within the meaning of s. 2, C. P. Code, and an appeal lies from such an order under s. 540, C. P. Code, 1882 (s. 96).—*Lal Narayan v. Mahomed Raffiuddin*, 28 C. 81. (15 A. 359; 23 C. 115 and 827, distinguished).

**Who May Appeal.**—The requisites of a valid appeal are—(1) that no one can appeal from a judgment or decree unless he was a party to the action or was treated as such or is the legal representative of a party or has privity of estate, title or interest apparent on the face of the record, (2) that an appellant has an interest in the subject-matter of the suit, and (3) that the appellant is prejudicially affected by the decree complained of; *Srinath Das v. Probodh Chunder*, 11 C. L. J. 580; *Rustomjee v. Official Liquidator*, 1919 P. R. 196; 49 I. C. 881.

No appeal will lie from a decree which does not itself in some way or other adversely affect the appellant. The fact that in the judgment there is an adverse finding on a point not directly or substantially in issue between the parties will not give a party a right to contest such finding, where the decree is entirely in his favour and does not necessarily imply that finding; *Secretary of State v. Saminatha*, 37 M. 25; 21 M. L. J. 947; (9 C. W. N. 584; 30 M. 447; 21 A. 117, referred to). See *Ahmadunnissa v. Gulzari Lal*, 24 I. C. 36. A defendant against whom the suit has been dismissed, cannot appeal against the decree. *Hiyat Baksh v. Musst. Lachminia*, 22 I. C. 916. There is no right of appeal vouchsafed to a party against whom a suit is dismissed, simply because the finding on a particular matter in controversy has been against him; *Latchayya v. Kothamma*, 84 I. C. 945; A. I. R. 1925 Mad. 264. A plaintiff, who claims for alternative reliefs in his plaint, can prefer an appeal although he obtained a decree, *Biswanath v. Surendra*, 19 C. W. N. 102.

*Held*, on review of authorities, that a defendant has the right to appeal notwithstanding that the suit has been dismissed as against him, if he is aggrieved by the decree. The question whether a party is aggrieved by a decree is a question of fact to be determined in each case according to its peculiar circumstances.—*Krishna Chandra v. Mohesh Chandra*, 9 C. W. N. 584. (17 W. R. 219, distinguished). Where a decision dismissing a suit is in fact wholly against the defendant, such defendant can appeal against it.—*Yusuf Sahib v. Durgi*, 30 M. 447; 17 M. L. J. 260 (9 C. W. N. 584 followed.). The true test in cases of this kind is to see not merely the form but the substance of the decree and judgment. Where the point adversely decided to the defendant is correctly and substantially in issue and where in other proceedings the matter would be *res judicata*, it would

abates unless some other member of the public similarly interested obtains the consent of the Advocate-General and applies to be brought on the record as co-plaintiff. The Allahabad decision has been superseded by the recent Privy Council decision in *Amand Roa v. Ram Das*, 48 I. A. 12: 48 C. 493: 62 I. C. 737 which has adopted the views taken by the Madras and the Punjab High Courts dissenting from the view taken by the Allahabad High Court.

The cause of action survives against the successor in office of a deceased trustee defendant in a pending suit; *Sivagnana v. Advocate General of Madras*, 28 M. L. J. 174.

Where the persons who originally obtained sanction and raised the suit died during the pendency of the suit, the suit can nevertheless go on as the suit is not prosecuted by individuals for their own interests but as representatives of the general public; *Raja Ananda Row v. Ramdas Daduram*, 48 C. 493: 25 C. W. N. 794, P. C.

**Mode of Executing Decrees Passed under Section 92.**—In a suit brought under s. 539, C. P. Code, 1882 (s. 92), a decree was passed appointing the defendants as managing trustees of a Hindu temple, and laying down certain rules for their guidance in future. *Held* that the application for the execution should be made under s. 260, C. P. Code, 1882 (Or. XXI, r. 35).—*Karam Chand v. Ghelabhai*, 19 B. 34.

Where a decree under s. 539, C. P. Code, 1882 (s. 92), directs particular acts to be performed by the defendants in the management of a temple, it may be enforced under s. 260, C. P. Code, 1882 (Or. XXI, r. 32), by the imprisonment of the defendants or by the attachment of their property, or by both.—*Damodar Bhat v. Bhogi Lal*, 24 B. 45. Followed in *Prayag Dass v. Tirumala*, 28 M. 319: 15 M. L. J. 133.

**Appeal and Revision.**—Suit by Advocate-General at the instance of relators dismissed. No appeal by Advocate-General.—*Held* that relators not being parties to the suit, they have no right to appeal.—*Jan Mahomed v. Syed Nuruddin*, 32 B. 155.

Where a decree of the High Court in a scheme suit provided for an appeal from an order of the District Court removing a *Dharmakarta* or appointing another *Dharmakarta*, *held* no appeal lay from an order of the District Court declining to remove the trustee of a temple; *Lokasikhamani Mudaliar v. Thiagaraya Chettiar*, (1917) M. W. N. 420: 38 I. C. 415.

A scheme decree of the High Court directed that one of the trustees should be selected according to the discretion of the District Judge. The District Judge selected a trustee; *held*, that no appeal or revision lay against this order of the District Judge selecting the trustee, as the District Judge is a *persona designata* under the scheme, *Lambodar v. Dhurani Dhar*, 28 Bom. L. R. 64. 93 I. C. 195 A. I. R. 1926 B. 167.

Where the Court framed a scheme for the management of a mosque and election of trustees; subsequently a dispute arose as to the validity of the election and the Judge decided that the election was valid. *Held* that the order amounted to proceedings in execution and was appealable; *Md. Esoof v. Md. Esoof*, 24 I. C. 915: 7 Bur. L. T. 293.

An order of a Collector granting permission to sue for removal of *mahant* of a temple is not open to revision; *Dhian Das v. Jagat*



In a suit for redemption, a person who was made a defendant on the ground that he was in possession of the mortgaged property on behalf of the mortgagee, and who disclaimed all interest on his own account, and alleged that he was in possession on behalf of the mortgagee, has no right of appeal from the decree in the suit passed in favour of the plaintiff.—*Seshayyar v. Pappavaradayangar*, 6 M. 185.

See notes under Order XLI, rule 4.

**Courts Authorized to Hear Appeals.**—On this point, see the provisions of the Civil Courts Acts of the different provinces.

As to the mode of determining *forum* of appeal on transfer of territorial jurisdiction after decree, see *Subbayya v. Kachayya*, 37 M. 477; *Allah Dei Begam v. Kesri Mal*, 28 A. 93; *Harabati v. Satyabadi*, 34 C. 636.

For the purposes of determining the *forum* of appeal, the rule is that where a plaintiff definitely fixes a sum as the amount of his claim (as in a suit for the recovery of a debt), that sum determines the *forum* of appeal, and not the amount affected by the decree and involved in the appeal; *Boidya Nath v. Makhan*, 17 C. 680; but where the plaintiff fixes a sum approximately or tentatively (as in a suit for accounts or mesne profits), there is a conflict of opinion as to the *forum* of appeal. According to the Calcutta High Court, the amount decreed by the first Court as the amount due to the plaintiff determines the *forum* of appeal; *Ijjatulla v. Chandra Mohun*, 34 C. 954 F. B.; *Mohini v. Satis*, 17 C. 704; *Gulab Khan v. Abdul Wahab Khan*, 31 C. 365. According to the Bombay and Allahabad High Courts, the amount found by the lower Court to be due to the plaintiff and accepted by him by payment of additional Court-fee, determines the *forum* of appeal; *Ibrahimji v. Bejanji*, 20 B. 265; *Goswami Sri Raman v. Bohra Desraj*, 32 A. 222. According to the Madras High Court it is the amount or value of the subject-matter as fixed in the plaint (though approximately) that determines the *forum* of appeal, and not the amount decreed; *Kannayya v. Venkata*, 40 M. 1; 39 I. C. 439 F. B. It has recently been held by a Full Bench of the Calcutta High Court in *Bidyadhar v. Manindra*, 29 C. W. N. 869 that where a suit is properly brought in the Court of a Munsif for recovery of possession of land, and mesne profits *pendente lite* are claimed or assessed at a sum beyond the pecuniary jurisdiction of the Munsif, the Munsif has jurisdiction to fix such mesne profits and pass a decree for a sum beyond his pecuniary jurisdiction. The value of such a suit for purposes of jurisdiction is the value of the immoveable property *plus* mesne profits up to the date of the suit where such profits are claimed, and the *forum* of appeal is determined by the value of the suit, and not by the amount decreed.

See notes under section 15, under the heading "*Jurisdiction of Appellate Court.*"

**Small Cause Suit Tried as an Ordinary Suit—Appeal from Decree, If Maintainable.**—Where a suit in the nature of a Small Cause Suit is instituted in a Court the presiding officer of which is not invested with Small Cause Jurisdiction and is decided as an ordinary suit the nature of the suit is not altered and an appeal from the decree to the District Judge is competent; *Khamasa Bewa v. Promotho Nath*, 51 I. C. 967; *Abhayaswari v. Hatu Sheikh*, 45 I. C. 645.

**Sub-section (2). Appeal from Ex Parte Decree.**—A defendant against whom a decree has been passed *ex parte*, and who has not adopted the

improperly alienated. Such a suit is within the scope of this section.—*Sajedur Raja Chowdhuri v. Gour Mohun*, 24 C. 418. (14 M. 186, *followed*).

If a property is valid *debutter* absolutely dedicated to one or more idols, it falls within the description of property conveyed or bequeathed in trust and the *shebait* is a trustee within the meaning of art. 184 of the Limitation Act. (31 C. 914, *followed*).—Limitation for a suit to recover possession by succeeding *Shebait*.—*Ram Kanai Ghosh v. Raja Hari Narain Singh*, 2 C. L. J. 546. See also *Shama Charan v. Abhiram*, 82 C. 511: 8 C. L. J. 906: 10 C. W. N. 738 reversed by 86 C. 1003 P. C. and *Ram Churn v. Protap Chandra*, 2 C. L. J. 448.

Where a suit is brought by plaintiffs, not in assertion of their individual rights but on behalf of the general public who are interested in the institution for the settlement of a proper scheme of management of the charities and for other reliefs, there is no bar of limitation; *Gopu Nataraja Chetty v. Rajammal*, 43 M. L. J. 448: (1922) M. W. N. 464.

**Mode of Valuation in Suits under this Section.**—See notes under sec. 15.

**Court-fees.**—The proper Court-fee in a case under s. 92 is Rs. 15, if there is a prayer for the appointment of the plaintiffs as trustees and as it falls under Art. 17, cl. (6) of the Court Fees Act, and this is so even also a prayer for accounts; *Ramrup Das v. Mohunt Sitaram*, 12 C. L. J. 211: 14 C. W. N. 932. A Court-fee of Rs. 15 is sufficient for a suit for removal of a manager from office.—*Muhammad Sirajul Haq v. Imamuddin*, 19 A. 104, and *Veerasami Pillai v. Chockappa Mudaliar*, 11 M. 149, note; *Gopi Das v. Lal Das*, 97 P. R. 1918: 173 P. W. R. 1918.

**93.** The powers conferred by Sections 91 and 92 on the Advocate-General may, outside the Presidency-towns, be, with the previous sanction of the Local Government, exercised also by the Collector or by such officer as the Local Government may appoint in this behalf. [LAST PARA. S. 539.]

Exercise of powers of Advocate-General outside Presidency-town.

## COMMENTARY.

This section corresponds with the last para. of s. 539 of Act XIV of 1882. The powers conferred by this section on the Advocate-General are exercised.—

- (a) in Lower Burma, by the Government Advocate (see *Burma Gazette*, 1893, Pt. I, p. 99);
- (b) in Moulmein in respect of the trust for the maintenance of certain Pagodas, by the Deputy Commissioner (see *Burma Gazette*, 1889, Pt. I, p. 221);
- (c) in Mandalay, by the Deputy Commissioner (see *Burma Gazette*, 1890, Pt. I, p. 455);
- (d) in the Central Provinces, by the Secretary to the Chief Commissioner (see Central Provinces List of Local Rules and Orders, Ed. 1896, p. 157);

Where during suit, an agreement had been arrived at, the terms were signed by the parties and all that the Court had to do was to pass a decree according to the terms to which the parties agreed, *held* that the decree was a consent decree and no appeal lay; *Gulab Chand v. Ramsukh*, 91 I. C. 294: A. I. R. 1926 Bom. 89.

Where a suit is time-barred but the defence of limitation is waived and a decree is passed, such a decree is a consent one, and no appeal lies therefrom; *Sri Ramchandra v. Chaitana Sahu*, 39 M. L. J. 68: 24 C. W. N. 1055 P. C.

A judgment obtained by consent of Counsel acting in Court in a matter within his authority cannot form the subject of appeal; *Radha Kishen v. Hukhmi Chand*, 81 C. L. J. 283.

An order directing the appointment of a Commissioner with the consent of parties does not come under cl. (3) of s. 96; *Lodd Govinda Doss v. Raja of Karvetnagar*, 29 M. L. J. 219.

A decree to which the pleaders of both parties had consented is a consent decree, though subsequently at the time of passing the decree, one of the parties resiled from it. From such a decree there is no appeal; *Govindasami v. Kaliaperumal*, (1922) M. W. N. 83; 16 L. W. 155.

Although there is no appeal from a consent decree, yet under Or. XLIII, r. 1 (m) there is appeal from an order recording or refusing to record a compromise. *See* the case noted under Or. XLIII, r. 1 (m). *See Paban Sardar v. Bhupendra*, 43 C. 85.

Although no appeal lies against a consent decree, it is competent to the party who has not joined in the compromise to appeal against the decree, if he has been prejudiced thereby; *Lokenath v. Jagu Singh*, 22 C. L. J. 338: 20 C. W. N. 178.

As to the mode of setting aside a consent decree, *see* the cases noted under Or. XXIII, r. 3.

An agreement by parties to a suit to abide by a sum to be named by the pleaders of the parties is not an adjustment of the suit and a decree passed on such agreement is not a consent decree and is therefore appealable; *Seumal v. Pursomal*, 6 S. L. R. 166: 19 I. C. 450.

Where in a suit under s. 92, Civil Procedure Code, the plaintiffs through their counsel merely approved of the appointment of certain gentlemen as a committee of the management, *held* that this did not make the decree a consent decree, when in other matters decided by the Judge, there was no consent by either party to his conclusions; *Muhammad Ishaq v. Muhammad Hussain Khan*, A. I. R. 1926 Lah. 382: 100 I. C. 838.

When a consent order is sought to be set aside, serious and substantial injustice must be shown to result from letting the consent order, which was made under mistake of fact, stand; *Jamnabai v. Fazalbhoy Heptoola*, 18 L. W. 437: 8 M. L. T. 376 P. C.

S. 96 (3) applies to suits and not to proceedings in execution; *Lachman Lal v. Padarath Singh*, 4 Pat. L. T. 735.

*Appeal on a Question of Costs.*—*See the cases noted under section 35, ante.*

## PART VI

### SUPPLEMENTAL PROCEEDINGS.

94. In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,—  
Supplemental proceedings.

- (a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;
- (b) direct the defendant to furnish security, to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;
- (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;
- (d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;
- (e) make such other interlocutory orders as may appear to the Court to be just and convenient. [New.]

### COMMENTARY.

This section is new. The general powers of Courts in regard to arrest and attachment before judgment, issue of temporary injunctions, appointment of receivers and other interlocutory orders, have been summarized in this section and the details of procedure have been relegated to the rules in Schedule I

Cl. (a).—The general powers of Courts to issue warrant for arrest of the defendant before judgment are summarized in clause (a). The details of procedure contained in ss. 477 to 482 of Act XIV of 1882 will be found in Schedule I, Or. XXXVIII, rules 1 to 4 *See notes under those rules.*

Cl. (b).—The general powers of Courts to order attachment before judgment, are summarized in cl. (b). The details of procedure contained in ss. 483 to 489 of Act XIV of 1882, will be found in Schedule I, XXXVIII, rules 5 to 12. *See notes under those rules.*

(c) **Appeals under N. W. P. Rent Act.**—In a suit for arrears of rent in which the right to receive rent is disputed but there is no determination of proprietary right, the Collector's decision is not appealable to the District Judge.—*Chota v. Jitan*, 3 A. 63; *Krishna Ram v. Hingu Lal*, 4 A. 237. But see *Bisheswar v. Sugundhi*, 1 A. 366.

An appeal lies to the District Judge under s. 180 of the North-Western Provinces Rent Act, 1881, as well from the appellate as from original decisions of the Collector.—*Raja Singh v. Sulka*, 6 A. 398. An appeal also lies to the High Court from a decree of the District Judge passed in appeal from an appellate decree of a Collector.—*Jai Ram v. Dulari*, 5 A. 309.

(d) **Appeals under the Land Acquisition Act.**—An appeal lies to the High Court from the decision of an Additional Judge appointed to hear cases under the Land Acquisition Act, 1870.—*Poresnath v. Secretary of State*, 16 C. 31.

The order of the District Judge, on a reference by the Collector under s. 15 of Act X of 1870, apportioning compensation amongst rival claimants is appealable.—*Kashim v. Aminibi*, 16 B. 525.

An appeal lies to the High Court from a decision of the Chief Judge of the Small Cause Court of Bombay, granting compensation to the owner of land taken by the municipality.—*Municipal Commissioner for City of Bombay v. Abdul*, 18 B. 184.

An appeal will lie to the High Court from an order of the District Judge made upon a reference by the Collector under Secs. 18 and 19 of the Land Acquisition Act, 1894, as to the disposal of compensation awarded for land.—*Sheo Rattan v. Mohri*, 21 A. 354 (23 C. 526 followed).

An appeal lies against an award in so far as it directs investment, under s. 54 of the Land Acquisition Act I of 1894.—*Shiva Rao v. Nagappa*, 29 M. 117.

(e) **Appeals under Guardian and Wards Act (VIII of 1890).**—No appeal lies under the Guardian and Wards Act (VIII of 1890) from an order of a District Judge refusing to remove a guardian.—*Mohima Chunder v. Tarini Sankar*, 19 C. 487. See also *In re Bai Harkha*, 20 B. 687; *Pakhwanti v. Indra Narain*, 23 C. 201; *Imtiazunnissa v. Anwarullah*, 20 A. 483; and *Pran Bandhu v. Brahmamayi Dasya*, 1 C. W. N. 693.

An order of the District Judge refusing remuneration to a guardian of the property of certain minors, is not appealable.—*Gangadhar v. Shielingrao*, 24 B. 95.

(f) **Appeals under Religious Endowments Act (XX of 1863).**—No appeal lies to the High Court from the order of a District Judge under s. 5 of Act XX of 1863, appointing a trustee of a religious endowment.—*Soma Sundara v. Vythilinga*, 19 M. 285 (11 M. 26 followed; 4 M. 295 dissented from).

The High Court has no jurisdiction to hear an appeal from the order of a District Judge under section 10 of Act XX of 1863, appointing a member to fill a vacancy in a committee.—*Minakshi v. Subramanya*, 11 M. 26, P. C.

An order granting leave to bring a suit for the purpose of having the accounts of a certain religious endowment is not a decree and no appeal

95. (1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last preceding section,—

Compensation for obtaining arrest, attachment or injunction on insufficient grounds.

(a) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or

(b) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same,

the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him :

Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction.

(2) An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction. [Ss. 491 AND 497.]

## COMMENTARY.

Sections 491 and 497 of Act XIV of 1882 have been amalgamated together. Except the alteration of words and language, no material changes have been made. The words "*by its order*" have been substituted for the words "*in its order*" which occurred in the old section

**Meaning and Scope of the Section.**—This section provides that where an arrest or attachment before judgment has been actually made under the provisions of Or. XXXVIII, or where temporary injunction under the provisions of Or. XXXIX, has been actually granted; and where the Court is satisfied that such arrest, attachment or injunction was obtained on wholly insufficient grounds; that is, the grounds mentioned in Ors. XXXVIII or XXXIX did not really exist and the order of the Court was obtained by misrepresentation or false allegations; or where the plaintiff's suit is dismissed not on technical grounds but on the merits, that is, on the grounds that there was no reasonable or probable cause for instituting the suit, then the Court on the application of the defendant and on being satisfied as to the existence of the grounds mentioned in either of the clauses (a) or (b) award to the defendant compensation to the extent of Rs. 1,000.

**Award of Compensation for Improper Arrest, Attachment or Grant of Injunction.**—Any person when he unlawfully interferes with the exercise of property rights of another, commits an act in the nature of trespass to property and is liable in an action for trespass; it is not necessary for the plaintiff in such a case to prove any malice or want of reasonable or probable cause. A party deprived by an injunction unlawfully taken

ctor bring in his evidence to prove his right to obtain probate. *Held* that no appeal lies from such an order—*Brojo Nath v. Dasmony*, 2 C. L. R. 589.

(i) Appeals under the Transfer of Property Act (IV of 1882).—An order under s. 87 of the Transfer of Property Act (IV of 1882), extending the time for payment of the mortgage-money by a mortgagor is a decree within the meaning of ss. 2 and 244, C. P. Code, 1882 (ss. 2 and 47) and an appeal will lie from it.—*Rohima v. Nepal Rai*, 14 A. 520.

An order mentioned in s. 87 of the Transfer of Property Act IV of 1882 is an order in execution of the substantive foreclosure decree, and is appealable as decree.—*Kedar Nath v. Lalji Sahai*, 12 A. 61.

An appeal from an order absolute made under s. 89 of the T. P. Act, lies under the provisions of s. 540, C. P. Code, 1882 (s. 96) as an appeal from original decree.—*Pramatha Chandra v. Khetra Mohan*, 29 C. 651 (22 C. 925 and 931 *relied upon*; the decision of the majority of the Full Bench in *Mallikarjuralu Setti v. Lingamuri*, 25 M. 244 *dissented from*, and that of the minority *followed*). Followed in *Bechu Singh v. Becharam*, 10 C. L. J. 91.

(j) Appeal under Trusts Act (II of 1882).—No appeal will lie from an order dismissing an application for the removal of a trustee, such order not being a "decree" within the meaning of s. 2, C. P. Code, and not being otherwise appealable.—*Wilson v. Macafee*, 19 A. 131.

(k) Appeals under the Indian Companies Act (VI of 1882).—Right of appeal conferred by s. 169 of Act VI of 1882, extends to all orders or decisions made or given in the matter of the winding up of a company whether the winding up be compulsory, voluntary or under supervision. An order refusing to make a supervision order under s. 191, C. P. Code, 1882 (Or. XVIII, r. 15) is appealable under s. 169, C. P. Code, 1882 (Or. XVI, r. 11).—*Kesavaloo v. Murugappa*, 30 M. 22; 16 M. L. J. 537.

*Held* that no appeal lay from an order made under s. 162 of Act VI of 1882, by a Court under the supervision of which proceedings in liquidation under that section have been taken.—*Wall v. Howard*, 18 A. 215.

An appeal lies from an order passed under s. 58 of the India Companies Act (VI of 1882), although no issue has been directed upon a question of title.—*Amrita Lal v. Srish Chunder*, 26 C. 944; 4 C. W. N. 101.

(l) Appeals under Registration Act (III of 1877).—An appeal lies from a decree in a suit under section 77 of the Registration Act, 1877 to obtain registration of a document.—*Bishramhar Pandit v. Prabhakar*, 8 B. 269.

(m) Appeal under Clause 15 of the Letters Patent.—An order refusing to enlarge the time for preferring an appeal which had become time barred is not a judgment within the meaning of cl. 15 of the Letters Patent, and is therefore not appealable.—*Gobind Lal v. Shib Das*, 33 C. 1323; 3 C. L. J. 545; 10 C. W. N. 986.

An order granting leave to sue under cl. 12 of the Letter Patent is a judgment and is appealable under cl. 15 of the Letters Patent.—*Laliteswar Singh v. Ramenwar Singh*, 33 C. 619; 11 C. W. N. 619; 5 C. L. J. 405.

The order for payment of compensation for unreasonable arrest before judgment on insufficient grounds is independent of the decree in the suit and the proper procedure is for the Court to make a separate order: the amount of compensation can however be set off against the decree amount; *Kannappa v. Sambasiva*, 21 I. C. 756.

It is doubtful if an award of compensation can be made in a case where the order of injunction was passed after hearing both the parties and it was found that there were sufficient grounds for making it. The proper stage for making such an application would be only when the suit is heard and until then it would be premature; *Chintamani Venkatapayya v. Venkatapayya*, 17 L. W. 150: 71 I. C. 450.

**Counter-Claim of the Defendant.**—Under the Civil Procedure Code, a cross-claim made by a defendant against a plaintiff cannot, in ordinary cases, be set up as a defence, except when it arises out of the very transaction sued upon and is in the nature of a set-off; but the special cross-claim provided by this section, viz., a claim for compensation for arrest on insufficient grounds, may under that section be taken into account in any suit, and the amount awarded as compensation be awarded in the decree, and thus *pro tanto* be a defence to the plaintiff's claim in the suit—*Roulet v. Fetterie*, 18 B. 717.

The defendant in a certain case was arrested before judgment and produced in Court. He then filed a counter-petition claiming compensation for improper arrest—This was awarded to him. *Held* that the award of compensation was perfectly legal and was not vitiated by the absence of an application as contemplated by s. 95 of the C. P. Code; *Subraya Devay v. Venkatarama*, 8 L. W. 80: (1916) M. W. N. 76.

Pending a civil suit against him, the defendant was arrested before judgment but was afterwards released. He then made a claim of Rs. 25,000 against the plaintiff as damages for his wrongful arrest and applied to include in the suit his counter-claim of Rs. 25,000. *Held* that the question which the defendant desired to be tried was not one which ought to be tried by counter-claim.—*Magoomal Jethanand v. Hamid Bin Ali*, 10 Bom. L. R. 1002.

“For the expense or injury caused to him.”—The words “the expense or injury caused to the defendant” in s. 95 are not confined to cases where special damage is shown or where the defendant has suffered some special injury that can be measured in money. General damages can be awarded under the section for injury to reputation or the humiliation caused of necessity by the arrest; *Subraya Devay v. Venkatarama Aiyar*, (1916) M. W. N. 76.

**This Section Does Not Bar a Regular Suit for Compensation.**—The remedy given under this section to an injured defendant of instituting proceedings by an application instead of by a suit is optional. That he is also competent to institute a regular suit against the plaintiff for wrongful arrest, attachment or injunction is clear from the provisions of sub-section (2). In a suit for compensation, however, the plaintiff must prove actual malice in addition to the facts required to be proved by this section; *Nanjappa v. Ganapathi*, 85 M. 598. But whether he elects to proceed by suit or by an application under this section, the defendant is not entitled to any compensation unless the attachment has been :



their failure to do so, from raising objections to such decrees in appeals from final decrees. On this point they accept the unanimous opinion of the Calcutta High Court. They think it unreasonable that parties should allow proceedings to be carried on to their final stage and large costs to be incurred if they intend to rely upon objections which could be taken at an earlier stage. This section renders it obligatory upon a party who considers himself aggrieved by a preliminary decree, to appeal from that decree, at the risk of being precluded from disputing its correctness on an appeal from the final decree. We feel strongly that this is a most useful provision as tending to that which is so desirable, namely, finality in litigation."—*Notes on Clauses.*

**Omission to Appeal from Preliminary Decree.**—This section requires that an appeal should be preferred from a preliminary decree, and that if it is not preferred, the party aggrieved shall not be allowed to challenge the finding on the preliminary question in appeal on the merits of the suit. The intention of the Legislature was clearly to prevent preliminary questions being raised in the form of an appeal after the case had been decided on the merits; *Govind Ramchandra v. Vithal Gopal*, 86 Bom. L. R. 560. See also *Ahmed Musaji v. Hashim Ebrahim*, 19 C. W. N. 449, P. C.: 42 C. 914, P. C.

In a suit for accounts the defendant did not raise the plea of limitation in his written statement nor was any issue directed upon the point. A preliminary decree was passed and no appeal was preferred against it. Where however, the final decree for accounts was passed, the defendants for the first time raised the plea that the suit was barred by limitation. Held that under s. 97 the defendant was precluded from raising the plea of limitation, inasmuch as he had not appealed against the preliminary decree; *Govinda Chandra v. Nirode Kumar*, 50 I. C. 747.

**Where No Preliminary Decree is Drawn up.**—Under the Code the right to appeal arises when there is a decree, i. e., when there is formal expression of adjudication. There is no right of appeal against a preliminary judgment. The obligation to appeal against a preliminary decree, by which a party is aggrieved, contemplated by section 97, arises when the right to appeal accrues and not before. Unless the preliminary decree is drawn up, no appeal could lie under the provisions of this section. Under the Code, it is the duty of the court to draw up a decree. There is no express provision of law which requires the party concerned to move the court to draw up the decree. It cannot be said that a party waives his right to appeal, when he or his pleader omits to ask the court to draw up a preliminary decree. Mere omission on his part to ask the court to do that which it is the duty of the court to do of its own motion, cannot affect the right of the party to appeal which can arise only when the decree is drawn up by the court; *Kaluram v. Gangaram*, 38 B. 331: 16 Bom. L. R. 67. Similar view was also taken in *Narain Balakrishna v. Gopal*, 38 B. 392: 16 Bom. L. R. 206; in *Sakharam v. Sadashiv*, 37 B. 480: 15 Bom. L. R. 382; in *Sidhanath v. Gonesh*, 37 B. 60: 14 Bom. L. R. 916 (34 B. 182 followed); *Mahu v. Kishan*, 8 N. L. R. 92 15 I. C. 935. But in *Govind Chandra v. Vithal Gopal*, 86 B. 536: 14 Bom. L. R. 560, it was held that it is the duty of the party or his pleader to move the court to draw up a preliminary decree. In *Kamini Debi v. Promotho Nath*, 20 C. L. J. 476: 19 C. W. N. 755, it has been held that if a decision is in reality a preliminary decree, a mere omission on the part of the court to embody its effect in a formal ex-

# PART VII

## APPEALS.

### APPEALS FROM ORIGINAL DECREES.

96. (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

Appeal from original decree.

(2) An appeal may lie from an original decree passed *ex parte*.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties. [S. 540.]

### COMMENTARY.

**Changes Introduced in the Section.**—This section is almost similar to section 540 of Act XIV of 1882 Clause (3) which is new has been added to this section. "As regards appeals from original decrees we have departed but slightly from the existing Code. We have thought it advisable to give legislative sanction to the view that no appeal shall lie from a consent decree."—*See the Report of the Special Committee.*

In the Bill another clause was introduced to the effect that "no appeal shall lie on a matter of costs only" but it has been omitted in the Act on the ground that case law on the subject is sufficiently clear. *See the cases noted under the heading "Appeal on question of costs" in s. 35. ante.*

"An appeal shall lie from every decree."—This section expressly lays down that an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Courts, except in those cases where the right of appeal has been cut down by any express provisions in the body of this Code or by any other law for the time being in force. Thus the general rule laid down in this section is that all decrees are appealable, unless the right of appeal is expressly taken away either by the provisions of this Code or by any other law.

It should however be borne in mind that this right of appeal is given from all adjudications which are decrees as defined in section 2, and when there is no decree there is no right of appeal. An appeal lies from the decree and not from the judgment; and although the word "*decision*" is used in the concluding portion of Sub-section (1), that does not make any difference.

It is not open to the appellants in an appeal against the final decree to attack the preliminary decree which might have been directly challenged by an appeal. But the appellate Court can consider whether the preliminary decree was capable of enforcement and whether it afforded a basis for the final decree as made; *Taraprasanna v. Kalika Mohan*, 38 C. L. J. 111.

*As to what is and what is not a preliminary decree and what are the essential requisites of a preliminary decree, see notes under, section 2.*

**98.** (1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

Decision where appeal heard by two or more Judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed :

Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ, and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it. [S: 575.]

## COMMENTARY.

"The wording of the proviso has been altered; it now deals with the decision on the point of law referred."—*Report of the Select Committee.*

**Alterations made in the Section and their Effect.**—This section corresponds with s. 575 of Act XIV of 1882. The words "*they may state the point of law upon which they differ, and the appeal shall then be heard upon that point only,*" have been substituted with some variations. No other material alterations have been made.

The effect of these alterations is clearly pointed out in the following observations: "Under the old Code the appeal was referred to one or more of the other Judges. Under the present Code, it is a point of law that is to be heard by one or more of the other Judges. The result is that whereas under the old Code I could have disposed of this appeal on this reference, under the present Code I cannot. The intention of s. 98 is that the Judges hearing the appeal should come to a complete decision with the reservation on the point of law on which they differ, and they should by their judgments make it clear that if the point of law is decided in one way, it will have a certain final result and if it is decided in another way, it will have another and a different final result."—*Per Jenkins, C. J., in Md. Zauhar Ali v. Samiruddin*, 18 C. W. N. 33. A similar view was taken by *Mookerjee, J., in Md. Mehdi Hassan v. Sheoshankar*, 39 C. 353 (309): 14 J. 552 (566).

See the cases noted below under the heading—APPEALS UNDER ANY OTHER LAW.

**Agreement Not to Appeal.**—A judgment-debtor, having induced the decree-holder to believe, and having expressly undertaken that he would not prefer an appeal and having by this representation and undertaking procured his own release from arrest, is estopped from appealing contrary to the deliberate representation and undertaking; *Protap Chunder v. Arathoon*, 8 C. 455: 10 C. L. R. 453. See *Bahirdas v. Nobin Chunder*, 29 C. 306: 6 C. W. N. 121; *Ananth Das v. Ashburner & Co.*, 1 A. 267; *Gajendra v. Durga Kunwar*, 47 A. 637: 89 I. C. 768: A. I. R. 1925 All. 503 F. B.

**Appeal Lies from Every Decree and Not from Any Finding or Judgment.**—A decision that a matter is not *res judicata* is not a preliminary decree from which an appeal can lie; *Bharma v. Bhamagavda*, 39 B. 421: 28 I. C. 461 (16 Bom. L. R. 945, applied).

An appeal lies from the decree and not from the judgment of a Court of original jurisdiction. In a suit to recover possession of land by setting aside a *zuripeshgee* leave, a decree was made dismissing the suit, but in the judgment there was a finding against the defendant as to some items of the consideration for the lease. Held that he could not appeal against the finding.—*Pankooer v. Bhugwant Kooer*, 6 N. W. P. 19; *Agra F. B.* (1874) 298; *Nawab Rai v. Bajrang Lal*, 6 N. W. P. 412; *Shama Soonduree v. Degamburee*, 13 W. R. 1; *Chowdhry Mohomed Momin v. Lutafut Hossein*, 13 W. R. 239; *Nur Bakhsh v. Ahmad Bakhsh*, 120 P. L. R. (1911); 101 P. W. R. 1911. *Contra*—*Sheogolam v. Nursingh*, 4 N. W. P. 120; and *Stephenson v. Unnoda*, 6 W. R. Mis. 18, where it has been held that there is nothing in strict law to prevent a party from appealing against a decision in his favour.

Parties have no right to appeal against findings embodied in the judgment but not in the decree.—*Parmaitunnissa v. Lutfunnissa*, 7 A. 606. (4 A. 497, followed). *Niamutkhan v. Phadu Buldia*, 6 C 319; 7 C. L. R. 227; *Koylash Chunder v. Ram Lall*, 6 C. 206; *Anusuyabai v. Sakharani*, 7 B. 464. But see *Lachman v. Mohan*, 2 A. 497; and *Nanda Lall v. Bonomali*, 11 C. 544.

When an original decree is amended under s. 206, C. P. Code, 1882 (s. 152) it, as amended, is the decree in the suit, and an appeal therefore lies from it under s. 540, C. P. Code, 1882 (s. 96), when the validity of the amendment can be questioned.—*Raghunath v. Raj Kumar*, 7 A. 276; and *Surta v. Ganga*, 7 A. 411.

Where a Judge, after the defendant's written statement was put in, framed certain preliminary issues and decided them, directing part of the plaintiff's claim to be dismissed, and part to be tried on the merits—held that no appeal lies from such an order on the part of the plaintiff, because the Civil Procedure Code only allows an appeal, where there has been a decision relating to the disposal of the entire suit, or on the part of the defendant, inasmuch as there had been no final order to take an account.—*Venkatagiri v. Mahomed Rahimtulla*, 3 M 13.

An order merely determining a point of law arising incidentally or otherwise in the course of a proceeding for determining the rights of parties seeking relief, is not appealable as decree.—*Beharilal v. Kedarnath*, 18 C. 469.

Where the Court is divided in opinion as regards the question of costs, an appeal lies on that question under cl. 15 of the Letters Patent; *Mohendra v. Ashutosh*, 20 C. 762.

Section 27 of the Letters Patent of the High Court of the North-Western Provinces has been superseded on those cases only to which s. 575, C. P. Code, 1882 (s. 98), properly and without straining the language applies. There are many cases to which s. 575, C. P. Code, 1882 (s. 98), even with the aid of s. 647 (s. 141), does not apply; and to these s. 27 of the Letters Patent is still applicable. One of the cases to which s. 575, C. P. Code, 1882, (s. 98), does not apply is where a preliminary objection being taken to the hearing of a first appeal is time-barred, the Judges of the Division Bench differ in opinion as to whether the appellant has shown sufficient cause, within the meaning of s. 5 of the Limitation Act (XV of 1877), for not presenting the appeal within the prescribed period.—*Husaini Begum v. Collector of Muzaffarnagar*, 11 A. 176. Distinguished in *Narayanasami v. Asuru Reddi*, 25 M. 548.

Where two Judges of a Division Bench have concurred in a final decree, the fact that there is a difference of opinion as to one point, amongst others, raised in review on the judgment on which such final decree is based, is no ground for an appeal under clause 15 of the Letters Patent.—*Hurbuns Sahay v. Thakoor Pershad*, 10 C 98: 13 C. L. R. 285.

**Opinion of the Senior Judge Prevails.**—This section does not apply in the case of appeals under cl. 15 of the Letters Patent from judgments of the High Court in the exercise of its Original Jurisdiction. Under cl. 36 of the Letters Patent, where the Judges are equally divided in opinion, the judgment of the senior Judge will prevail.—*Roop Lal v. Lakshmi Dass*, 29 M. 1; *Justin Hall v. Arthur Francis*, 24 C. W. N. 352: 58 I. C. 421. But if the appeal is from a subordinate Court, the procedure is governed by the present section; *Bhuta v. Lakadu*, 43 B. 433: 50 I. C. 715; *Tin Tin v. Maung Ba*, 1 Rang. 584: 77 I. C. 385: A. I. R. 1924 Rang. 148; *Prasulla v. Bhabani*, 97 I. C. 897: A. I. R. 1926 Cal. 1211: 30 C. W. N. 1011; *Punjab Akhbarat and Press Co. v. Ogilvie*, 7 Lah. 179: 8 Lah. L. J. 13: 93 I. C. 344: A. I. R. 1926 Lah. 65

There is no specific provision in s. 98 of the C. P. Code within the meaning of s. 4 of the said Code to affect the special procedure laid down in s. 36 of the Letters Patent of the Bombay High Court under which, if the judges of the High Court sitting in a Division Bench and hearing an appeal under the Letters Patent are equally divided, the opinion of the senior Judge prevails; *Bhaidas Shivdas v. Bai Gulab*, 45 B. 719, P. C. 25 C. W. N. 605: 33 C. L. J. 488; *Surajmal v. Horniman*, 20 Bom. L. R. 185: 47 I. C. 449.

Where an appeal under s. 10 of the Letters Patent is heard by a Bench consisting of two Judges, and such Judges are divided in opinion as to the decision to be given on such appeal, the appeal will be decided according to the opinion of the senior Judge; that is, s. 575, C. P. Code, 1882, (s. 98), does not, in respect of appeals under s. 10 of the Letters Patent, override s. 27 of the Letters Patent.—*Lachman v. Ram Logan*, 26 A. 10. Referred to in *Pandy Wallad Dugdu v. Jamnadas*, A. I. R. 1923 Bom. 218.

**Right of Appeal from the Judgment of the Senior Judge.**—An appeal lies to the High Court under clause 15 of the Letters Patent from the dis-

be contrary to all principles of justice and equity to hold that he is precluded from agitating the matter in appeal, merely because the suit was decided in his favour on some other ground.—*Venkataswarulu v. Lingayya*, 47 M. 633; 83 I. C. 960; A. I. R. 1924 Mad. 689; *Venkata Charlu v. Radha-bayamma*, 7 M. L. J. 612; A. I. R. 1924 Mad. 858.

An appeal by defendants against whom specifically no decree was made, but whose defence to the suit was necessarily disposed of by the decree, will lie.—*Jamna Das v. Udey Ram*, 21 A. 117.

A party cannot appeal against a decree in his favour solely with a view to attack the propriety of the grounds in support of that decree; *Byomkesh Seth v. Bhut Nath Pal*, 84 C. L. J. 489.

Where the claim of the plaintiffs in a suit is not either decreed or dismissed, yet if the right and title asserted by them to the properties in dispute, is implicitly recognized by the decree, the defendants are entitled to appeal from it.—*Behari Bhagat v. Begam Bibi*, 3 A. 75.

In a suit for redemption on the allegation that the mortgage debt had been satisfied from the usufruct, the Court of first instance held that the plaintiffs were entitled to redeem, but dismissed the suit on the ground that the mortgage-debt had been satisfied. Held that the defendants were entitled to appeal.—*Ramgholam v. Sheo Tahal*, 1 A. 266.

A transferrer of the rights and interests of the plaintiff in a suit, who was substituted for the original plaintiff in the very inception of the case, without any objection on the part of the defendant is entitled to appeal.—*Muneeruddeen v. Parbutty Churn*, 15 W. R. 121. But the purchaser of the rights and interests of a plaintiff or of a defendant, after the disposal of a suit, has no right of appeal against the order decreeing or dismissing the suit.—*Dhunni v. Sunnoo*, 15 W. R. 106; *Juddoopattee v. Chunder Kant*, 9 W. R. 309; *Gajadhar v. Ganesh*, 7 B. L. R. 149; 15 W. R. 485; *Troylockho Nath v. Brindabun*, 18 W. R. 438.

A party improperly brought on the record as representative of a deceased judgment-debtor, can appeal on the question of costs alone.—*Bishen Dayal v. Bank of Upper India*, 18 A. 290.

An appeal may be preferred by persons who did not sign the compromise petition and were not parties to the compromise decree; *Gobind Chandra v. Bhagabat*, 27 I. C. 242; see also *Nityamoni v. Gokul Chandra*, 18 C. L. J. 16.

See also cases noted under Or XLI, r. 4.

Right of Appeal between Co-defendants and Pro-Forma Defendants.—Where a Sub-Judge dealt with a case at the hearing as raising not only a question between the plaintiff and defendants, but also between the defendants.—Held that one of the defendants could appeal against the decree between himself and the other defendant.—*Souru Padmanabh v. Narayanrao Bin*, 18 B. 520 (7 W. F. 366 and 5 A. 266 distinguished).

A pro-forma defendant against whom no judgment has been given has no right to appeal, even if another party has been found to be the owner of land which he claims; for such finding carries with it no legal consequence as against him.—*Ram Dass v. Hureehur*, 23 W. R. 86.

stantially varied nor any case shall be remanded by the Appellate Court on account of any misjoinder of parties or causes of action or on account of any error, defect or irregularity in any proceedings in a suit unless such error, defect, irregularity, etc., affects the merits of the case or the jurisdiction of the court. The object of the section is to prevent injustice being done on the ground of mere technicalities. But where it appears that the error, defect, or irregularity is so grave as prejudicially affects the trial of the case on the merits or the jurisdiction of the court, then such error, defect, or irregularity would be a material one and a good ground for reversing or varying the decree. Under the former Code, decrees were reversed simply on the ground of misjoinder of parties and causes of action and it is to prevent the reversal on those grounds that the words "*misjoinder of Parties or causes of action*" have been added. In other words, the effect of the addition of the above words is that where the court of first instance decided the question of misjoinder of parties or cause of action in favour of the plaintiff, there is an end of the matter and the defendant is precluded from raising the question in appeal (*see* 18 C. L. J. 260). But where the objection of misjoinder of causes of action (as pointed out by Cox. J., in 21 I. C. 438), goes to the jurisdiction of the court then this section does not cure the defect. Similar provisions are also to be found in section 167 of the Evidence Act, in section 34 of the Stamp Act and in section 11 of the Suits Valuation Act VII of 1887, which to a certain extent modifies this section as will be presently shown. The section mentions two exceptions: (1) want of pecuniary or territorial jurisdiction (*see Ramjit v. Ramdor*, 17 C. W. N. 116 (120), (2) error, defect or irregularity prejudicially affecting the trial of the case on the merits. In those two exceptional cases only the Appellate Court may reverse or vary the decree, otherwise not. It overrides 26 B. 259; 27 M. 80; 24 C. 540; and similar other cases.

**Misjoinder of Parties and Causes of Action.**—As to misjoinder of plaintiffs, *see* Or. I. r. 1; as to misjoinder of defendants, *see*, Or. I, r. 3; as to misjoinder of plaintiffs and causes of action, *see* Or. II, r. 3; as to misjoinder of defendants and causes of action, *see* Or. II, r. 3; as to misjoinder of causes of action *see* Or. II, rr. 3, 4 and 5.

**Non-Joinder.**—The words "*misjoinder of parties*" have been used in this section but these words include nonjoinder of parties also.—*Yakkannath v. Manakkat*, 33 M. 436: 20 M. L. J. 344. Doubted in *Shanmuga v. Sabbaya*, 42 M. L. J. 133: 70 I. C. 645: A. I. R. 1922 Mad. 317.

**"In any proceedings in the suit."**—These words have been substituted for the words "*whether in the decision or in any order passed in the suit or otherwise*" which occurred in the old section. The object of the substitution is that the word "*proceedings*" is wide enough to include the error, defect or irregularities in the frame and institution of the suit as well as irregularities subsequent to the institution. The addition overrides 26 B. 259 (266).

**Erroneous Remand Order when Covered by this Section.**—Appeal on full Court-fee from decree dismissing suit in part—Remand of whole case though no cross-appeal or objections preferred—High Court competent in second appeal to consider the validity of remand order not specifically appealed—Case not covered by this section.—*Cheda Lal v. Badullah*, 11 A. 85.

course provided by s. 108, C. P. Code, 1882 (Or. IX, r. 18) can appeal from such decree under the general provisions of s. 540, C. P. Code, 1882 (s. 96).—*Kuruppan v. Ayyathorai*, 9 M. 445; *Ashruffunnissa v. Leharcaur*, 8 C. 272; 10 C. L. R. 502; *Jadunath v. Ram Narain*, 12 O. C. 25; 1 I. C. 329. See also *Anantharama v. Madhava*, 3 M. 264; *Luckmidas v. Ebrahim*, 2 B. 644; *Ex parte Modolatha*, 2 M. 75.

An appeal lies from an *ex parte* order directing attachment in execution of a decree.—*Zamindar of Sivagiri v. Alwar*, 3 M. 42.

Held that a defendant whose application to set aside an *ex parte* decree under s. 108, C. P. Code, 1882 (Or. IX, r. 18) was refused on the merits, could not be allowed to fall back upon the remedy, by way of appeal, which was open to him at the time when the original decree was passed, and of which he did not choose to avail himself.—*Ardha Chandra v. Matangini*, 23 325 (827). See, however, *Golap Singh v. Indra Kumar*, 9 C. L. J. 367; 18 C. W. N. 493.

When a suit is decided *ex parte*, an Appellate Court to which an appeal is preferred under this section, has jurisdiction to reverse the decree on the ground that such Court was wrong in proceeding to decide the suit *ex parte* and remand the suit for rehearing.—*Sadhu Krishna v. Kuppan Ayyangar*, 30 M. 54; 16 M. L. J. 479 (23 C. 738; 17 B. 733 and 23 M. 260 dissented from; 23 M. 445 followed).

Where an *ex parte* decree was set aside by an order under s. 108, C. P. Code, 1882 (Or. IX, r. 18) and the suit was dismissed on the merits, held that such order was not an order affecting the decision of the case under s. 591, C. P. Code, 1882 (s. 105) and was not appealable under that section.—*Chintamoney v. Raghu Nath*, 22 C. 981. Followed in *Krishna Chandra v. Mohesh Chandra*, 9 C. W. N. 584.

Sub-section (3).—No Appeal Lies from a Consent Decree.—This sub-section is new. It has been inserted with a view to give legislative sanction to the view that no appeal lies from a consent decree. Under the present Code, a consent decree may be passed under Or. XXIII, r. 3, *Gurcharan v. Shubdev*, 3 Lah. 175; 66 I. C. 238. A. I. R. 1922 Lah. 309. See the cases noted under that Order.

An order made by consent of parties is not liable to be challenged by way of appeal. The principle is now embodied in sub-section (3) of s. 96 of the C. P. Code; *Syed Asad Raza v. Wahidunnissa*, 30 C. L. J. 231 (5 C. W. N. 877 followed).

Where a decree purports to be passed by the Court with the consent of parties, it is not appealable. Persons who are not really parties, if aggrieved by it, must apply by way of review or institute a suit to get it set aside, *Madhu Sudan v. Satish*, 91 I. C. 620. A. I. R. 1926 Cal. 512.

Every decree which has incorporated an agreement, compromise or satisfaction ordered to be recorded under Or. XXIII, r. 3 of the C. P. Code, is not *ipso facto* "a decree passed by the Court with the consent of parties" within s. 96 (3), C. P. Code. Sub-section (3) is limited to cases where the parties invite the Court to pass a particular decree and the Court acts accordingly. A decree based on a finding arrived at by the Court against the consent of one party, to the effect that the matter in dispute has compromised, is not a decree passed with the consent of parties, and (3) has therefore no application to it; *Renuka v. Onkar*, 46 I. C.



defect.—*Kallian Singh v. Gur Dayal*, 4 A. 163; *Sarala Sundari v. Saroda Prosad*, 2 C. L. J. 602; *Chakauri Singh v. Suraj Kuar*, 2 A. L. J. 91; *Mokund Lall v. Chobay Lall*, 10 C. 1061; *Behari Lall v. Kodu Ram*, 15 A. 380.

Where a plaintiff brought a suit against three sets of defendants, being persons to whom a Hindu widow in her life time had, by separate alienations, transferred separate portions of the property claimed. *Held* that the suit was bad for misjoinder of parties and causes of action, and that s. 578, C. P. Code, 1882 (s. 99) could not be applied to cure the defect.—*Ganeshi Lal v. Khairati Singh*, 16 A. 279.

Where the misjoinder of causes of action affects, the jurisdiction of the Court, then this section does not cure the defect; *Bal Gobind v. Gaja Lakshmi*, 21 I. C. 438.

The plaintiff land-lord brought one suit for enhancement in respect of two *etmams* in a temporarily settled area twenty years after the last proceedings for increasing the rent. In that record-of-rights, the defendants were recorded as settled rayats. *Held* that the plaintiffs and defendants being the land-lords and tenants of both *etmams* and having the same interest in each, the misjoinder in bringing one suit was merely technical and did not affect the merits of the case; *Mahbul Ali v. Jages*, 24 C. W. N. 946.

Where misjoinder of causes of action has prejudiced the defendant on the merits and no objection to such misjoinder was not taken in the written statement or at the settlement of the issues, the provisions of s. 99 will apply and the ends of justice will be sufficiently met by findings in the case of each separately, instead of dismissing the suit; *Aiyavu Muppan v. Vellaya Madan*, 34 M. 55.

**Error, Defect, or Irregularity Not Affecting the Merits and Curable by this Section.**—S. 99, C. P. Code, shows the principle to be adopted in appeals, the appellate Court will not reverse the order of the Court below on a point which is not of importance at the time of the hearing of the appeal and which does not affect the merits of the case; *Sivakolandu Pillai v. Ganapathy Iyer*, (1917) M. W. N. 89.

The effect of this section is to prevent the misjoinder of causes of action from being made a ground of appeal and being dealt with on appeal, *Rup Narain v. Gopal Devi*, 36 C. 780; P. C.: 10 C. L. J. 58; 15 C. W. N. 920; 11 Bom. L. R. 833; 6 A. L. J. 567; 93 P. R. 1909; 19 M. L. J. 548. 5 M. L. T. 423. Followed in *Provabati v. Rameswar*, 6 I. C. 248; and *Vasudeva v. Athi Kottil*, 25 I. C. 51. But in *Aiyavu Muppan v. Vellaya Madan* 34 M. 55, the Hon'ble Judges of the Madras High Court declined to follow the above Privy Council Case and observed: "Assuming this to be a pronouncement by that tribunal that all misjoinder of causes of action could be cured under this section, if there was no prejudice on the merits, a proposition to which we are prepared to assent in the face of *Sumurthwaite v. Hannay*, (1894) A. C. 404 and approved in 25 M. 61.

The lower appellate Court is not justified in reversing a decision of the Court of first instance for a technical error, unless that error has affected the decision of the case on the merits. The best test to ascertain whether an erroneous interlocutory order has affected the ultimate decision on the

## APPEALS UNDER ANY OTHER LAW.

(a) Appeals under the Court Fees Act.—An appeal lies against an order rejecting a plaint on the ground of its being insufficiently stamped.—*Ajoodhaya Pershad v. Gunga Pershad*, 6 C. 240; 6 C. L. R. 567; *Raj Kristo v. Bama Sundurec*, 23 W. R. 206. See, however, *Monohar Ganesh v. Bawa*, 2 B. 219, and *Narayan v. The Collector of Thana*, 2 B. 145. But the decision of a Court of first instance as to the valuation of the subject-matter of the suit, and on the question of Court-fee payable on the plaint is final.—*Amjad Ali v. Muhammad Israil*, 20 A. 11. See also *Ishan Chandra v. Lokenath*, 6 B. L. R. App. 12; 14 W. R. 451; and *Mafizuddin v. Karimunissa*, 6 B. L. R. App. 11; 114 W. R. 881.

An order dismissing a suit for failure to pay the additional Court-fees in accordance with the Court's order is appealable.—*Kanaram v. Komapan*, 1 M. 169.

See notes under section 2.

(b) Appeals under the Bengal Tenancy Act (VIII of 1885).—There is no appeal from an order passed by a Civil Court under section 84 of the Bengal Tenancy Act.—*Gogun Mullah v. Rameshur Narain*, 18 C. 271. Followed in *Peari Mohun v. Barada Churn*, 19 C. 485.

An application under section 93 of the Bengal Tenancy Act is not a suit between a landlord and tenant within the meaning of section 143 of the Act, and no appeal lies from an order rejecting such an application.—*Hussain Buz v. Mutukdaree Lall*, 14 C. 812.

Where there was dispute as to the amount of rent annually payable, an appeal lies under section 153, Bengal Tenancy Act.—*Aubhoy Charan v. Shoshi Bhusan*, 16 C. 155.

No appeal lies to the High Court from the decision of a Special Judge under section 104, clause (2), of the Bengal Tenancy Act.—*Lata Kerut Narain v. Palukdhari*, 17 C. 826.

An order made under s. 91 of the B. T. Act, on an application under s. 90, is not appealable.—*Dya Gazi v. Ram Lal*, 2 C. W. N. 851.

An order in measurement proceedings under section 37 of Act (VIII of 1869, B. C.) is a decree within the meaning of s. 2, C. P. Code, and therefore appealable under s. 510, C. P. Code, 1882. (s. 96).—*Brajendro Coomar v. Krishna Coomar*, 7 C. 681; 9 C. L. R. 444. See also *Ahmed Ali v. Nittyanund*, 24 W. R. 171; and *Abdool Baree v. Nittya Nund*, 21 W. R. 103. But see *Kally Churn v. Protap Chunder*, 5 C. L. R. 484 (22 W. R. 491, 15 W. R. 23 and 245 cited).

An order under s. 174 of the B. T. Act is not one under s. 244, C. P. Code, 1882 (s. 47) and is therefore not appealable.—*Kishore Mohun v. Sarodamani*, 1 C. W. N. 30; *Sukh Narain v. Garoke Prosad*, 3 C. W. N. 844. But where the purchaser is the decree-holder himself and the question arises between him and the judgment-debtor, an appeal lies.—*Kadarnath v. Umacharan*, 6 C. W. N. 57; *Chundi Charan v. Banki Behari*, 20 C. 449, F. B.; *Kali Mondal v. Ramnarayan*, 32 C. 957, F. B.; 9 C. W. N. 721. 1 C. L. J. 475.

No appeal lies from an order setting aside a sale under s. 173 of the Bengal Tenancy Act.—*Roghu Singh v. Misri Singh*, 21 C. 825. See also *Harabandhu v. Harish Chandra*, 3 C. W. N. 184.

P. Code, 1882 only was applicable, the order of the first Court could not, having regard to this section be interfered with in appeal.—*Nilratan v. Ram Rutton*, 5 C. W. N. 627.

Treating a receiver as commissioner, and not drawing up a preliminary decree, are mere irregularities, covered by this section; *Murlimal v. Lachman*, 72 P. L. R. 1914: 43 P. W. R. 1914: 22 I. C. 526.

Where the form of the permission given by the Collector for the institution of a suit under ss. 92, 93 showed that he had omitted to exercise the judgment in the matter of the interest of the plaintiffs in the trust, it was held to be a mere irregularity and within the scope of this section.—*Sajedur Raja Chowdhuri v. Gour Mohun*, 24 C. 418.

Improper exercise of discretion under s. 42 of the Specific Relief Act has no higher footing than that of an error, defect or irregularity, not affecting the merits of the case or the jurisdiction of the Court, within the meaning of s. 99. This does not imply that, even in cases where the discretionary power to award declaratory relief has been exercised wholly arbitrarily, and in a manner grossly inconsistent with judicial principles, the Court of Appeal would have no power to interfere—*Sant Kumar v. Deo Saran*, 8 A. 365. See also *Muhammad Mashak v. Khuda Baksh*, 9 A. 622.

Where the plaint in a suit for recovery of possession of land was filed not by the plaintiff himself but by a Mukhtear holding a special power of attorney from plaintiff and the defendants objected that the suit was not properly instituted according to Or. III, r. (2) (a), as amended by the Bombay High Court Rules. Held that the irregularity if any, was cured by s. 99, C. P. Code and that the decree of the lower Court should be confirmed; *Ganapathy v. Jivanabai*, 24 Bom. L. R. 1302.

Where the plaintiff filed the plaint through an agent and did not even sign the plaint and there was no power of attorney given by the plaintiff to such agent and no objection was taken. Held that s. 99 applies to the case; *Ma Ngwe Kin v. Ma Hme*, 1 Rang. 42: 74 I. C. 100.

Error in allowing a wrong party to begin is no ground for reversal of a decree in appeal.—*Makund v. Bahori Lal*, 3 A. 824. See also *Tuvuriammal v. Santiago*, 7 Bur. L. T. 129: 23 I. C. 242.

Error in the frame and valuation of a suit where such error does not affect the merits of the case or the jurisdiction of the Court is not a ground for reversal of a decree in appeal.—*Param v. Achal*, 4 A. 289 (12 Bom. L. R. 370 distinguished) See also *Hamidunnissa v. Gopal Chandra*, 24 C. 661.

Application to summon witnesses—Duty of Court in respect of such application—Effect of refusal of Court to summon witnesses—Appeal—Held that s. 578, C. P. Code, 1882 (s. 99) would apply if the irregularity in refusing the application did not affect the merits of the case. If it did affect the merits, the ground of appeal would be a good one.—*Bhagwat Das v. Debi Din*, 16 A. 218 (7 C. 560, 15 B. 86 approved).

The exclusion of evidence in the lower Court is not sufficient ground for reversing that Court's decree, unless the Appeal Court comes to the conclusion that the evidence refused, if it had been received, ought to have varied the decision.—*De Souza v. Pestonji*, 8 B. 408.

es against such an order.—*Mozaffer Ali v. Hedayet Hossain*, 84 C. 581; C. L. J. 641.

An order passed under section 18 of Act XX of 1863 refusing leave to sue is not appealable.—*In re Venkateswara*, 10 M. 98. See also *Kazem Ali v. Azem Ali*, 18 C. 882. Nor an order granting leave to institute a suit under section 18 of Act XX of 1863 is appealable.—*Protap Chandra v. Brojonath*, 19 C. 275.

(g) Appeals under Succession Certificate Act (VII of 1889).—An appeal lies from the order of the District Judge refusing to grant a certificate of heirship under Regulation VIII of 1827 by virtue of the provisions of s. 28 of the Succession Certificate Act (VII of 1889).—*Javer Mal v. Nazir of the District of Poona*, 18 B. 784; *Rangubai v. Abaji*, 19 B. 809.

An order granting a certificate accompanied by a condition that security should be given is appealable; *Bai Nandkore v. Magan Lal*, 86 B. 272.

No appeal lies against an order of a District Judge granting certificate conditionally on the applicants furnishing security.—*Bhagwani v. Munni Lal*, 18 A. 214. Followed in *Bai Deb Koer v. Lal Chand*, 19 B. 790; and dissented from in *Radha Rani v. Brindabun*, 25 C. 320: 2 C. W. N. 50. See also *Rama Reddi v. Papi Reddi*, 19 M. 199; *Alta Soondari v. Srinath*, 20 C. 641; and *Naurangi Kunwar v. Raghubansi Kunwar*, 9 A. 231. Nor an appeal lies from the order of a District Judge holding that the security furnished by the applicant is insufficient.—*Lucas v. Lucas*, 20 C. 245.

No appeal impugning the order of the District Court requiring security from the person to whom the certificate has been granted, lies in the High Court.—*In the matter of the Petition of Paddo Sundari Dasi*, 8 A. 804 and *Bai Nand Kore v. Magan Lal*, 86 B. 272.

No appeal lies from the order of a District Judge refusing an application to recall a certificate granted under Act XXVIII of 1860.—*Nanuk Pershad v. Lalla Nitya Lall*, 6 C. 40; 6 C. L. R. 888.

See notes under section 2.

(h) Appeals under and Probate & Administration Act (V of 1881).—Section 86 read with section 53 of the Probate and Administration Act (V of 1881), only allows an appeal to the High Court in cases in which an appeal is allowable under the Civil Procedure Code. No appeal therefore lies against an order refusing to make a person opposing probate, a party defendant to an application for probate.—*Khettramoni v. Shyama Churn*, 21 C. 539 (13 C. 100, and 2 A. 904 followed).

An appeal lies to the High Court from the order of a District Judge admitting a person as a caveator under s. 69 of Act (V of 1881).—*Abhiram Dass v. Gopal Dass*, 17 C. 48.

An appeal lies to the High Court against the order of a District Judge or District Delegate granting permission to an executor or administrator to dispose of immoveable property under section 90 of the Probate and Administration Act (V of 1881).—*Uma Charan v. Muktakeshi*, 28 C. 149; 5 C. W. N. 448.

Where an application for probate has been granted, and an objection being made, a subsequent order is passed, directing that the case be postponed that probate be suspended for a certain time and that the exe-

by the provisions of section 99.—*Surjamoni v. Kali Kanta*, 28 C. 37: 5 C. W. N. 195 (25 C. 807 distinguished).

Where there was no petition stating the reasons for the request for reception of additional evidence at appellate stage and there was nothing in the order sheet to show that the appellant's pleader consented to the additional evidence being put in by the respondent nor to show why the lower appellate Court thought it right to admit the additional evidence. Held that the lower appellate Court in the circumstances of the case in not following the Code, put the High Court in second appeal in a position in which it was simply not entitled to say that this additional evidence had not affected the merits of the case and a second appeal would lie; *Namadas v. Rajani Kanta*, 39 C. L. J. 261.

Where the authority of an agent to file a suit is defective, such a defect cannot be cured as mere irregularity under this section, as it affects the jurisdiction of the Court.—*Fateh Din v. Ralli*, 109 P. R. 1097.

Where a Court passes judgment without hearing parties or their pleaders, it is an irregularity which cannot be cured by this section.—*Sher Alam v. Bahadur Shah*, 5 P. L. R. (1905).

Omission to state reasons in appellate Court's judgment, which did not comply with the provisions of Or. XI, r. 31 is a defect not curable by this section; *Shaharulla v. Bangoo Mondul*, 13 C. W. N. 143. See also *Sohawan v. Babu Nand*, 9 A. 26. But see *Rohimoni Debi v. Jamiruddin*, 8 C. L. R. 597.

Where the parties apply to refer the matter to arbitration in appellate Court, and if the Judge omits to do so, his judgment is defective and not curable by section 99; *Datta v. Khedu*, 8 A. L. J. 678: 33 A. 645.

Where the sole appellant died pending appeal and no application was made to bring his representatives on the record, but a vakalatnama was filed by a pleader on behalf of the representatives and the appeal was heard and decreed in the name of the deceased appellant, held that this was not a mere irregularity which could be cured by section 99.—*Badal Khan v. Murtaza*, 9 I. C. 977.

Where a decree is transferred to another Court for execution, and that Court orders the execution to proceed after substitution of the name of the transferee of the decree, the said order is one passed without jurisdiction and can be set aside on appeal, notwithstanding the provisions of s. 578 C. P. Code, 1882 (s. 99).—*Amar Chandra v. Guru Prosunno*, 27 C. 489. But see *Shamial v. Modhu Sudan*, 22 C 558.

Where an assignee of a decree applied for execution and the judgment debtor's property was attached before hearing his objection, it was held to be an irregularity not curable by this section; *Kassem Goolam v. Dayabha*, 13 Bom. L. R. 978.

**Error in Valuation, Stamping Pleadings or Memo. of Appeals.**—A Munsif, after hearing the evidence on both sides, found that the suit had been undervalued, but instead of returning the plaint, dismissed the suit. Held that such dismissal was a matter affecting the merits of the case with which the Appellate Court could deal under this section.—*Bhudeva v. Gouri Kant*, 8 C. 834.

An order by a single Judge directing a woman to deposit security for costs, under s. 380 of the C. P. Code of 1882, is a judgment and is appealable; *Sonabai v. Tribhawan*, 32 B. 602.

An order refusing to issue a commission for the examination of witnesses whose personal attendance cannot be enforced, is a judgment within the meaning of cl. 15 of the Letters Patent and appealable as such.—*Maruthamuthu Pillai v. Krishnamachariar*, 30 M. 143.

Under clause (15) of the Letters Patent, 1865, an appeal lies to the High Court from the decision of one of its judges exercising admiralty or vice-admiralty jurisdiction.—*In the matter of the Ship "Champion"*, 17 C. 66.

An order of a single Judge of the High Court directing the amendment of the decree passed in appeal by a Division Bench of which he had been a member, is not appealable.—*Muhammad Naimullah v. Ishanullah*, 14 A. 226.

An appeal lies against an order of a single Judge if that order decides a question of some right between the parties; *Jehangir v. Hope Mills Co., Ltd.*, 33 B. 216.

Order of Judge refusing to decide whether arbitrators are going beyond the scope of their authority is a judgment and is appealable; *Atlas Assurance Co. v. Ahmedbhai*, 34 B. 1.

An order of remand by a single Judge is a judgment and appeal lies from such order; *Gopinath v. Moheswar*, 35 C. 1096.

97. Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree. [New.]

Appeal from final decree where no appeal from preliminary decree.

## COMMENTARY.

**Object of the Section.**—This section is new. It has set at rest the diversity of judicial opinions which hitherto existed on the point. The principle laid down in *Bolaram Dey v. Ram Chandra Dey*, 23 C. 279, which was overruled by the Full Bench case of *Khadem Hossein v. Emdad Hossein*, 29 C. 758: 5 C. W. N. 617, has been adopted. In the former case it was held that omission to appeal from the preliminary order precludes the parties from questioning the correctness of the preliminary order in an appeal from the final decree. This section has overridden the Full Bench case above referred to (see *Saratmoni v. Bata Krishna*, 10 C. L. J. 336, p. 342); and also the cases of *Biswa Nath v. Bani Kanto*, 23 C. 406 and *Jamsetji v. Dadabhoy*, 24 B. 302. For the meaning of preliminary decree, see the definition of the word "decree" in section 2 cl. (2).

The following Report of the *Special Committee* clearly explains the object of the section:—

"The Committee have inserted an express provision to compel litigants to appeal from preliminary decrees, and have estopped them, on

Where a Court of first instance had admitted a document in evidence as duly stamped, s. 34, clause 3 of the Stamp Act (I of 1879) precludes the Appellate Court from questioning the admission of such document. If the Appellate Court considers the document to be insufficiently stamped, it can only proceed under s. 50 of the Act—*Gurupadapa Bin v. Naro Vithal*, 13 B. 493.

**Meaning of "Jurisdiction" in this Section.**—The expression "jurisdiction of the Court" means the jurisdiction of the trial Court; *Duni Chand v. Ramdhan*, 93 I. C. 933: A. I. R. 1926 Lah. 402. The term "jurisdiction" in s. 578, C. P. Code, 1882 (s. 99) is used in the sense of pecuniary or local jurisdiction, or jurisdiction relating to the subject-matter of a suit. It does not mean the legal authority of a Court to do certain things; *Mohesh Chandra v. Jamuiruddin*, 28 C. 324: 5 C. W. N. 509.

The institution of a suit in a Court of higher grade than the Court which is competent to try it, is a question of the kind provided for by s. 99, and the irregularity is not one which affects "the merits of the case or the jurisdiction of the Court" within the meaning of that section.—*Nidhi Lal v. Mazhar Husain*, 7A. 230. See also *Krishna Sami v. Kanakasabai*, 14 M. 183; and *Matra Mondal v. Hari Mohan*, 17 C. 155.

The provisions of the section clearly indicate that the Court can in second appeal enter into a question which goes direct to the jurisdiction of the Court deciding the appeal; *Babu Baijnath v. Gajraj*, 7 A. L. J. 675

The principle that a decree made without jurisdiction is reversible on appeal is also involved by implication in s. 99; *Ramjit Misra v. Ramadhar*, 17 C. W. N. 116 p. 120.

If a question of jurisdiction is raised in appeal, the mere fact that there has not been a miscarriage of justice will not present the appellate Court from interfering; *Peyari Lal v. Banke Lal*, 95 I. C. 406: A. I. R. 1926 All. 650.

### APPEALS FROM APPELLATE DECREES.

**100.** (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds, namely:—

- (a) the decision being contrary to law or to some usage having the force of law;
- (b) the decision having failed to determine some material issue of law or usage having the force of law;
- (c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

pression, will not negative the right of the party affected to prefer an appeal. In *Chanmala v. Gangadharappa*, 39 B 339, F. B., it has been held that a decision in favour of the plaintiff upon a preliminary defence that the matters in dispute are caste questions outside the jurisdiction of Civil Courts does not amount to a preliminary decree attracting the provisions of s 97 of the C P Code (37 B 60 overruled; 38 B. 392 dissented from).

**Right of Appeal Against Preliminary Decree.**—It was held under the old Code in *Mackenzie v. Narsingh Sahu*, 36 C 762: 1 I. C. 413; *Kuriya Mal v. Bishambhar*, 32 A 225 5 I C 276, that where a party appeals against a preliminary decree after the passing of the final decree, but without preferring an appeal against the final decree, his appeal against the preliminary decree was barred. Under the present Code, it has been held that the mere fact that no appeal has been preferred from the final decree is no ground for not hearing the appeal against the preliminary decree, whether the latter appeal is filed before or after the final decree; if the preliminary decree is set aside, the final decree falls with it; *Lakshmi v. Maru*, 37 M 29 21 M L J 1063: 10 M L T. 437: 12 I. C. 664; *Ramuri v. Veerappudian*, 37 M. 455: 22 M. L J. 217: 14 I. C. 394; *Kanhaya Lal v. Tribeni*, 12 A. L. J. 876: 36 A. 532: 24 I. C. 827 (F. B.). On the other hand it has been held by the High Court of Calcutta that an appeal preferred only against the preliminary decree after the passing of the final decree is barred; *Kulada v. Ramasalinmulla*, 12 C W N. 590 6 C L J. 547; *Mackenzie v. Narsingh Sahai*, 36 C 762: 10 C L J. 113; *Khrodamoyi v. Adhar*, 18 C. L. J. 223; *Sadhu Charan v. Haranath*, 20 C W N. 231, *Nanibala v. Ichhamoyee*, 40 C. L. J. 291 A I R 1925 Cal 218: 84 I. C. 674; *Jogendra v. Satyendra*, 29 C W N. 640 A I R 1925 Cal 790; *Gopal v. Abdur Rahim*, 54 C. 328: 51 C W N 550 A I R 1927 Cal 550. But the same High Court in *Kulada v. Ramanund*, 40 C 1036: 25 C W N 776; *Nanibala v. Ichhamoyee*, 40 C L J 291: A I R. 1925 Cal 218, has held that in such a case the appellate Court may, if a proper case is made out, allow the appellant to amend the memorandum of appeal so as to enlarge its scope and convert it into a combined appeal against both the preliminary and final decrees.

A decision that a matter is not *res judicata* is not a preliminary decree and no appeal lies; *Bharmbin v. Bhama Gauda* 39 B. 421.

The finding on a preliminary issue, whether a party is or is not an agriculturist can be the basis of a preliminary decree, only when it necessarily involves a conclusive determination of the rights of the parties with regard to the matter in controversy; *Municipal Committee of Nasik v. Collector of Nasik*, 39 B. 422.

**Appeal Both Against Preliminary and Final Decree, If Legal.**—S. 97 of the C P Code does not prevent a party from filing a combined appeal against a preliminary and final decree, if the dates permit him to do so; *Balwant Singh v. Sakharan*, 18 Bom L. R. 80.

Where there are preliminary and final decrees in the same suit, an appeal against the preliminary decree alone cannot be maintained unless it is instituted before the passing of the final decree; *Biharidas v. Bajungdas*, 67 I. C. 261.



for arrears of rent brought under the provisions of the Chota Nagpore Landlord and Tenant Procedure Act (I of 1879, B. C.); *Khedu Mahto v. Budhu Mahto*, 28 C. 508: 4 C. W. N. 833, F. B. (10 C. 89; 11 C. L. R. 480, and 24 C. 249, so far as they held that a second appeal did not lie in cases of this nature arising under Bengal Act I of 1879, overruled). Distinguished in *Sadai Naik v. Serai Naik*, 28 C. 532: 5 C. W. N. 279, where it has been held that a second appeal lies in a rent-suit under Act X of 1859, tried by a Deputy Collector. See however, *Lall Bhin Singh v. Guman Ghanjhu*, 1 C. W. N. 841.

No second appeal lies from the decision of Judicial Commissioner passed on appeal in suit under Chota Nagpur Tenancy Act VI of 1908, *Raghubar Sahi v. Pratap Uday Nath*, 39 C. 241: 15 C. L. J. 145: 16 C. W. N. 294.

No second appeal lies from an order passed in execution under the Chota Nagpur Landlord and Tenant Procedure Act (I of 1879, B. C.) as amended by Bengal Act V of 1903.—*Israr Lal v. Jagoo Sahu*, 33 C. 878: 10 C. W. N. 234.

Though under the provisions of Act (II of 1904), no second appeal lies expressly from the decision of the Divisional Judge to the Judicial Commissioner of the Central Provinces, yet such an appeal lies under the provisions of this section.—*Balabhadra v. Bhawani*, 6 C. L. J. 233: 11 C. W. N. 956: 34 C. 853.

Where a dispute as to the right of one of two claimants to certain compensation awarded under the provisions of the Land Acquisition Act has been referred to the Civil Court under section 15 of that Act, a second appeal will lie to the High Court from the judgment passed in an appeal against the decision of the Court to which the dispute was referred.—*Afri Bai v. Arnopoorba Bai*, 9 C. 838: 12 C. L. R. 409.

Where an award under the Land Acquisition Act does not exceed Rs. 5,000, a second appeal does not lie from the decision in appeal of the District Judge; *Ahmudbhoy v. Waman*, 88 B. 337: 16 Bom. L. R. 72. No second appeal lies from an award under the Land Acquisition Act; only the appeal is allowed under the Act; *Nathubhai v. Manardas*, 86 B. 560: 14 Bom. L. R. 825. See also *The Special officer, Salsette Building Sites v. Desabhai*, 17 C. W. N. 421 P. C.; *Rangoon Ballaung Co. v. Collector of Rangoon*, 39 C. 21 P. C.; 16 C. W. N. 931: 16 C. L. J. 245: 23 M. L. J. 276: 14 Bom. L. R. 833: 10 A. L. J. 271.

Held that an objection taken to a suit under the Dekhan Agriculturists Relief Act on the ground that a proper certificate had not been obtained, could be taken for the first time on second appeal, as it was an objection affecting the jurisdiction of the Courts below.—*Nyamtula v. Nama Talad*, 18 B. 424.

An appeal lies to the High Court from a decision of a District Court passed under section 10 of the Madras Forest Act, 1882, on appeal from the decision of a Forest Settlement Officer.—*Kamaraju v. The Secretary of State*, 11 M. 309.

Section 26 of the Succession Certificate Act confers on the District Court the same appellate jurisdiction over an order of an inferior Court as is conferred by section 19 on the High Court over the order of the Dis-

**Difference on any Question of Fact.**—According to the provisions of this section when the Judges differ on a question of fact, there can be no reference, but the decree shall be confirmed. See *Jehangir v. Secretary of State*, 6 Bom. L. R. 230 (232).

Where there is no majority in favour of a reversal of a part of the decree, the decree as to that extent is to be confirmed under sub-section (2) of section 98 of the C. P. Code; *Mohunt Krishna Dayal v. Irshad*, 22 C. L. J. 525.

**Procedure on a Difference of Opinion.**—The only Bench which can legally deal with an appeal which has been referred under the provisions of s. 575, C. P. Code, 1882 (s. 98), is one which includes the Judges who first heard the appeal, and whose difference in opinion on a point of law necessitated the reference—*Rohilkhand and Kumaon Bank v. Row*, 6 A. 468. See also *Subbayya v. Krishna*, 14 M. 186.

Where a Bench of two Judges hearing an appeal and differing in opinion have delivered judgments of the Court without any reservation, they are not competent to refer the appeal to other Judges of the Court under s. 575, C. P. Code, 1882 (s. 98).—*Lal Singh v. Ghansham*, 9 A. 625:

In second appeals from the mofussil on the appellate side of the Bombay High Court where the judges differ, the procedure is governed by s. 98 of the C. P. Code and not by cl. 86 of the Letters Patent of the Bombay High Court; *Bhuta Jayat Singh v. Lakadu*, 43 B. 433: 21 Bom. L. R. 157.

**"Differ in opinion on a point of law."**—Where an appeal is laid before a judge under s. 98 of the C. P. Code, he has jurisdiction only to deal with the questions of law on which there is a difference of opinion and he has no jurisdiction to go into other matters; *Pratap Singh v. Bhalbati Singh*, 35 A. 498 P. C.: 17 C. W. N. 1165: 18 C. L. J. 384.

A reference to a third Judge under s. 98, C. P. Code, can be made only when the point of law on which the judges have disagreed has been stated by both the judges for purposes of the reference; *Adwaita Charan v. Saroj Ranjan*, 23 C. L. J. 592.

**Letters Patent Appeal.**—The term "judgment" as used in clause 15 of the Letters Patent signifies what is now understood by the term "decree" or order; *Krishna Dayal v. Irshad Ali*, 22 C. L. J. 525.

Where the Judges of a Division Bench hearing an appeal in a probate case have disagreed and a decree has been drawn up in accordance with section 98, an appeal lies from such decrees under clause 15 of the Letters patent; *Pancheemoni v. Chandrakumar*, 22 C. L. J. 298.

Section 575, C. P. Code, 1882 (s. 98), does not take away the right of appeal which is given by clause 15 of the Letters Patent. When the judgment of a lower Court has been confirmed under s. 575, C. P. Code, 1882 (s. 98), by reason of one of the Judges of the Appeal Court agreeing upon the facts with the Court below, an appeal will lie against such judgment, notwithstanding the terms of s. 575, C. P. Code, 1882 (s. 98).—*Gossami Sri Gridharji v. Porushotum*, 10 C. 814. See also *Gossami Sri Gridharji v. Ramanlalji Gossami*, 17 C. 3 (11); *Deira Chand v. Hira Chand*, 18 B. 449 (454). See *Keshav v. Vinayak*, 18 B. 355 (362).

ing enhancement of rent in a case brought by the landlord under s. 105 B. T. Act, in which the decision depended upon whether the raiyat was at fixed rates, the question being one as to the incidents of tenancy; *Akbar Ali v. Syed Abbas*, 19 C. W. N. 1328 (37 C. 30: 18 C. W. N. 949 followed).

No second appeal lies to the High Court from the decision of a Special Judge under s. 104, clause 2 of the Bengal Tenancy Act—*Gopinath v. Adoita Naik*, 21 C. 776. See also *Anand Lal v. Shib Chunder*, 22 C. 477; overruled by *Dengu Kazi v. Nobin Kishori*, 24 C. 462: 1 C. W. N. 294 Distinguished in *Narohary v. Hari Charan*, 26 C. 556.

An award of damages by a lower Appellate Court, under s. 10, Act X of 1859, though excessive, if it is within the legal limit, cannot be interfered with in special appeal as an error in law.—*Joheeroodeen v. Dabee Pershad*, 18 W. R. 22 and 391.

No second appeal lies to the High Court from the decision of a Revenue Officer settling rent under section 104 of the Bengal Tenancy Act.—*Achha Mian v. Durga Churn*, 25 C. 146. See also *Kali Kishore v. Gopi Mohan*, 9 C. L. J. 574.

The word "proceedings" in section 6 of Act I of 1868, as applied to a suit means the suit as an entirety, that is, down to the final decree. A second appeal, therefore, to the High Court, on a question of the amount due as rent, will not lie when the suit was instituted previously to the passing of Act VIII of 1885, although the judgment in the suit was delivered and the first appeal therefrom heard, subsequently to the passing of that Act—*Satghuri v. Mujidan*, 15 C. 107. See also *Hurro Sundari v. Brojohari*, 13 C. 86.

No second appeal lies in a suit for rent valued at less than Rs. 50 from a decision of a Court specially empowered to exercise final jurisdiction under s. 153 (b) of the B. T. Act, deciding a question whether or not relation of landlord and tenant exists between the parties; *Kalpada v. Shekhar Basini*, 23 C. L. J. 235 (35 C. 547: 12 C. W. N. 835 followed).

**Meaning of High Court in this Section.**—Under clause 24, section 3, of the General Clauses Act (X of 1897), the Court of the Judicial Commissioner in Central Provinces comes within the expression "High Court" in this section.—*Balabhadra v. Bhawani*, 34 C. 853: 11 C. W. N. 956: 6 C. L. J. 233.

**Grounds of Special or Second Appeal.**—Clauses (a) and (b) of s. 584, C. P. Code, 1882 (s. 100), specifying the grounds on which a second appeal lies to the High Court, embody what s. 622, C. P. Code, 1882 (s. 115), refers to in the word "illegally," that is to say, the cases where the Court below has, in the exercise of its jurisdiction, come to a decision which is contrary to some specified law or usage having the force of law, or failed to determine some material issue of law or usage. Clause (c) of s. 584, C. P. Code, 1882 (s. 100), indicates the meaning of the words "material irregularity" in s. 622, C. P. Code, 1882 (s. 115), i.e., some material irregularity in procedure, "which may possibly have produced error or defect in the decision of the case upon the merits.—*Badami Kuar v. Dinu Rai*, 8 A. 111 (8 A. 203 referred to).

The grounds upon which a second appeal lies to the High Court are those set out in s. 584 (s. 100); and s. 585, C. P. Code, 1882 (s. 101)

sentient judgment of a senior Judge in an appeal heard under the same clause; *Jadunath v. Hari Kar*, 17 C. L. J. 203 (2 B. L. R. 66 followed); see also *Jivan Ram v. Tondi Singh*, 31 A. 13

When the Judges of a Division Bench are equally divided in opinion as to the decision to be given on any point, the opinion of the senior Judge is to prevail, subject, however, to a right of appeal from such judgment of the Division Court. The judgment passed on such appeal, and not the judgment of the Division Court, will be final.—*Roy Nandiput v. Urquhart*, 4 B. L. R. A. C. 181. 13 W. R. 209.

99. No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court. [S. 578.]

No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.

## COMMENTARY.

**Alteration Made in the Section and their Reasons.**—This section corresponds with section 578 of the C. P. Code of 1882. The following changes have been introduced by this section. The words “*misjoinder of parties or causes of action*” and the words “*in any proceedings in the suit*” have been added. The alterations seem to have been made in accordance with the principle laid down by the Judicial Committee in *Lala Rupnarain v. Gopal Devi*, 36 C. 780 P. C.: 13 C. W. N. 920: 10 C. L. J. 58, P. C., where their Lordships observed that misjoinder of causes of action is not such a defect as may be a ground for reversal of the decree. The following report of the Special Committee clearly explains the object of the changes.

“The Committee have extended this clause in order to give the Courts a larger discretion in dealing with irregularities in proceedings, and they have inserted express words to meet the point decided in 26 B. 259 and 27 M. 80, and in a recent decision of the Calcutta High Court.”—*See the Report of the Special Committee.*

In *Varaj Lal v. Ramchand*, 26 B. 259 and in *Mohima Chandra v. Atul Chandra*, 24 C. 540, the High Court in second appeal reversed the decree of the lower Courts on the ground of misjoinder of plaintiffs: and in *Mathappa Chetty v. Muthu Palani*, 27 M. 80, the High Court held that misjoinder of causes of action is not a mere irregularity as can be condoned and cured under s. 578 of the C. P. Code of 1882. In *Sarala Sundari v. Saroda Prosad*, 2 C. L. J. 602, the question as to whether misjoinder of causes of action can be cured under this section or not, has been fully discussed. In order to meet the above decisions the above change has been introduced in this section, and under the present Code no decree is to be reversed or modified on account of misjoinder of parties or causes of action.

**Object and Scope of the Section.**—This section lays down a very important rule of law, by providing that no decree shall be reversed or sub-

relevancy of evidence are questions to be considered by the High Court; *Kumarappa Reddi v. Manavala Govindan*, 41 M. 874: 84 M. L. J. 104 (F. B.).

Although the provisions of this section disallow a second appeal with reference to findings of fact, yet the existence of non-existence of a usage having the force of law is unaffected by such disallowance. Consequently it is the duty of the Court, when it has to pronounce an opinion upon such question to examine the evidence bearing on it, not only as to the sufficiency thereof to establish all the elements (antiquity, uniformity, etc.), required to constitute a valid usage having the force of law, but also the credibility of the evidence relied on and the weight due to it. Custom in India is transcendent law. A custom cannot be established by a few instances or by instances of recent date. Observations on the nature of evidence necessary to support custom.—*Kakarla Abbayya v. Raja Venkata*, 29 M. 24: 16 M. L. J. 8 (7 M. 8 followed; 10 C. 838, and 22 B. 430 not followed). Referred to in *Makund Murari v. Krishna Dhone*, 9 I. C. 839. See also *Hashim Ali v. Abdul Rahman*, 28 A. 698: 3 A. L. J. 467: A. W. N. (1896) 187; *Peary Mohan v. Jote Kumar*, 11 C. W. N. 83; *Ram Bilas v. Lal Bahadur*, 30 A. 311; *Musst Aisha Bagam v. Daulat Singh*, 100 I. C. 605: A. I. R. 1927 All. 471; *Durgacharan v. Raghunath*, 18 C. L. J. 559 18 C. W. N. 55; *Balibhadra v. Mirchilal*, 43 I. C. 235.

If a decree appealed against, is based on wrong views of the law of evidence, or on a misconception of the canons which the Privy Council and the High Court have defined as to how a special custom is to be proved, the High Court will interfere in second appeal.—*Desai Ranchoddas v. Rawal Nathubai*, 21 B. 110. See also *Palakdhari v. Manners*, 23 C. 179.

The High Court, in second appeal has jurisdiction to consider the evidence given in support of an alleged custom and to determine whether or not that evidence is sufficient in point of law to establish the custom set up; *Girraj Singh v. Hargobind*, 32 A. 125 (20 A. 698, and 30 A. 311 followed); *Krishnaji v. Nilakanth*, 18 N. L. R. 163.

The question whether the facts proved and found satisfy the requirements of law to establish a custom is a question of law and one which the High Court can and must determine in second appeal; *Ottappamananna v. Secretary of State*, 12 L. W. 871: 55 I. C. 770; *Kalandar v. Kalandar*, 41 M. L. J. 437.

Whether certain events did or did not happen is a question of fact but whether the facts found do or do not establish a custom is a question of law. A judgment based upon evidence not admissible in law is unsustainable; *Durga Charan v. Raghunath*, 18 C. L. J. 559: 18 C. W. N. 55.

It is open to doubt whether the expression "a usage having the force of law" in s. 100 should not be confined to the usages of the country or of the community.—*Pankajammal v. Secretary of State*, 40 M. 1103: 32 M. L. J. 237.

**What Amounts to Error of Law.**—The question of, burden of proof is a question of law and the High Court is entitled to interfere in second appeal if the lower Appellate Court has placed the burden on the wrong party; *Madhoram v. Nandu Mal*, 1 Lah. 429: 58 I. C. 982; *Sheopujan v.*

Observations by Mahmood, J., upon the distinction between the duties of the Court of first appeal, and those of the Courts of second appeal in connection with the provisions of ss. 574 and 578, C. P. Code, 1882, (Or. XLI, r. 81 and s. 99) and with the remand of cases for trial *de novo*.—*Sohawan v. Babu Nand*, 9 A. 26 (9 A. 29-note, and 5 A. 14 referred to).

Where a case was remanded by the Lower Appellate Court under s. 562, C. P. Code, 1882 (Or. XLI, r. 23) instead of under s. 566, C. P. Code, 1882 (Or. XLI, r. 25), which was properly applicable to the case, held that having regard to the provisions of s. 578, C. P. Code, 1882 (s. 99), the remand order and the subsequent proceedings were not null and void, as by the remand order there was no error affecting the jurisdiction of the Court or the merits of the case.—*Mohesh Chandra v. Jamiruddin*, 28 C. 324: 5 C. W. N. 509 (12 A. 510, F. B., dissented from). Followed in *Trailokya Mohini v. Kali Prasanna*, 11 C. W. N. 380; in *Durga Kinkar v. Konchar Ronza*, 5 C. L. J. 71; in *Debendra Nath v. Prasanna Kumar*, 5 C. L. J. 328; in *Nabinchandra v. Kali Kumar*, 18 C. L. J. 613: 41 C. 108. But see *Malikarjuna v. Pathanani*, 19 M. 479, where an illegal remand order was held to be an error affecting the merits of the case. See also *Palanichetty v. Rangaidass*, 32 M. 83: 4 M. L. T. 479.

Where High Court remanded an appeal for hearing by the District Judge who transferred it to the Sub-judge for disposal. Held that the trial by the Sub-Judge was merely an irregularity which did not affect the merits of the case; *Singamuscetti v. Bopalla*, 15 M. L. T. 304: 1914 M. W. N. 317: 23 I. C. 425 (36 C. 193 followed).

**Misjoinder of Parties or Causes of Action.**—Under this section the Appellate Court is not entitled to reverse the decree of the lower Court on the ground of nonjoinder of parties, unless it is satisfied that the omission has affected the merits of the case or the jurisdiction of the Court; *Duron Singh v. Durbijoy*, 9 C. L. J. 623. See also *Kulada Prosad v. Kalidas*, 42 C. 536 p. 545.

The effect of s. 99 is, that when the court of first instance decided the question of misjoinder of parties or causes of action in favour of the plaintiff, there is an end of the matter and the defendant is precluded from raising the question in appeal; *Himat Khan v. Sher Khan*, 18 C. L. J. 260. See also *Vasudeva v. Athi Kotti*, 26 I. C. 51. Where the plea of misjoinder of causes of action had been upheld in the first court but failed in the lower appellate court, it is immaterial in determining the applicability of this section. The section applies to appeals heard after the Act came into operation though instituted before the Act; *Tejmal v. Jaggupilla*, 22 M. L. J. 225: 11 M. L. T. 25.

Misjoinder of causes of action or of parties or non-joinder of parties, which does not produce error in the decision of the case on its merits, is not a ground for the reversal of a decree on special appeal.—*Ramayya v. Venkataratnam*, 17 M. 122. See also *Upendra Chandra v. Tara Prasanna*, 30 C. 794; *Sarala Sundari v. Saroda Prosad*, 2 C. L. J. 602; *Khayale Singh v. Pitam Singh*, 8 I. C. 880.

Where one party alone objected to the frame of the suit and the defect (of misjoinder and multifariousness) did not affect the merits of the case or the jurisdiction of the Court, the lower appellate Court ought not to have reversed the decree of the Court of first instance by reason of such

The finding on an issue of a lower Appellate Court which is based on a misconception of what the evidence is, cannot be accepted in second appeal as a legal finding on it.—*Gobind v. Vithal*, 20 B. 753.

Misreading or misconception of evidence is not a ground for interference in second appeal.—*Ananda Chandra v. Parbati Nath*, 4 C. L. J. 198, (19 W. R. 222; and 1 C. L. J. 232 followed; 20 B. 753, 30 C. 207, and 33 C. 200 distinguished). But see *Lachmandas v. Ramjidas*, 95 I. C. 240: A. I. R. 1916 Lah. 541, where it has been held that a judgment of lower Appellate Court based on misreading of evidence is liable to be set aside in second appeal.

Misreading of the documentary evidence is not a question of law which justifies a second appeal.—*Mahabir Misser v. Musst. Aso Kuar*, 67 I. C. 435.

**Construction of Documents.**—The right of construction of documents is a question of law, which Judges in second appeal are not by section 584 (now s. 100) of the C. P. Code precluded from considering by any finding of the lower Appellate Court; *Lala Fateh v. Rani Kisen Kunnwar*, 34 34 A. 579 P. C.; 17 C. L. J. 1 P. C.; 16 C. W. N. 1033: 14 Bom. L. R. 1900; *Nathuni Rai v. Maharajadhiraj Rameshwar Singh*, 1 Pat. L. R. 289.

The misconstruction of a document is an error in law sufficient to form a ground of special appeal.—*Kalee Churn v. Chundee Churn*, 9 W. R. 366; *Ramsubba v. Avudai Ammal*, (1914) M. W. N. 595; *Palanandy v. Kambararaya*, 24 I. C. 87; *Shohrat Singh v. Ghulam*, 18 A. L. J. 195.

The misconstruction of a document which is the foundation of a suit and which is in the nature of a contract or a document of title, is a ground of interference in second appeal.—*Hara Sundar v. Basanto Kumar*; 9 C. W. N. 154 (19 W. R. 222 and 223 followed); *Dursan Singh v. Durbijoy Singh*, 9 C. L. J. 623 (19 W. R. 223, and 4 C. L. J. 198 followed); *Madan Mohan v. Monmotha Nath*, 18 I. C. 425; *Gordhan Das v. Dhirajlal*, 28 Bom. L. R. 467; 95 I. C. 81; A. I. R. 1926 Bom. 403. In *Braja Mohan v. Thakur Das*, 10 C. L. J. 593, it has been held that a second appeal does not lie because some portion of the evidence is in writing (that is, in the form of a document) and the Judge in the Court of appeal below makes a mistake as to the meaning of it (19 W. R. 222 folld.). But see *Rudra Prasad v. Baijnath*, 15 A. 367.

The date at which a particular holding first began to be held as a definite holding is essentially a question of fact and must depend on evidence. That evidence may be, and naturally is, documentary, but the documents admitted in evidence upon that question are really historical materials and although they have to be construed, and if possible understood, they are not to be treated as involving issues of law merely because they have to be construed. It is not as though they were being construed, as instruments of title or mere contracts or statutes or otherwise the direct foundation of rights; *Midnapore Zemindary Co. v. Uma Charan*, 4 Pat. L. T. 627, P. C.; 21 A. L. J. 723, P. C.; *Gosain v. Puran Singh*, 48 A. 588: 95 I. C. 582; A. I. R. 1926 All. 542.

The misconstruction of a document which is the foundation of a suit is no doubt a question of law, but the misconstruction of a document which

merits, is to see whether the Court would have come to the same decision had the erroneous order not been passed.—*Pran Nath v. Sree Kant*, 2 C. L. R. 257.

Refusal of a defendant's application for the issue of a commission to take her evidence. *Held* that the error was, at all events, no valid ground of appeal. The evidence, even if taken on commission, could not have affected the merits of the case within the meaning of s. 99 inasmuch as she was the defendant in the suit, and her testimony in support of her written statement would not have been believed.—*Akikunnissa v. Rup Lal* 25 C. 807. But see *Surjyamoní v. Kali Kanta*, 28 C. 37: 5 C. W. N. 105, where the High Court reversed the decree on the ground that the lower Courts improperly refused the parties to grant time to produce further evidence.

Section 99 covers a case when a person authorised to instruct a pleader actually signs the *vakalat* for the litigant, where no fraud is committed and the litigant himself knows of it and acquiesces in it. It is a formal irregularity cured by the section; *Banwarilal v. Chethru Lal*, 74 I. C. 1033.

A defect in the signature of the plaint or the absence of the signature, where it appears that the suit was filed with the knowledge and by the authority of the plaintiff, may be cured by amendment at any stage of the suit, and is not a ground for interference in appeal.—*Basdeo v. Smidt*, 22 A. 55. Followed in *Ram Komal v. Bank of Bengal*, 5 C. W. N. 91. See also *Rajit Ram v. Katesarnath*, 18 A. 396, and *Rakhal Chandra v. Secretary of State*, 10 C. W. N. 841. *Charan Mondal v. Gorachand*, 19 C. W. N. cxxx (22-n); *Sashee Bhushan v. Rasik Lal*, 17 C. W. N. 989: 15 I. C. 583; *Durgagir v. Kallu*, 7 N. L. R. 33; 10 I. C. 731. *Raja Braja Sundar v. Svaranjan*, 1 Pat. L. T. 647. Omission to verify an inventory is an irregularity which is covered by this section.—*Nasirunnissa v. Ghafuruddin*, 28 A. 244.

Where the depositions of witnesses did not bear the usual certificate that they had been read over to the witnesses, the irregularity is cured by the section and the case cannot be remanded on account of such irregularity.—*Ram Gopal v. Raghnath* 2 C. L. 406.

When the deposition of a witness is signed only by him but not by the presiding judge, the omission is only an irregularity but does not afford a ground for retrial so long as there is no doubt that it was recorded by the judge; *Alam Singh v. Seth Gopal Das*, 68 I. C. 664.

Recording evidence in English in an ejectment suit is an irregularity which is covered by this section.—*Ratan Lal v. Farshi Bibi*, 34 C. 396: 11 C. W. N. 826.

The provisions of s. 506, C. P. Code, 1882 (the Second Schedule) that an application for reference to arbitration shall be in writing, is merely directory, and non-compliance with the provisions does not render the reference a nullity, but is only an irregularity which would be cured by this section provided the other conditions of the law are fulfilled.—*Shama Sundaram v. Abdul Latif*, 27 C. 61: 4 C. W. N. 92.

Where an application to allow the execution proceedings to be reopened, on the ground that there was a mistake in calculating the amount due, was granted by the Court under s. 47. *Held* that even if s. 623, C.



Interpretation of Leading question of law; 42 C. 46 P. I. F. 117: 22 A. L. J. 1110

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In a suit conducted on behalf of a minor by a relative, the absence of the certificate of guardianship required by s. 3 of the Bengal Minors Act (XL of 1858) is not a fatal defect; and the fact of the Court allowing such a suit to proceed must be taken as implying that the necessary permission has been given. Even if such permission has not, in fact, been given, the irregularity is covered by s. 99.—*Parmeshar Das v. Bela*, 9 A. 508. See also *Bhaba Pershad v. Secretary of State*, 14 C. 159; and *Hardi Narain v. Ruder Perkash*, 10 C. 627, P. C.

A defect in following the rules laid down in Or. XXXII, r. 3 for the appointment of a guardian *ad litem* for a minor defendant, unless the interests of the minors are prejudiced thereby, is only an irregularity of the nature contemplated by s. 99, and is not fatal to the suit.—*Wallan v. Banke Behari*, 30 C 1021, P. C.: 7 C. W. N. 774, P. C. Followed in *Mannu Lal v. Ghulam Abbas*, 32 A. 287, P. C.

Where a next friend died during the pendency of an appeal and the appeal was decreed in his favour without appointing another next friend, the omission is mere irregularity covered by this section.—*Bholai Ram v. Ajudhia Prasad*, 3 A. L. J. 81.

Error in rejecting documents already admitted by the predecessor of the Judge is not one affecting the merits of the case or the jurisdiction of the Court.—*Devachand v. Hirachand*, 18 B. 449.

Disposal of a Civil suit on Sunday is a mere irregularity which is covered by this section.—*Sheo Ram v. Thakur Prasad*, 29 A. 562 and 30 A. 136.

Postscript in a judgment, immediately after it is pronounced is a mere irregularity which is covered by this section.—*Ram Prosad v. Lala Sham Narain*, 6 C. L. J. 22 p. (25).

**Error, Defect, or Irregularity Affecting the Merits, and Not Curable by this Section.**—When a document upon which a suit was based was not produced along with the plaint, but the court allowed it to be produced at a later stage and relying on it gave the plaintiff a decree but on appeal, the appellate court rejected the document merely because it was not produced along with the plaint and dismissed the suit. Held that the appellate court acted illegally, which was not curable by this section; *Mewa Lal v. Kumari Jha*, 13 C. W. N. 797: 10 C. L. J. 33.

Where a plaintiff has attained majority before the institution of the suit, a plaint signed and verified on his behalf by a next friend is not valid and the defect is not a mere irregularity in proceeding and cannot be cured by s. 98 of the C. P. Code; *Ruhul Amin v. Lala Shankar Lal*, 45 A. 701: 21 A. L. J. 626.

Where a suit was brought on behalf of a minor without authority, held that it was an irregularity affecting the merits of the case, though not the jurisdiction of the Court, and the Appellate Court was therefore right in reversing the decree of the first Court.—*Venkatrav Raje v. Madhavarav*, 11 B. 53.

Where the lower Court improperly refused to grant time to the parties to produce further evidence, the High Court reversed the decree of the lower Court on the ground that the error or irregularity was not covered

arrived, to consider whether or not these conclusions have been arrived at in due compliance with the law of the admissibility of evidence and burden of proof.—*Wali Ahmad v. Ajudhia Kandui*, 13 A. 537.

A Court of second appeal can go into the question of the admissibility of a piece of evidence but not of its value.—*Ram Kumar v. Har Narain*, 92 I. C. 104; A. I. R. 1926 Cal. 727.

Where the lower appellate Court not only misunderstood the effect of a witness's deposition, but referred to evidence which did not exist at all and based its decision principally, if not entirely, upon it, the decision though on a question of fact would be contrary to law and liable to be set aside in second appeal.—*Bhupendra Kumar v. Peary Mohan*, 17 C. W. N. 37. See also *Ameerun v. Cherag Ali*, 24 W. R. 343, and *Mackenzie v. Jowahir*, 25 W. R. 137.

For the lower appellate Court to discredit witnesses merely for general reasons not affecting the particular credit of any individual deponent, is to commit an error of law, which can be the subject of a special appeal.—*Sheo Purshun v. Brun Pandey*, 24 W. R. 251. See also *Gaya Prasad v. Abbas*, 25 I. C. 660.

A special appeal will not lie merely on the ground that the lower Appellate Court has disbelieved a witness by reason of his being an interested person, or for any other reason within its discretion.—*Dwarkanath v. Muddun Mohun*, 6 W. R. 292.

The omission of a lower appellate Court to give its reasons for believing witnesses disbelieved by the first Court does not constitute a ground of special appeal.—*Luckee Monee v. Raj Kishore*, 4 W. R. 106. Nor does the omission to give reasons for confirming the decision of the lower Court constitute a ground for special appeal.—*Shamee Mohamed v. Prodhan*, 5 W. R. 178.

No general rule can be laid down as to when the reasons should be stated by an appellate Court for believing one set of witnesses rather than another: and the omission of a lower appellate Court to state such reasons is not a ground for special appeal; *Shamshuroody v. Jan Mahamed*, 21 W. R. 260; *Mukdoomunnissa v. Nokhy Singh*, 24 W. R. 296.

Where the lower Court in deciding the case has taken into consideration inadmissible evidence, the High Court will interfere in second appeal, unless it clearly appears that even without such evidence the lower Court would have come to the same conclusion on other materials; *Jogeswar v. Akhoy*, 19 C. L. J. 1. See also *Durgacharan v. Raghunath*, 18 C. L. J. 559; 18 C. W. N. 55.

Misreading of the record on vital matters is a ground of second appeal, *Md. Nawaz v. Ghulam Haidar*, 75 P. L. R. 1916.

Where the lower appellate Court misdirected itself in regard to the most important part of the evidence bearing upon a question, or approached the consideration of that evidence from a wrong point of view, held that it committed an error of law and the High Court could interfere in second appeal, *Akhoy Kumari v. Kanai Lal*, 16 I. C. 618.

The question whether evidence on the record is legally or reasonably sufficient to support the findings of the lower appellate Court may be

The refusal of a plaintiff respondent to make good a deficiency in Court-fees in respect of his plaint when called upon to do so by the Appellate Court, is not a ground upon which the Appellate Court should reverse the decree of the Court of first instance and dismiss the suit.—*Mehdi Husain v. Madar Baksh*, 2 A. 880

An appellate Court being of opinion that the stamp on the plaint was inadequate, called upon the plaintiff to pay the additional fee. Held that the order of the Appellate Court was properly made under the provisions of the Court Fees Act.—*Shama Soondary v. Hurro Soondary*, 7 C. 348: 8 C. L. R. 528 (22 W. R. 433 dissented from; this section explained).

The decision of the Court of first instance that a plaint is undervalued, is binding upon the Court of appeal, reference or revision, but the Court of first instance is not justified in rejecting the plaint without giving to the plaintiff an opportunity of affixing the proper stamp.—*Bai Anope v. Mulchand*, 9 Bom. 355.

Where the question in appeal was as to the amount of Court-fees to be paid on the written statement claiming a set-off. Held that the error did not affect the merits of the case or the jurisdiction of the Court; *Abdul Aziz v. Razak Ali*, 17 C. L. J. 805, F. B.

**Suits Valuation Act (VII of 1887), S. 11.**—Section 99 of the C. P. Code, is to be read with s. 11 of the Suits Valuation Act, which may be taken as an explanation to this section. The section runs as follows:—

“(1) Notwithstanding anything in s. 578 (now s. 99) of the Code of Civil Procedure, an objection that by reason of the over-valuation or under-valuation of a suit or appeal, a Court of first instance or lower appellate Court which had not jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto shall not be entertained by an appellate Court unless—

“(a) The objection was taken in the Court of the first instance at or before the hearing at which issues were first framed and recorded, or in the lower appellate Court in the memorandum of appeal to that Court, and

“(b) the appellate Court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was over-valued or under-valued, and that the over-valuation and under-valuation thereof has prejudicially affected the disposal of the suit or appeal on the merits.

“(2) If the objection was taken in the manner mentioned in clause (a) of sub-section (1), but the appellate Court is not satisfied as to both the matters mentioned in clause (b) of that sub-section, and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect of jurisdiction in the Court of first instance or lower appellate Court.

“(3) If the objection was taken in that manner, and the appellate Court is satisfied as to both those matters, and has not those materials before it, it shall proceed to deal with the appeal under the rules applicable to the Court with respect to the hearing of appeal; but if it remands the suit or appeal or frames or refers issues for trial or requires additional evidence to be taken, it shall direct its order to a Court competent to entertain the suit or appeal.”

on behalf of the defendant, amount to a substantial error of procedure; *Bhikhan v. Marlanali*, 56 I. C. 40.

Where the procedure adopted by the lower Appellate Court was not in accordance with law, which requires that all the facts and the circumstances of the case should be taken into consideration the High Court in second appeal set aside the judgment of the said Court and remanded the case.—*Bhuput Rai v. Kali Rai*, 6 C. W. N. 857.

A second appeal lies from an order of the lower Appellate Court erroneously dismissing an appeal on the ground that no appeal lay, provided a second appeal is otherwise entertainable having regard to the nature of the original suit.—*Mathura Mohan v. Amiruddi*, 8 C. W. N. 64.

The procedure of a Court is substantially defective under s. 100 (c) C. P. Code if it rejects the report of a commissioner without affording him an opportunity to meet objections raised by a defendant who neither appeared nor placed the objections before him for consideration; or if it permits documentary evidence to be considered piecemeal by two different Commissioners and places reliance upon a sketch map when it is possible to prepare a scientific map; *Kamini Kishore v. Maharaja Birendra Kishore*, 60 I. C. 484.

The Court of first instance accepted as correct, a boundary line mapped by an *amin*. The lower Appellate Court, after remanding the suit for a second local investigation and report, determined to disregard the second return which differed from the first, and affirmed the judgment. Both parties having appealed, the High Court, dissatisfied as to this disregard of the second return, decided to hear the appeal as a regular one, examined the evidence and reversed the judgment of the Court below. *Held* that to have dealt with the appeal as a regular appeal was in excess of the Court's jurisdiction; and that it had no power to hear the appeal as a second appeal, there not having been, in the proceedings below, any error or defect within the meaning of s. 584, C. P. Code, 1882 (s. 100).—*Lukhi Narain v. Jadunath*, 21 C. 504 P. C.

A second appeal lies against the decree of the lower appellate Court on the ground of a substantial error or defect in the procedure which may possibly have produced an error or defect in the decision of the case upon the merits, when it is shown that the Court has decided the case upon part only of the evidence after rejecting the commissioner's report.—*Tirthabasi v. Bepin Krishna*, 28 C. L. J. 600.

A Court, in proceeding to hear and determine an appeal without waiting for return of commission issued at the request of a party, commits a substantial error or defect in procedure as contemplated by s. 584 (c) C. P. Code, 1882 (s. 100).—*Madho Singh v. Kashi Singh*, 16 A. 542 Referred to in *Ganga Prasad v. Lal Bahadur*, 17 A. 117.

The omission of the Court to make specific mention of a particular document and the statement in it, does not amount to a substantial error or defect in procedure.—*Dibakar v. Mritunjay*, 18 I. C. 495.

Failure to write a legal Judgment as required by Or. XLI, r. 81, is a good and sufficient ground for interference in second appeal.—*Mg. Po Gaing v. Ramanathu*, 11 I. O. 915.

Admission by the lower appellate Court of additional evidence tendered by the respondent with the consent of the appellant and without

(2) An appeal may lie under this section from an appellate decree passed *ex parte*. [S. 584.]

## COMMENTARY.

**Alterations Made in the Section.**—This section corresponds with section 584 of Act XIV of 1882. The changes introduced in this section are the substitution of the words "*save where*" for the words "*unless when,*" which occurred in the old section, and the addition of the word "*expressly*" before the word "*provided*" and the words "*for the time being in force*" after the word "*law.*" The word "*specified*" which occurred in cl. (a) of the old sections has been omitted, probably in view of its meaning as explained in 18 C. 23 P. C. and 20 C. 93 P. C., where it was laid down that the word "*specified*" obviously means specified in the memorandum or grounds of appeal. That being the meaning of the word, it was considered quite unnecessary in the present section. The other changes are mere verbal, and no change seems to have been made in the meaning.

**Scope of the section.**—This section provides that a second appeal lies to the High Court from every decree passed on first appeal by any subordinate court only on the ground specified in clauses (a), (b) and (c) to this section, except where such second appeal is expressly barred by the provisions in the body of this Code or by any other law for the time being in force. In other words, if the grounds mentioned in the memorandum of the second appeal come within any of the three clauses mentioned in the section, then a second appeal lies from every decree in the first appeal. The general practice with regard to the admission of the second appeal is that after the presentation of the memorandum of appeal in the High Court, the Judge or the Judges, on the day fixed, after hearing the appellant's pleader may either admit the appeal if satisfied that the grounds mentioned are covered by any of the three clauses or reject it under Or. XLI, r. 11, if the grounds mentioned do not fall within any of the above clauses. It is clear from the provisions of the section that it distinctly prohibits second appeals on questions of fact and confines the competency of the High Court to deal with questions of law and procedure; and here is the difference between the first and second appeals. In the former case an appeal may be entertained on questions of fact; whereas in the latter case an appeal cannot be entertained on questions of fact. As to what are and what are not questions of fact, it is for the Judges to determine in each particular case. No hard and fast rule can possibly be laid down on this point. There is great divergence of judicial opinion on the point. Where one Division Bench considered certain question as a question of law, another Division Bench on a similar question came to a different conclusion. Again where the High Court considered a question as a question of law the Judicial Committee came to a different conclusion; see *Durga Chawdhry v. Jewahir Singh*, 18 C. 23 P. C. and several other cases noted under this section.

**Save where Otherwise Expressly Provided in the Body of this Code.**—Sections 101 and 102 and sub-section (2) of section 104 of this Code expressly prohibit second appeals in the cases therein mentioned.

**"Or. by other law for the time being in force"**—Special or Second Appeal under Local or Special Acts.—No second appeal lies in a suit

The High Court cannot in second appeal interfere with the order of the lower Appellate Court rejecting an application made to it for the admission of additional evidence under Or. XLI, r. 27 (1) of the C. P. Code.—*Vaithinatha Pillai v. Kuppa Thevar*, 42 M. 737 F. B.: 37 M. L. J. 125.

The appellant cannot in second appeal take a point of law which involves the taking of additional evidence.—*Shridhar Larman v. Janardhan*, 72 I. C. 993: A. I. R. 1923 Bom. 37.

Where the first Court of Appeal admitted additional evidence, the hearing of the special appeal will not be treated as a first appeal, so as to allow the pleaders to go into the facts.—*Gopal Singh, v. Jhakri Rai*, 12 C. 37. See also *Beni Pershad v. Nand Lal*, 24 C. 98. But see *Hinde v. Ponnath*, 7 M. 52.

See the cases noted under Or. XLI, r. 27.

**Presumptions, Inferences of Facts or Conclusions drawn from Oral or Documentary Evidence.**—In second appeal the High Court has the power of considering whether the procedure adopted by the lower Appellate Court in dealing with the facts is proper or not; and whether the inferences of fact, or law, derived by that Court from facts established to its satisfaction are well-founded or not.—*Protap Narain v. Raghu Ram*, 6 C. W. N. 185.

The rule that the High Court will not upset concurrent findings of fact in second appeal has no application to a case where the findings are not based on evidence but on a wrong presumption.—*Imam Din v. Dulo*, 239 P. L. R. 1914: 144 P. W. R. 1914: 25 I. C. 278.

Where the lower Appellate Court comes to a conclusion without taking into account the presumption arising from the habits of the people, it commits an error in law and a second appeal is competent.—*Diwan v Jagta*, 1 Lah. 206: 113 P. L. R. 1920.

A Judge in this country is judge both of law and fact, but if, in deciding upon the facts, he deals improperly with the presumptions which the law would raise, he commits an error in law which the High Court can correct in special appeal. When a Judge decides without legal evidence he commits an error in law.—*Surnomoyee v. Luchmeeput*, 9 W. R. 338.

Special appeal allowed, and case remanded for retrial, where the lower Appellate Court had drawn conclusions from the evidence not warranted by law or reason and had failed to try a material issue in the case.—*Maharam Sheikh v. Nakowri Das*, 7 B. L. R. App. 17.

An omission of the Judge to draw an inference from the conduct of parties relied on as evidence is not an error of law with which the High Court will interfere in a special appeal.—*Savi v. Panchanun*, 25 W. R. 503.

Whether facts found justify an inference of fraud is a question of law and can be questioned by a Court of second appeal.—*Radha Madhab v. Kalpataru*, 17 C. L. J. 209. See also *Deo Nagar v. Ram Sewak*, 5 I. C. 309.

*Held*, that the decision that the defendant's possession had been adverse having been an inference from facts in the Courts below, the

trict Court. There is no provision in the Act for a second appeal in any case.—*Subba Rao v. Palaniandi*, 17 M. 167.

An appeal under the Agra Tenancy Act, 1901, is not a second appeal of the description referred to in this section.—*Hamid Hussain v. Bhola Nath*, A. W. N. (1906) 186.

A decision of a District Court on appeal from the Talukdari Settlement Officer is subject to second appeal to the High Court.—*Jamsang Devabhai, v. Gayabhai*, 16 B. 408

Even if there was an implied rule against second appeals under the Madras Rent Recovery Act VIII of 1865, a second appeal lies unless the right is taken away by any express enactment; *Rani Veeraraghavlu v. Venkata Narasimha*, 87 M. 443 P. C.: 19 C. W. N. 97: 20 C. L. J. 875: 27 M. L. J. 451: 16 Bom. L. R. 853 (26 M. 518 approved). Special appeal under Regulation XIII of 1830 is synonymous with second appeal under the C. P. Code; and special appeal from the decision of the Civil Judge at Vinchur under Regulation XIII of 1830 lies to the High Court on the grounds mentioned in s. 100; *Ramchandra v. Pandu*, 38 B. 340: 16 Bom. L. R. 75.

**Special or Second Appeal under Bengal Rent Acts.**—The High Court has no jurisdiction either to entertain a second appeal from, or to interfere, under s. 622, C. P. Code, 1882 (s. 115), with an order of a special Judge in regard to settlement of rents.—*Shewbarat Koer v. Nirpal Roy*, 16 C. 596. See, however, *Mathura Mohan v. Uma Sundari*, 25 C. 84. See also 16 C. L. J. 182.

In suits for arrears of rent where the amount claimed is below Rs. 100 no second appeal lies, where the question is not one relating to title to land, or to some interest in land as between parties having conflicting claims thereto.—*Prasanna Kumar v. Srinath*, 15 C. 231. See also, *Tarini Charan v. Umar Mahta*, 23 I. C. 416.

The High Court has no jurisdiction in second appeal to set aside the decree of the lower Appellate Court on the ground that it had applied the wrong standard of measurement to land of which the rent was in question; *Nagar Chandra v. Shukur*, 46 C. 189 P. O.: 23 C. W. N. 345.

The finding of the lower Court on the evidence as to the length of the unit of measurement on the basis of which rent has to be paid cannot be assailed in second appeal; *Kristo Das Law v. Abdul Karim*, 25 C. W. N. 828: 34 C. L. J. 85.

A second appeal only lies to the High Court under s. 108 of the Bengal Tenancy Act from the decision of a Special Judge in cases under s. 106 of the Act. No second appeal, therefore, lies from the order of the Special Judge dismissing an appeal on the ground that no appeal lay to him in a case of a boundary dispute which had been tried and decided by a Settlement Officer acting as a Survey Officer under Part V of the Bengal Survey Act (V of 1875).—*Irshad Ali v. Kanta Pershad*, 21 C. 935

A suit to recover cesses for an amount not exceeding Rs. 100 falls under the provisions of s. 153 of Act VIII of 1885 with respect to appeals.—*Mohesh Chunder v. Umatara*, 16 C. 638.

A second appeal lies to the High Court against the Judgment of the Special Judge affirming a decision of the Assistant Settlement officer allow-



*Lal v. Uma Charan*, 19 C. L. J. 541; *Nethri v. Gopalan*, 20 M. L. J. 291; *Sri Thacurji Maharaja v. Hirde Narain*, 63 I. C. 811.

Where the decision of the District Judge is based neither on the evidence given in the case, nor on admission, such finding of fact is not binding in second appeal.—*Vishvanath v. Dhondappa*, 17 B. 475.

Where the lower Appellate Court has referred to evidence which does not exist at all, and has based his decision principally, if not entirely, upon it, the High Court will interfere in second appeal; *Bhupendra v. Peary Mohan*, 17 C. W. N. 37 (24 W. R. 843 followed).

A finding of fact based on no evidence or against express *prima facie* reliable evidence can be interfered with in second appeal; *Khubi v. Chottu*, 103 P. L. R. 1915: 41 P. W. R. 1915: 28 I. C. 555.

If the contention is that there is no evidence of negligence by a common carrier as to loss of goods, it is a question of law; but the question whether the evidence is sufficient to justify the inference of negligence, is one of fact; *Akhil Chandra v. I. G. N. Ry. Co.*, 21 C. L. J. 585.

**Question of Fact—Finding on such a Question.**—It is settled law that a Court of Second Appeal is not competent to entertain a question as to the soundness of a finding of fact by the Court below. But the soundness of conclusions from facts found may involve a matter of law, and may be questioned by a Court of Second Appeal. The expression "specified law" in cl. (a) of s. 584, C. P. Code, 1882 (s. 100) means "specified in the memorandum or ground of appeal."—*Ram Gopal v. Shamskhaton*, 20 C. 93, P. C. (18 C. 23, P. C., followed). Explained in *Balaram v. Manota Dass*, 84 C. 941: 11 C. W. N. 959: 6 C. L. J. 237. See also *Raja Ram v. Ganesh Hari*, 21 B. 91; *Rameshwar Pershad v. Amanutulla*, 26 C. 53: 2 C. W. N. 649; *Krishna Kishore v. Mohamed Ali*, 8 C. W. N. 255; *Raggu Mal v. Sitaram*, 63 I. C. 575.

The High Court ought not to interfere in second appeal with a finding of fact so long as there is some evidence to support it, but where the lower Court has arrived at its findings without evidence and the trial is bad, the High Court will interfere: *Thakurji Sri Jugal v. Raj Mungal*, 7 Pat. L. T. 547: 94 I. C. 929: A. I. R. 1926 P. 187.

Findings of fact arrived at by first appellate Court are conclusive, and the High Court and the Privy Council are bound to accept them without further enquiry; *Basiram v. Ram Ratan*, A. I. R. 1927 P. C. 117.

The finding of the lower appellate Court should not be accepted as a finding of fact when it is vitiated by errors of law or misreading of the documentary evidence, and is based on inadmissible evidence; *Sidheswar v. Gaungasagar*, 130 L. J. 61: 96 I. C. 455: A. I. R. 1926 Oudh. 464.

The High Court in second appeal is bound by findings of fact arrived at by the lower Appellate Court, provided they are arrived at after a consideration of the whole evidence on the points arising in the case, but the High Court will interfere and remand a case when the Court gave no reasons for arriving at its conclusions, nor did it in any way refer to the evidence on the points.—*Bankhandi Rai v. Kishore Mandal*, 2 Pat. L. T. 17: 6 Pat. L. J. 72.

The question whether there was undue influence or not, and whether the document was executed under undue influence or not, is a question

enacts that no second appeal shall lie except on the grounds mentioned in s. 584 (s. 100). The provisions of those sections should be strictly adhered to.—*Kameshar Pershad v. Amanutulla*, 26 C. 53: 2 C. W. N. 649 (14 C. 740: L. R. 14 I. A. 101; 17 C. 291: L. R. 16 I. A. 233; 18 C. 23: L. R. 17 I. A. 122: and 19 C. 249: L. R. 19 I. A. 1, referred to).

The High Court set aside a judgment on the ground that the High Court did not know what it meant although it was not considered to be erroneous, *Debendra v. Annada*, 19 C. L. J. 545.

Under the Code no second appeal will lie except on the grounds specified in s. 584, C. P. Code, 1882 (s. 100). There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable, the error may seem to be. Where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding.—*Durga Chowdhurani v. Jewahir Singh*, 18 C. 23, P. C. (14 C. 740: 17 C. 291, P. C., referred to and followed; 9 C. 309, and 7 A. 649 overruled). Followed in *Dwarka Nath v. Mukunda Lal*, 5 C. L. J. 55; *Ram Ratan v. Nandu*, 19 C. 249, P. C.; *Ram Gopal v. Shamskhaton*, 20 C. 93, P. C. (18 C. 23, P. C., followed); *Womesh Chunder v. Chondee Churn*, 7 C. 203; *Rani Vurara Ghanala v. Venkata Narasimha*, 37 M. 443 P. C.: 20 C. L. J. 375: 19 C. W. N. 97; 16 Bom. L. R. 853; *Wali Mahammad v. Mahammad*, 5 Lah. 81: 86 I. C. 998: A. I. R. 1924 Lah. 444; *Dalip Singh v. Ishar*, 7 Lah. L. J. 11: 80 I. C. 250: A. I. R. 1925 Lah. 333.

"Decision being contrary to law."—An appeal lies against an appellate decree passed without jurisdiction, as the decision is contrary to law within the meaning of s. 100, sub-s. (1) of the C. P. Code; *Bandiram v. Purna*, 27 C. L. J. 115: 45 C. 926.

**Question of Law.**—Questions of law and fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law; so also is the question of the admissibility of evidence and the question whether any evidence has been offered on one side or the other; but the question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact; *Nagar Chandra v. Shukur*, 46 C. 189 P. C.: 23 C. W. N. 845. where the facts are not in dispute, the legal inference to be drawn therefrom is a question of law; *Lakshmi Narain Baijnath v. Secy. of State* 27 C. W. N. 1017.

**Custom or "Usage having the force of law."**—The expression "usage having the force of law" means the common customary law of the country or community; *Balaram v. Mangta Dass*, 84 C. 941, p. 951: 11 C. W. N. 959: 6 C. L. J. 237; or a local or family usage as distinguished from the general law; *Ram Gopal v. Shams Khaton*, 20 C. 93: 19 I. A. 228.

The words "usage having the force of law" in s. 100 (a) do not give the Court any larger powers of interference with findings as to custom in so far as they are findings of fact than with any other findings. While the reliability of evidence let in is for the lower Appellate Court, the value to be attached to the evidence supposing it is accepted as true and

not be disturbed in second appeal; *Parbati v. Mahmood*, 29 A. 267: 4 A. L. J. 121.

In suits to enforce a right of way, the question whether the plaintiff has a right of way or not is a question of fact to be determined by the evidence he produces of user. Where on the evidence, the Judge found the plaintiff had not a right of way, *held* there was no error of law which gave the plaintiff a right to a special appeal; *Mahomed Ali v. Jugal Ram*, 5 B. L. R. App. 84: 14 W. R. 124.

A finding that there has been no prescriptive enjoyment of an alleged easement for the statutory period is a finding of fact with which the High Court will not interfere in second appeal; *Nagaraja Pillai v. Secretary of State*, 26 I. C. 723.

Where on a consideration of the entire evidence in the case the lower Appellate Court has come to the conclusion that the relationship of landlord and tenant exists between the parties and that the presumption raised by an entry in the record of rights has been rebutted, the finding is one of fact with which the High Court cannot interfere in second, appeal; *Karim Buz v. Dwarkanath*, 64 I. C. 190.

The question whether a person in possession is the ostensible or the real owner within the meaning of s. 41 of the T. P. Act and whether a transferee from such person took the transfer *bona fide* after making reasonable inquiry and taking reasonable care, are questions of fact and cannot be disturbed in second appeal; *Jamna Das v. Uma Shankar*, 36 A. 309.

The High Court has jurisdiction to interfere in second appeal with the decision of the lower appellate Court on questions of fact, only, if the said Court has made a new case for the parties not warranted by pleadings and evidence; *Abdul Sattar v. Maung Le Maung*, 22 I. C. 802

The only questions which can be considered in second appeal are whether, having regard to established principles, the judge of the appellate Court has rightly directed himself, and whether there is evidence to support the finding of fact at which he has arrived; *Govind Upadhyaya v. Lakkhani*, 63 I. C. 221.

The application for probate was rejected on the ground that the applicants were not legally appointed executors. The defendant admitted having intermeddled with the estate of the testator, but the Courts in India concurrently found that he did not do so for the reason that as he had not been duly appointed executor he could not have so intermeddled so as to make himself responsible as executor. *Held*, that this decision was not a question of fact but one of law and was therefore open to reconsideration by the Judicial Committee on appeal.—*Maniram v. Rupchand*, 33 C. 1047, P. C.: 4 C. L. J. 94: 10 C. W. N. 874, P. C.

Whether an alienation of minor's property by the mother and legal guardian is or is not for the benefit of the minor is a question of fact, and the finding of the District Judge is conclusive on this point.—*Mafarzal Hosain v. Basid Sheikh*, 34 C. 36: 11 C. W. N. 71: 4 C. L. J. 485.

The mere fact that the evidence in the case is merely documentary does not constitute the finding of the lower Court as to adverse possession a finding of law; *Mahomed Amed v. Babu*, 71 I. C. 762.

*Maharaja*, 2 Pat. 919: 78 I. C. 847: A. I. R. 1924 Pat. 810; *Pratap Narain v. Ram Kumar*, 24 A. L. J. 518: 94 I. C. 944: A. I. R. 1926 All. 459.

A lower Appellate Court by putting aside and omitting to consider the relevant evidence actually produced upon the essential question in the case, commits an error in law, which the High Court is competent to interfere in special appeal.—*Huro Prasad v. Woomatara*, 7 C. 263: 8 C. L. R. 449.

Where the lower Appellate Court left out of account an important portion of the evidence relied upon by the plaintiffs, held that this was an error of law and a ground of second appeal.—*Hasan Kuli v. Nakchedi*, 83 C. 200.

To discredit oral evidence on merely general reasons not affecting the credit of any particular deponent is an error of law and justifies interference in second appeal.—*Ram Subhag v. Kesho Prasad*, 29 I. C. 678

An erroneous view of evidence involves an error of law.—*Jawar Chunder v. Satish Chunder*, 30 C. 207: 7 C. W. N. 128. But see 4 C. L. J. 199.

The fact that the lower Appellate Court has misdirected itself as to the effect of evidence which has been admitted in a suit, is an error of law affording a good ground for a second appeal.—*Ram Prasad v. Rajo*, 5 C. L. R. 94.

In the absence of better evidence the lower Appellate Court erred in law in not accepting a topographical survey map as evidence of possession at the time the map was prepared.—*Gajhoo Damar v. Kotwar*, 11 C. W. N. 230.

Where the lower Appellate Court's judgment was not based on the whole evidence on the record (it having left some important evidence out of consideration), the judgment was set aside in special appeal, and the case remanded for re-trial.—*Shundhabun Mohunt v. Shurut Chunder*, 23 W. R. 160; *Abdul Rahman v. Sofy Mikhayesh*, 24 W. R. 298; *Mohun Singh v. Jughutti Kooer*, 24 W. R. 297.

The High Court in second appeal can set aside the finding when the lower Appellate Court wrongly excluded the settlement proceedings from its consideration and disregarded the evidence of the road-cess returns filed by the tenants, and thereby committed errors of law.—*Mohim Chandra v. Kali Tara*, 11 C. W. N. 1028.

Held that the lower Appellate Court erred in law in disregarding certain evidence without giving sufficient reason for rejecting it.—*Trailokya Mohini v. Kali Prasanna*, 11 C. W. N. 380

The investigation of a case upon a portion of the evidence excluding the other portion under a mistaken impression that it was not legal evidence but conjecture, is an investigation erroneous in law, and is likely to produce an error in the decision of the case on its merits. The mode in which evidence is to be dealt with discussed.—*Mathura Pandey v. Ram Rucha*, 8 B. L. R. A. C. 108: 11 W. R. 482.

Where the judgment of the lower Appellate Court was not intelligible and its meaning could not be understood, the High Court set aside the judgment in second appeal.—*Devendra v. Ananda*, 19 C. L. J. 545.

The question whether attestation by a Hindu reversioner amounts to assent is a question of fact and the High Court will not interfere with the finding on the point in second appeal; *Lakhpati v. Ramodh Singh*, 18 A. L. J. 616.

**Mixed Question of Law and Fact.**—Acceptance of overdue instalments by a creditor may constitute waiver—The question of waiver is a mixed question of law and fact and the question may be interfered with in second appeal; *Easin v. Abdul Wahab*, 15 C. W. N. 10.

Where the lower appellate Court had found that as a plot of land was held revenue free by the Government, it ceased to be a part of the Mahal, the question is one of mixed fact and law and can be interfered with in second appeal; *Abdul Rahim Khan v. Ahmad Khan*, 86 A. 231.

The question of adverse possession is a mixed question of fact and law (19 C. 253 *refd. to*). Where the Court of second appeal is called upon to consider whether from the facts found, an inference can fairly be drawn that the possession was adverse, it is a question of law which the Court is entitled to investigate. The facts found need not be questioned. It is the soundness of the conclusions from them that is in question and this is a matter of law (42 A. 152 *relied on*); *Balaram v. Syamacharan*, 33 C. L. J. 344: 24 C. W. N. 1057; *Jogendra Nath v. Rajendranath*, 26 C. W. N. 890 (19 C. 253, 262; 20 C. 93; 29 C. L. J. 241; 24 C. W. N. 1057 *refd. to*); *Mt. Munga v. Lachmi Prasad*, 6 N. L. J. 70: 74 I. C. 51; *Sabitri v. Nadier Chand*, 94 I. C. 38: A. I. R. 1926 Cal. 881.

The question of what passes at a sale in execution of a decree is a mixed question of law and fact, and the High Court in second appeal is not bound by the finding of the Court of the first appeal with regard to it.—*Gnanammal v. Muthusami*, 13 M. 47.

The question as to what passed to a purchaser at a sale of the family properties in execution of a decree on a promissory note executed by a Hindu father is a mixed question of law and fact; *Natesa Pathar v. Subba Pathar*, 23 L. W. 349: 94 I. C. 68: A. I. R. 1926 Mad. 851.

The question whether a Hindu family is joint or separate is not necessarily a question of fact merely, but may be in certain circumstances a mixed question of law and fact and open to reconsideration in second appeal; *Birdi Chand v. Popat Lal*, 95 I. C. 183: A. I. R. 1926 Nag. 389.

The question whether the facts found attract the operation of s. 14 of the Limitation Act is a mixed question of law and fact and as such can be challenged in second appeal; *Shaikh Fazlul v. Shaik Helaluddin*, 101 I. C. 674: A. I. R. 1927 Pat 256.

The question of the nature of tenancy is a mixed question of law and fact; *Maharam v. Telamuddin*, 15 C. L. J. 220.

The finding on a question of custom is a mixed finding of fact and law; *Shatmeer Singh v. Pyare Lal*, 20 A. L. J. 57: 64 I. C. 956.

The existence or non-existence of an alleged custom is a mixed question of law and fact and a finding about it is revisable by the High Court in second appeal; *Zamorin Raja Avergal v. Unicut Karnavan Samu Nair*, 38 M. L. J. 275; *Bal Bhaddar Prasad v. Narayan Das*, 73 I. C. 727.

is alleged to contain an admission, that is to say, a misappreciation of the meaning and effect of an admission is not a question of law which can be raised in second appeal; *Ujir Ali v. Shadhai Behara*, 85 C. L. J. 182.

The expression "construction" as applied to documents includes two things: first, the meaning of the word and secondly, its legal effect. The meaning of the word is in all cases a question of fact. The effect of the word is a question of law. A second appeal is not admissible merely because some portion of the evidence is in writing of which the meaning has been mistaken by lower Appellate Court; *Dal Singh v. Phirman*, A. I. R. 1923 Lah. 628; *Badri Prasad v. Raj Kunwar*, 75 I. C. 686; A. I. R. 1923 All. 337; *Debi Chand v. Jai Chand*, A. I. R. 1926 Lah. 21.

The expression "construction" as applied to document includes two things: (1) the meaning of the words, and (2) their effect in law. The meaning of the words is a question of fact in all cases, and the effect of the words is a question of law. Where the document is not of such a character as to create, modify or extinguish the rights and obligations of the parties or otherwise affect their status, no question of its legal effect arises and the construction of such a piece of documentary evidence does not raise a question of law. Unless there is a question of the legal effect of a deed which may be treated as a document of title or embodies a contract or is the foundation of this suit, a second appeal does not lie: *Raja Makund Deb v. Gopinath*, 21 C. L. J. 45; 25 I. C. 286 (cases on the point exhaustively reviewed). See also *Pran Kishore v. Sarada Prasad*, 37 C. L. J. 580; *Kuldip Narayan v. Banwari*, 5 Pat. L. J. 251; 1 Pat. L. T. 126; *Benode v. Manmatha Nath*, 21 C. L. J. 42; *Pran Krishna v. Prasanna*, 37 C. L. J. 580; 72 I. C. 55; A. I. R. 1923 Cal. 358; *Basul Karim v. Satis Chandra*, 15 C. W. N. 752; 13 C. L. J. 418, where it has been held that though the misconstruction of a document which is the foundation of the suit or which is in the nature of a contract or a document of title is a ground for second appeal, a second appeal does not lie, because some portion of the evidence is in writing and the Judge in the Court below makes a mistake as to the meaning of it (cases on the point exhaustively reviewed).

A finding cannot be sustained in second appeal if it is based on a misreading of the first Court's Judgment; *Mt. Basanti v. Chandra Singh*, A. I. R. 1923 Lah. 502.

**Question as to Nature of Tenancy.**—The question as to the nature of tenancy, i.e., whether the tenants are merely tenants-at-will or whether they are yearly tenants, is a question of law, which can be dealt with in second appeal; *Sulatu Das v. Jadunath*, 8 C. W. N. 774 F. B. Followed in *Ram Dayal v. Midnapur Zemindari Co.*, 15 C. W. N. 263; 7 I. C. 785. See also *Durganath v. Rajendra*, 17 C. W. N. 1073. In *Maharam v. Telamuddin*, 15 C. L. J. 220, it has been held that the question of the nature of the tenancy is a mixed question of law and fact.

**Irrelevancy of Decision.**—Where in a rent suit, although the tenancy and rental were admitted and no plea of payment thereof was taken, the Court dismissed the suit on the ground that the lands described in the plaint were not comprised in the tenancy, held that it was not necessary for the Court to decide the question as to what lands were comprised in the tenancy, and hence this irrelevancy of the decision made the judgment appealable; *Jatindra v. Indu Bhusan*, A. I. R. 27 Cal. 410; 100 I. C. 525.

R. 550; *Dhoondh Bahadour v. Priag Singh*, 17 W. R. 314; and *Kewal Kondoo v. Omrao Singh*, 25 W. R. 166.

A finding of fact arrived at upon reasons purely speculating amounts to a mis-trial, which can be set aside by the High Court in special appeal.—*Mahomed Aisaddi v. Shaffi Mulla*, 8 B. L. R. 26.

A finding of a fact by the lower appellate Court was set aside on special appeal, and the case was remanded on the ground that the Judge assumed a state of things in favour of the defendant which the defendant had not urged, and which was contradictory to his case and because the finding of the Judge was opposed to a proper inference which arose from such facts.—*Surbeswar v. Choto Arizoolah*, 8 B. L. R. Ap. 78: 17 W. R. 218.

Where there is sufficient evidence to support a finding of fact in second appeal, it cannot be impeached on the ground that the reasoning is not accurate; *Sheik Muhammad Shuker v. Abdul Ghani*, 71 I. C. 869: A. I. R. 1923 All. 362.

No special appeal will lie on a ground relating merely to the weight of the reasons given by the lower Appellate Court for the conclusion arrived at.—*Doorga Churn v. Shamanund*, 12 W. R. 876; *Mackenzie v. Jowahir*, 25 W. R. 187.

**Proper or Improper Exercise of Discretion—Interference in Special Appeal.**—In a suit by co-sharers for demolition of a building as having been recently erected without their consent on common land by another co-sharer, the first Court granted mandatory injunction, but the lower Appellate Court refused it. *Held* that such refusal was a good ground of special appeal, as the Court below had exercised an arbitrary discretion.—*Ram Bahadur v. Ram Shanker*, 27 A. 689, F. B.: A. W. N. (1905) 153: 2 A. L. J. 455.

Unless a very strong case is made out, a Court of second appeal will not interfere with the discretion of the Court below in passing a decree for money payable in instalments, especially where a large portion of the amount decreed consists of interest (15 C. W. N. 1088 *rejd. to*); *Bhup Chand v. Ude Ram*, 66 I. C. 147: A. I. R. 1922 Lah. 355.

A question of the award of future interest is discretionary with the Court and is no ground for interference in second appeal; *Aga Mahomed Aslam v. Jodh Singh*, A. I. R. 1923 Lah. 513.

An appeal as to costs will lie from an appellate decree where the Court has exercised its discretion as to costs arbitrarily, and not according to general principles.—*Daulat Ram v. Durga Prasad*, 15 A. 333; *Narain Das v. Khushi Ram*, 27 Punj. L. R. 391.

The question as to whether the Courts below have exercised a proper discretion in dismissing a suit under s. 136, C. P. Code, 1882 (Or. XI r. 21) is one with which the High Court will not interfere on special appeal.—*Lalla Dabee Pershad v. Santo Pershad*, 10 C. 505.

No second appeal will lie when the lower Appellate Court has disallowed the plaintiff's plea of excuse for not having filed his appeal within limitation, exercising therein judicial discretion, after consideration of the facts and not arbitrarily.—*Tulsa Kunwar v. Gajraj Singh*, 25 A. 71, follow-

dealt with in special appeal without a remand or rehearing.—*Joy Ram v. Omrao Roy*, 12 W. R. 481.

A case in which the High Court in special appeal, being of opinion that the judgment of the District Judge reversing that of the Munsif on the credibility of witnesses, did not fulfil the conditions that it ought to fulfil, brought up the case before itself and heard it as a regular appeal.—*Purmeshur v. Brijolall*, 17 C. 256.

Where the lower appellate Court dismissed the plaintiff's suit on the ground of his failure to discharge an *onus* wrongly placed on him, and ignoring altogether the evidence adduced by the defendant, the High Court will interfere in second appeal; *Hari Moni v. Moti Sheikh*, 16 C. W. N. 779.

Where a deposition made in another suit, to which special appellant was not a party, was admitted and used by the first Court without any objection on the part of the special appellant, it was held that he could not be allowed to object to it in special appeal.—*Waseer Jamedar v. Noor Ali*, 12 W. R. 33. See also *Lakshman v. Amrit*, 24 B. 591: 2 Bom. L. R. 386.

**Omission to Consider Important Evidence is an Error of Law.**—Total omission to consider an important part of the evidence is an error of law; *Narain Pal v. Adwaita Mandal*, 3 I. C. 173 (30 C. 207 *refd. to*).

In a suit for recovery of possession of land on declaration of title thereto, the Court of first instance in giving a decree to the plaintiff relied upon a sale certificate along with other matters. The appellate Court reversed the decree without considering the sale certificate. *Held*, that the appellate Court ought to have taken into consideration the sale certificate along with the other evidence in the case; *Harendra Kumar v. Durgacharan*, 62 I. C. 697.

The report of the commissioner in a case of boundary dispute is an important piece of evidence and should be considered by the lower appellate Court. An omission to do so justifies the second appellate Court in remanding the case to the lower appellate Court; *Musst. Sonekuar v. Baidyanath*, 3 P. L. T. 483.

**"Substantial error or defect in procedure."**—Where a lower Court sets up a new case not raised by the parties in the first Court, and arrives at a finding of fact on the basis of such new case, there being no evidence on the record to support such finding, it will be a substantial error or defect of procedure in consequence of which the High Court may interfere in second appeal.—*Shivabasava v. Sangappa*, 29 B. 1 P. C.: 8 C. W. N. 865, P. C.

Where the lower appellate Court reversed the decree of the first Court without any evidence upon which it might reasonably come to the conclusion, *held* that there had been a substantial error or defect in the procedure of the lower appellate Court, and the High Court was right in interfering in second appeal.—*Hemanta Kumari v. Brojendra Kishore*, 17 C. 875, P. C. See also *Virbhadrappa v. Mahantapa*, 15 B. 670; and *Shivabasava v. Sangappa*, 29 B. 1 P. C.: 8 C. W. N. 865, P. C.

The failure by an appellate Court to determine the critical question between the parties to a suit and to consider the oral evidence adduced



law, but a question which depends upon facts.—*Biru Mahata v. Shyama Churn*, 22 C. 483.

The question of deficiency of Court-fee cannot be raised for the first time in second appeal.—*Wilayat Ali v. Umaradaraz*, 19 A. 165. Where the question of deficiency of Court-fee is raised in the second appeal, the proper procedure is not to dismiss the appeal, but to direct the party to pay the proper duty within a specified time.—*Valambal Amal v. Vythilinga*, 24 M. 331. See also *Narain Singh v. Chatur Bhuj*, 20 A. 362.

An objection as to want of stamp upon an arbitration award cannot be taken for the first time in second appeal; *Jadunath v. Kailas*, 10 C. L. J. 41.

**Order Admitting or Rejecting Review or Setting Aside an Order Granting Review.**—See the cases noted under Or. XLVII, r. 7.

**Dismissal of an Appeal for Default of Hearing, If Ex Parte.**—An order dismissing an appeal for default is not a decree, therefore no second appeal lies from such order—*Nga Chok v. Nga On Gaing*, U. B. R. 1909, 2nd Quarter Civil 27; and 23 C. 115 and 327.

Held by the Full Bench, that a respondent, in whose absence the appeal has been heard *ex parte* and against whom judgment has been given, may prefer a second appeal from the decree, under the provisions of s. 584, C. P. Code, 1882 (s. 100), and his remedy is not limited to an application under s. 560, C. P. Code, 1882 (Or. XLI, r. 21), to the Court which passed the decree to rehear the appeal.—*Ajudhia Prasad v. Balmakund*, 8 A. 354. (2 A. 567 approved). See also *Kali Kishori v. Dhununjoy*, 3 C. 228; and *Maruti v. Vithu*, 16 B. 117.

Where an appeal was heard *ex parte* and the decree of the first Court was reversed in the absence of the respondent, who was not aware of the proceedings till after the time for applying for a rehearing under s. 560, C. P. Code, 1882 (Or. XLI, r. 21) had expired, held that the High Court in second appeal had power to interfere under s. 584 (c), C. P. Code, 1882 (s. 100).—*Balaji Rau v. Sithabhoj*, 19 M. 414.

A defendant who obtains a judgment in his favour in the Court of first instance, and who, on appeal by the plaintiff, does not appear at the hearing of the appeal or present a petition for a rehearing, may present a second appeal against the decree of the lower Appellate Court.—*Ex parte Modalatha*, 2 M. 75.

See notes under Order XLI, rule 19.

**Question of Law Not Taken in the Courts Below Whether can be Entertained in Special Appeal.**—An order dismissing an appeal as being presented out of time under section 4 of the Limitation Act, 1877, is a "decree passed in appeal" within the meaning of s. 584, C. P. Code, 1882 (s. 100). A second appeal will therefore lie from such order.—*Gunga Dass v. Ram Joy*, 12 C. 30. See, however, *Tulsa Kunwar v. Gajraj Singh*, 25 A. 71; and *Hamid Ali v. Gaya Din*, 28 A. 327.

An appellant in a second appeal raised orally at the hearing, a plea not taken in his memorandum of appeal to the effect that the respondent's appeal to the lower Appellate Court had been barred by limitation when it was presented. Held that the plea could not be heard.—*Ahmad Ali v. Waris Husain*, 15 A. 123 (13 A. 580 approved; 18 C. 23 referred to.)

dealt with in special appeal without a remand or rehearing.—*Joy Ram v. Omrao Roy*, 12 W. R. 431.

A case in which the High Court in special appeal, being of opinion that the judgment of the District Judge reversing that of the Munsif on the credibility of witnesses, did not fulfil the conditions that it ought to fulfil, brought up the case before itself and heard it as a regular appeal.—*Purneshur v. Brijolall*, 17 C. 253.

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69 (followed in *Mir Khan v. Sarfu*, 5 Lah. L. J. 163: 74 I. C. 577). In *Kanahai Lal v. Suraj Kunwar*, 21 A. 448, it has been held that, although the plea of *res judicata* may be taken at any stage of a suit, including first or second appeal, an Appellate Court is not bound to entertain the plea if it cannot be decided upon the record before that Court, and if its consideration involves the reference of fresh issues for determination by the lower Court.

Held that, in disposing of a second appeal, the High Court is competent under s. 542, C. P. Code, 1882 (Or. XLI, r. 2), to consider the question whether the plaintiff has any cause of action or not, although such question has not been raised by the defendant-appellant in the Courts below, or in his memorandum of second appeal, but is raised for the first time at the hearing of such appeal.—*Luchman Prasad v. Bahadur Singh*, 2 A. 894. See also *Parbati Charan v. Kali Nath*, 6 B. L. R. Ap. 73. But see *Kali Coomar v. Bromomoyee*, 1 W. R. 23; *Sudakhina v. Raj Mohun*, 11 W. R. 350; and *Buksh Ali v. Joyanut Khan*, 11 W. R. 248.

**Objection as to Jurisdiction, If Admissible in Second Appeal.**—An objection as to jurisdiction was allowed to be taken for the first time in second appeal; *Ichharam v. Nilmoni*, 12 C. W. N. 636; *Ram Kishan v. Ranshan*, A. I. R. 1923 Lah. 557.

Where both the Courts below have found that the suit lands did not form part of an estate so as to oust the jurisdiction of Civil Courts, the decision is binding on the High Court; *Tota Varahaliat v. Sri Venkata*, 18 L. W. 824: 75 I. C. 465.

Even if it was competent to the High Court to remit a case for hearing on an issue not raised by the defendant in the pleadings or suggested in the lower Courts, this might be done only in exceptional cases for good cause shown and on payment of all costs thrown away; *Maharaja Sri Ram Chandra Bhanj Deo v. The Secy. of State*, 43 C. 1104 P. C.: 20 C. W. N. 1245: 24 C. L. J. 296.

An objection as to stamp cannot be taken for the first time in second appeal; *Jadunath v. Kailash*, 37 C. 63: 14 C. W. N. 75: 10 C. L. J. 41.

**New Case Not be Made in Second Appeal.**—A party is not entitled to make a new case in the second appeal; *Chuni Ahir v. Khem Chand*, 27 I. C. 810; *Laban Sardar v. Chayen Mullick*, 13 C. W. N. 768.

It is not open to a defendant to change the whole nature of his defence at the last moment, and to set up in a Court of Appeal a plea which he has directly and fraudulently repudiated in the Court below.—*Satyabhama v. Krishna Chunder*, 6 C. 55; 6 C. L. R. 375.

It is not the function of the High Court in second appeal to remedy the defects in a party's case; *Chandbhai Muhammad Bhai v. Hasanbhai Rahimtulla*, 23 Bom. L. R. 1038.

The parties are not entitled in special appeal to change their ground of action, and to set up a new case, and ask relief on different grounds.—*Kanhia v. Mahin Lal*, 10 A. 495; *Mahomed v. Sitaramayyar*, 15 M. 50; and *Ilahi Khan v. Sher Ali*, 26 A. 831; *Purushotam v. Pandurang*, 89 B. 149, *Gopal v. Hanmat*, 6 B. 107; *Narinjan v. Charu Das*, 3 Lah. 239: 69 I. C. 557; A. I. R. 1922 Lah. 863.

recording the reason for its admission as regarded by Or. XLI, r. 27, is a substantial error in procedure and is a good ground for second appeal.—*Kebal v. Rajani*, 89 C. L. J. 261: 81 I. C. 990: A. I. R. 1925 Cal. 98.

**Refusal to Call or Examine Witnesses or Parties.**—An exercise of the discretion of the Court in refusing to grant a fresh summons on account of delay in applying for it, cannot be interfered with on special appeal.—*Brijo Lal v. Aghor Lal*, 25 W. R. 71.

It is in the discretion of a Court of first instance, after the plaintiff's case is closed, to allow him to call further witnesses. There is no right of special appeal upon the point.—*Rakhal Dass v. Protap Chunder*, 12 W. R. 455. But see *Moni Lal v. Khiroda Dasi*, 20 C. 740 and 745-note, where the High Court interfered in second appeal, holding that it was a substantial error in procedure.

Failure of a Court to examine the witnesses of a party is a valid and substantial ground for interference in second appeal; *Ma Daw Thu v. Ma Daw*, 8 I. C. 990.

Omission by the first Court to examine some of the witnesses for the plaintiff, where such omission was not brought to the notice of the lower Appellate Court, cannot be made a ground of second appeal.—*Gulam v. Badruddin*, 13 B. 836.

**Omission to Frame or Try any Issue or to Determine any Essential Question of Fact.**—If, on second appeal, it is found that certain material facts, having an important bearing upon a question at issue in the suit, have been omitted to be considered by the lower Appellate Court, the High Court will interfere with the decision of the lower Appellate Court even though it be on a question of fact.—*Dina Nath v. Hari Dasi*, 11 C. 499.

Where the first Court dismissed a suit on one of the issues, viz., that of title, observing that it was not necessary to decide the other issues, one of which was as to issue of limitation, and the second Court decreed the suit by reversing the finding of the first Court on the issue of title, but omitted to record a finding on the issue of limitation. Held that the case must be remanded to the lower Appellate Court for finding on the remaining issues.—*Kailash Chandra v. Kunja Behari*, 4 C. L. J. 86.

Where it appeared that an issue was raised as to ownership, and both parties gave evidence before the Sub-Judge on such issue, and the lower Appellate Court omitted to find on such issue. Held, reversing the decree of the lower Appellate Court, that it ought to have found the issue as to ownership.—*Ramkar Gopalji v. Ganga Ram*, 16 B. 545.

**Allowing or Disallowing Additional Evidence in Appeal.**—The refusal by an Appellate Court to exercise the discretion under s. 568, C. P. Code, 1882 (Or. XLI, r. 27), with respect to the admission of additional evidence would be an error or defect in procedure within the meaning of s. 584, C. P. Code, 1882 (s. 100) because s. 568 (Or. XLI, r. 27) distinctly implies that the discretion must be exercised. But a refusal in the exercise of discretion to admit additional evidence is undoubtedly not such an error or defect.—*Ram Piari v. Kallu*, 23 A. 121. Followed in *Durga Prasad v. Jai Narain*, 83 A. 879: 8 A. L. J. 175.

"Any suit of the nature cognizable by Courts of Small Causes."—Suits triable by Courts of Small Causes under the provisions of the Provincial Small Cause Court Act, IX of 1887, when tried by Courts invested with the powers of Small Cause Courts, are not appealable. But where the Local Government has not established Small Cause Courts, nor invested any other Judge with power to try Small Cause Suits, in such places, the Small Causes Suits are tried by Civil Courts under the ordinary procedure, and such suits are then called suits of Small Cause Court nature, and no second appeal lies from the decision in these suits. See *Soundaram v. Sennia*, 23 M. 547: 10 M. L. J. 329, F. B. As to suits which are of the nature cognizable by a Court of Small Causes, see ss. 16, 16 and 27 of the Provincial Small Cause Courts Act (IX of 1887).

The term "suit" in s. 102 of the C. P. Code is not used in a restricted sense. It includes not merely the proceedings in the suit up to the stage of decree but comprehends also the proceedings in execution of the decree; *Warish Munshi v. Aftabuddin Behari*, 16 C. L. J. 96.

A suit for rent under the Madras Estates Land Act is not a "suit" of the nature cognizable by a Court of Small Causes within the meaning of s. 102, C. P. Code, and a second appeal lies even in cases where the subject-matter of the suit is less than Rs. 500; *Sri Varadaraja Hari Chandra v. Kanda Barikivadu*, 44 M. 697: 40 M. L. J. 466

**Original Character of Suit Determines Whether Second Appeal Lies or Not.**—For the purpose of determining whether a second appeal lies or is prohibited by s. 102, what must be looked at is not the shape in which the case comes up to the High Court, but the shape in which the suit was originally instituted in the Court of first instance.—*Kaimuddin v. Rajjo*, 11 A. 18. See also *Hari Chandra v. Narayana*, 24 M. 508 and *Lakshman Das v. Anna*, 32 B. 356 (360). *Cherriyoni v. Nhera Poyill*, 22 M. L. J. 47; *Jagannath v. Debi Sahay*, 13 I. C. 493; *Lakshan Das v. Lane*, 32 B. 356; nor should regard be had to the mode of trial of the suit; thus a suit which is of the nature cognizable by a Court of Small Causes, is none the less so, because instead of being tried under the summary procedure, it has been tried in the ordinary manner; *Indra Chandra v. Sris*, 40 C. 537: 21 I. C. 120; *Shankabhai v. Somabhai*, 25 B. 417.

Where a Sub-Judge vested with small cause jurisdiction tried a small cause suit under his ordinary jurisdiction, held that the character of the suit is not altered by the mode in which the Sub-Judge had exercised his jurisdiction, and that his decree, being final, was not appealable.—*Shankarbhai v. Somabhai*, 25 B. 417. But see *Hari Balu v. Ganpatrao*, 38 B. 190.

A suit of a nature cognizable by a Small Cause Court does not cease to be so within the meaning of this section because the Court in which it was instituted as a Small Cause Court suit, returned the plaint to be filed on the regular side under s. 23 of the Provincial Small Cause Courts Act, on the ground that the suit involved questions of title.—*Muttukaruppan v. Shellan*, 15 M. 98. See also *Kali Krishna v. Issatunnissa*, 24 C. 557. Followed in *Rash Behari v. Sridhar Belal*, 6 O. W. N. 687; *Narayan Bhaskar v. Balaji*, 21 B. 248; *Sada v. Brij Mohan*, 20 A. 480; 32 B. 580; *Bachchi v. Debi Prasad*, 57 I. C. 557; *Kanwar Singh v. Ujaqa Singh*, 8 O. L. J. 391: 65 I. C. 7; *Mohini v. Sankar Das*, 29 C. L. J. 552: 80 I. C. 210; A. I. R. 1924 Cal. 487; *Ram Krishna v. The Pre-*

correctness of this, as a legal conclusion to be drawn or not, was a question open to second appeal, and the High Court was not precluded from deciding to the contrary.—*Lachmeswar Singh v. Manowar Hossain*, 19 C. 253, P. C. Referred to in *Rajaram v. Ganesh*, 21 B. 91.

Where the lower Appellate Court arrives at a conclusion, which is an inference based upon an erroneous view of law, the judgment is open to question in second appeal.—*Ishan Chunder v. Bishu Sirdar*, 24 C. 825: 8 C. W. N. 655 (19 C. P. C. 253, P. C. and 20 C. 93 P. C., referred to). See also *Nur Mohamed v. Kessumal Sawalmal*, 7 S. L. R. 11: 20 I. C. 523.

The High Court will not interfere in second appeal with a finding of fact by a District Judge merely because he failed to indicate sufficiently in his judgment that he gave as much weight in defendant's favour and against the plaintiff to the presumption arising from the non-production of a deed as the High Court would have given to it, had they been the Judges composing the Court of first appeal.—*Chokkalinga v. Mahalingam*, 24 I. C. 883; 1 L. W. 850.

**Decision Based on Inadmissible Evidence.**—A judgment of a lower Appellate Court based on inadmissible evidence can be impeached in second appeal (2 W. R. 74: 21 C. L. J. 45 *refd. to*); *Tara Kumar v. Kumar Arun Chandra*, 86 C. L. J. 889; *Raoji v. Warlu*, 1923 Neg. 107; or where secondary evidence is admitted in contravention of the provisions of ss. 65 and 66 of the Indian Evidence Act; *Lachman v. Musat. Puna*, 16 I. A. 125: 16 C. 753.

**Decision Based Not on Evidence but on Surmises and Conjectures.**—When a finding of fact is based on no evidence whatever or is based on purely conjectural grounds, it can be examined by a High Court in second appeal; *Munsha Singh v. Uttam Singh*, 4 Lah. L. J. 81: 64 I. C. 428; *Kishen Lal v. Kanhaya*, 5 Lah. L. J. 106.

A finding as to the ancestral nature of certain property based upon mere conjectures and presumptions is liable to be set aside in second appeal; *Natha Singh v. Mahan Singh*, 8 Lah. L. J. 485: 97 I. C. 241: A. I. R. 1926 Lah. 659. It is open in second appeal to attack a decision based not on evidence but on surmises and conjectures; *Dhrupad v. Hari*, 22 C. W. N. 826; *Bhagwan Das v. Samser Singh*, 33 P. L. R. 1918.

**Decision Based on Evidence Not on the Record.**—It is a well-known principle of law that a decision that there is no evidence to support a finding is a decision of law; *Harendra Lal v. Hari Dasi*, 41 C. 972: 18 C. W. N. 817: 19 C. L. J. 484: 16 Bom. L. R. 409: 12 A. L. J. 774: 27 M. L. J. 80. See also *Purushottam Pandurang*, 89 B. 149.

Where the lower Appellate Court reversed the decree of the first Court without sufficient evidence. Held that the decision was erroneous in point of law and was a ground of special appeal.—*Sham Chand v. Bungo Chunder*, Marsh, 558: 2 Hay 663.

Where there is no evidence in support of the finding of the lower Appellate Court, the High Court will interfere in second appeal.—*Ananda Chundera v. Parbati Nath*, 4 C. L. J. 198 (17 C. 875, P. C. followed). In second appeal the High Court can interfere when there is no evidence to justify the finding of fact.—*Peary Mohan v. Jote Kumar*, 11 C. W. N. 83,

*Gopi Mohun*, 15 C. 652; *Srinivasa v. Siva Kolundu*, 19 M. 849; *Sa Bhusan v. Krishna Kali*, 20 C. L. J. 196; 18 C. W. N. 1808; *Chand Daya v. Bhagban*, 23 C. L. J. 125.

The suits for contribution exempted from the jurisdiction of the Small Cause Courts, are suits in which contribution is claimed in respect of payment made by a sharer of money due from a co-sharer. But exemption does not apply to cases where no debt was due from the sharer prior to payment and the contribution is sought in respect of debt created by the payment itself. In such cases no second appeal will lie when the amount of subject-matter does not exceed Rs. 500.—*Mar Ammal v. Mavula Maracoir*, 30 M. 212; 17 M. L. J. 376 (11 C. referred to).

A suit brought to recover, by way of contribution, a share of a decretal amount paid by the plaintiff is one of a Small Cause nature and is excluded by Sch. II of Art. 41 of the Provincial Small Cause Courts Act, 1887, and where the amount is less than Rs. 500, no second appeal lies.—*Mohammed Ser Khan v. Chamman Khan*, 94 I. C. 949; A. I. R. 1915 All 456.

**Damages.**—A suit for compensation for money realised by the defendants from the actual occupants of the land, who were stated to have been the plaintiff's tenants is a suit for damages, and therefore no second appeal lies to the High Court in such a suit valued at less than Rs. 500.—*Kali Krishna v. Izzatunnissa*, 24 C. 557. Followed in *Rash Behari Sridhar Belal*, 6 C. W. N. 687.

A suit for damages against a police officer for entering plaintiff's house and thereby obliging plaintiff's wife and others to remain secluded is cognizable by Small Cause Court and no second appeal lies; *Bhag Nath v. Krishna Lal*, 10 C. L. J. 198 (12 M. L. J. 349 followed).

No suit for damages occasioned by personal injury will lie in the Small Cause Court, unless actual pecuniary loss has resulted from such injury to the plaintiff. When there is no such pecuniary loss, the suit for damages will lie in the ordinary Civil Courts, and a special appeal will lie to the High Court, although the damages claimed are below Rs. 500.—*Alibuksh v. Samiruddin*, 4 Bom. L. R. 31; 12 W. R. 477; *Raj Chund v. Panchanun*, 4 W. R. 7.

A suit for money paid by an unsuccessful claimant, under s. 248, Act VIII of 1859, in order to save from sale his share of an estate which had been attached in execution of a decree, is in reality a suit for damages, and (the value being below Rs. 500) is in the nature of a Small Cause Court suit in which no special appeal will lie.—*Poorshuttaum Gour Soonder*, 18 W. R. 283.

A suit to recover money attached, but subsequently released on dishonest and wrongful objection, is a suit for damages, and one of the nature cognizable by a Small Cause Court, and no special appeal therefore lies.—*Kalian Singh v. Chunni Lal*, 6 A. 10.

A suit for damages of any kind below Rs. 500 (e.g., a suit for damages for not cutting through a bund whereby plaintiff's crops were destroyed in consequence of accumulation of water) is cognizable by a Small Cause Court and no special appeal lay in such a case.—*Gopee Nath v. George*, 6 W. R. 7.

of fact. But it is open to Court in second appeal to examine the evidence to see whether there is any evidence to support the finding. If there is no evidence, then the High Court would surely interfere with the finding of fact; *Venkatarama v. Krishnammal*, 52 M. L. J. 20: 99 I. C. 571. A. I. R. 1927 Mad. 255

A finding of fact arrived at by the lower Appellate Court on the ground that there is no evidence to the contrary could be successfully challenged in second appeal if there is as a matter of fact evidence to support the contrary; *Rajeswari v. Pulin Behari*, 25 C. W. N. 881.

Whether the erection of an indigo factory by an occupancy tenant under s. 23 of the B. T. Act renders the land unfit for the purposes of the tenancy, depends upon the circumstances of the individual case, the size of the holding, the area withdrawn from actual cultivation and the effect of such withdrawal upon the fitness of the holding, as a whole, for profitable cultivation. The question in each case is a question of fact, and the High Court cannot in second appeal interfere with the finding of the lower Court.—*Hari Mohun v. Surendra Narain*, 84 C. 718, P. C. : 6 C. L. J. 19: 11 C. W. N. 794 (31 C. 174. 9 C. W. N. 87 reversed).

Where the main question in a case was whether or not the grant of certain pasture land in a village by the Government was inconsistent with general wishes and well-being of the village community and the lower Appellate Court was of opinion that the grant was inconsistent with the general wishes and well-being of the community, such a finding was one of fact and cannot be disturbed in second appeal; *Gita Ram v. Kirpa Ram*, 88 A. 256. 12 A. L. J. 378.

Where under the terms of a contract of sale, goods were to be undamaged and the Courts below found it to be damaged, it is a finding of fact binding in second Appeal; *Firm of Ram Dayal Ram Narain v. Firm of Bhairo Bux Gouridutta*, 1 Pat. L. R. 398.

The question of the amount of damages, in a case of slander, is a question of fact and it is not open to the High Court to interfere in second appeal upon a question like that; *Jogeswar Sarma v. Dinaram Sarma*, 8 C. L. J. 140

In a suit for damages for assault the question of the amount of damages is a question of fact; *Mumtaz Hussain v. Lewis*, 9 I. C. 881. See also 31 A. 333; 3 C. L. J. 140; 10 W. R. 164.

The question whether a particular transaction is *bona fide* or fraudulent is always a question of fact; *Lachmi Narain v. Mt. Naseer Fateema*, 94 I. C. 927: A. I. R. 1926 Oudh 501.

A question as to the existence of a customary right of privacy in a town is a question of fact and when the evidence on both sides has been considered by the lower Appellate Court, the High Court will not interfere in second appeal; *Shah Mohamed v. Ramsan*, 66 I. C. 833 (45 C. 285; 46 C. 189; 37 M. L. J. 109 *folld.*).

A finding that a gift was an absolute one enuring for the benefit of the donee's descendants is one of fact and cannot be interfered with in second appeal; *Allah Jawaya v. Adri*, 4 Lah. L. J. 457.

The question as to the effect to be given to a petition as evidence gift and the finding that there was no gift, was a finding of fact and



A suit to recover the value of crops alleged to have been illegally carried away by the defendant, while the plaintiff was in possession, is one of a Small Cause Court nature and therefore no second appeal lies—*Annamali v. Subramanyan*, 15 M. 298. See also *Krishna Prosad v. Maizuddin*, 17 C 707. See also *Bindraban v. Sahodra*, 11 A. L. J. 599: 21 I. C. 638.

**Immoveable Property.**—Hut is immoveable property and a suit for declaration in respect of a hut is not cognizable by a Small Cause Court and a second appeal lies in such a suit, *Arjun Ram v. Sadananda*, 9 I. C. 1.

Standing trees are also immoveable properties and suit for recovery of possession of standing trees, is not cognizable by the Small Cause Court and a second appeal lies; *Purna Chundra v. Kinkar Manjhi*, 9 I. C. 183.

**Marriage.**—A suit for recovery of presents made on a promise of marriage is a suit based on a promise of marriage and therefore excluded from the cognizance of a Small Cause Court and consequently a second appeal lies; *Nag La v. Nag Than*, 14 I. C. 837. See also *Kali Sunker v. Koylash Chunder*, 15 C. 833.

**Maintenance.**—A suit for arrears of maintenance payable under a written agreement does not lie in a Court of Small Causes.—*Saminatha v. Mangalathammal*, 20 M. 29; *Amrito Moye v. Bhogiruth*, 15 C. 164; and *Bhagvantrao v. Ganpatrao*, 16 B. 267.

**Mesne Profits.**—A suit for mesne profits does not fall under Art. 31, Sch. II of the Provincial Small Cause Court Act and is cognizable by a Court of Small Causes. Hence no second appeal lies under the rule in a suit for mesne profits when the value of the subject-matter is less than Rs. 500.—*Kunjo Behary v. Madhab*, 23 C. 884 F. B. On the other hand, it has been held by a Full Bench of the Madras High Court that such a suit comes within Art. 31 of the said Act and is therefore exempted from the cognizance of a Court of Small Causes; *Savarimuthu v. Aithurusu*, 25 M 103. The Bombay High Court has taken a view contrary to that of the Calcutta High Court; *Antone v. Mahadev*, 25 B. 85.

The plaintiff sued to recover three specific sums of money amounting to Rs. 447-11, being her share of the revenues and profits of three acts of lands, alleging in her plaint that the money had been wrongly received by the defendant. Held, that the suit was of Small Cause Court nature and no second appeal lies.—*Girjabai v. Raghunath*, 30 B. 147: 7 Bom L R 741.

**Money.**—A suit to recover money under sub-section (2) of s. 73 of C. P. Code, is excluded from the jurisdiction of the Small Cause Court, and consequently a second appeal lies; *Gouri Dutt v. Amarchand*, 15 C. L. J. 49.

Held, that a suit to recover Rs. 200 paid in respect of the purchase of land which was not completed, was a suit of the description cognizable by the Small Cause Court, and a special appeal would not lie.—*Khoobchand v. Hasaree Lall*, 1 Agra 275.

In a suit for recovery of a sum of money less than Rs. 500, as money paid in excess of rent due. Held, that the suit being cognizable by the Court of Small Causes, no special appeal lay to the High Court.—*Sib Sahaya v. Birchandra*, 2 B. L. R. A. O. 172: 11 W. R. 80.

A finding of the lower appellate Court that the possession of a party to the suit has not been adverse for a continuous period of 12 years, is a finding of fact which can not be reached in second appeal; *Mahomed Asimkhan v. Sultan Ahmed Khan*, 4 Lah. L. J. 809.

The finding of a fact by the Lower Appellate Court upon evidence a portion of which was inadmissible, is not such a finding of fact as cannot be interfered with in special appeal.—*Guru Das v. Sambhunath*, 3 B. L. R. 258.

As a general rule, the High Court will not interfere with the finding of facts by the Lower Appellate Court on second appeal, save on some very special ground; for instance, where such a finding of facts as appears to be necessary under the peculiar circumstances of the cases, has not been satisfactorily arrived at.—*Goluck Nath v. Kirti Chunder*, 16 C. 645.

Held that the finding as to the existence of an implied contract to pay, the enhanced rent is a finding of fact, and must be accepted in second appeal.—*Siriparapu v. Malukarjuna*, 17 M. 43.

The question of acquiescence or waiver is a question of fact and the finding of the Lower Appellate Court on such a question is final and cannot be interfered with in second appeal; *contra*, per Mookerji, J.—*Ananda Chandra v. Parbati Nath*, 4 C. L. J. 198; *Murari Lal v. Bal Kisan*, 95 I. C. 636; A. I. R. 1926 Nag. 416.

The question of negligence is very largely a question of fact; *Syed Sadag Reza v. Khoshmonuni*, A. I. R. 1922 Cal. 317.

A finding of fact cannot be attacked in second appeal on the ground of the insufficiency of evidence; *Prasanna Kumar v. Madhu Badya*, 63 I. C. 500; or on the ground of error, though the error is gross and inexcusable; *Haayt v. Firm of Datta Ram Rajuram*, 4 Lah. L. J. 464.

The findings of fact of the first Appellate Court cannot be interfered with in second appeal.—*Luchman Singh v. Puna*, 16 C. 753; P. O.; *Mt. Chhoto v. Mt. Sora Devi*, 70 I.C. 299.

The limitation of the power of the Appellate Court in hearing a second appeal must be attended to, and the Appellate Court cannot be allowed to question the finding of the first Appellate Court on a question of fact.—*Pertab Chunder v. Mohendranath*, 17 C. 291 P. C.; Followed in *Bal Krishna v. Gobind Babaji*, 26 B. 617. See also *Radha Prosad v. Bal Kowar*, 17 C. 726 F. B. (p. 742).

A finding that a deed of gift was executed in breach of the provisions of s. 53 of the Transfer of Property Act with intent to defeat or delay the creditors of the transferor, is a finding on a question of fact with which the High Court cannot interfere in second appeal; *Ram Kumar v. Saji Unnessa*, 63 I. C. 169.

The presumption as to genuineness of a document of 80 years old is one of fact and cannot be interfered with in second appeal; *contra*, per Tyabji, J. Such a presumption is one of law; *Parankusa Zatindra v. Subramania*, 26 I. C. 117.

A finding of fact based on a misreading of evidence can be attacked in second appeal; *The Firm Jowaladas Parmanund v. Uttamchand*, A. I. R. 1923 Lah. 585.

Small Cause Courts and no special appeal lies in such a case.—*Shamanund v. Nund Koomar*, 3 Agra 290: Agra F. B. (Ed. 1874) 153.

The plaintiff, a widow of a deceased Brāhmin priest, entrusted the defendant with certain books, containing the list of her husband's clients, and had authorized him to carry on the business of *purohit* on her behalf and make over the proceeds to her. The suit was brought to recover those books, and Rs. 60, realized by the defendant from the *jojmans*. Held, that the suit was of Small Cause Court nature and no second appeal would lie.—*Hans Raj v. Ratani*, 27 A. 200.

**Rent, Tax and Cesses.**—A suit to recover arrears of *chowkidari* tax payable by *putnidar* under *putni* settlement is a suit for rent, and therefore a second appeal would lie, where the value of the suit is less than Rs. 500.—*Assanulla Khan v. Tirthabashini*, 22 C. 680 (21 C. 132, 11 C. 221, *rejd. to*) See also *Kanhai Ram v. Sukhdeo*, 12 A. L. J. 98: 22 I. C. 337.

A suit brought by an assignee of arrears of rent, after they fell due, for the recovery of the amount due, is a suit for rent, and therefore second appeal lies in such a suit.—*Srish Chunder v. Nachim Kazi*, 27 C. 827, F. B.: 4 C. W. N. 357. See, however, *Mohendra Nath v. Kailash Chandra*, 4 C. W. N. 605

A suit by a landlord against a tenant for a certain sum of money payable by him out of the rent to a third person under assignment is one for rent and not for damages and a second appeal lies therefore in such a case.—*Basanta Kumari v. Ashutosh*, 27 C. 67, F. B.: 4 C. W. N. 3. But see *Hemendra Nath v. Kumar Nath*, 32 C. 169: 9 C. W. N. 96 (11 C. 221. *Folld*).

No second appeal lies in a suit for rent or in the alternative for recovery of damages for use and occupation, where the sum claimed is below Rs. 100.—*Mohim Chundra v. Mirsa Ahmed*, 22 C. L. J. 564 (23 C. 884 *folld.*).

*Mirasi* right is an interest in the village lands and the *thunduwaram* payable to the *Mirasdar* is not of the nature of "rent" but comes under the general expression "dues" in Art. 19 of the Prov. Small Cause Court Act. A second appeal therefore lies in a suit for the recovery of *thunduwaram*, though the amount sought to be recovered is less than Rs. 500; *Kumarappa Reddi v. Manavala Goundan*, 41 M. 374 F. B.: 34 M. L. J. 104.

Where in a suit for rent below Rs. 500, there was a prayer by the landlord for a declaration as to the propriety of the *patta* tendered to the tenant, and it appeared that the plaintiff could have obtained all the relief which he sought without asking for a declaration. Held, that the prayer for a declaration does not prevent the suit being of the nature cognizable in a Small Cause Court within the meaning of this section and that no second appeal lies in such a case; *Ramachandraiyer v. Mir Muhammad Norulla*, 30 M. 101, F. B.: 16 M. L. J. 477. See also *Rama Nath v. Kumatha*, 16 M. L. J. 432, and *Veera Raghava v. Vellal*, 23 M. L. J. 517.

A suit to recover money paid to redeem crops distrained for rents and also for damages sustained on account of the distraint is, so far as the claim relates to damages, a suit coming under clause (7), Article 35 of

Where the principles of law applicable have neither been ignored nor violated, a finding as to the existence of a nuisance is binding on the Court in second appeal (81 I. C. 62, and 40 B. 401 referred to); *Chairman of the Municipal Commissioners of Dacca v. Krishna Das*, 86 C. L. J. 189.

The question whether a deposit of decretal amount by an unregistered purchaser of a transferable under-tenure, is sufficient or not is a mixed question of fact and law which the High Court is competent to determine in second appeal; *Kripa Sindhu v. Banchanidhi*, 19 C. L. J. 888.

The determination of a lower appellate Court whether there was or was not adverse possession is a mixed question of law and fact and can be interfered with in second appeal; *Shookoor Mullick v. Behari Lal*, 11 I. C. 185.

The question of the alleged ownership in the disputed land is a mixed question of fact and law; *Kadha Kristo v. Umesh Chunder*, 19 C. L. J. 539.

The question of contest between a verbal sale and a registered sale deed is a mixed question of fact and law and cannot be allowed to be raised in second appeal; *Abdul Sattar v. Mauug Lee Maung*, 22 I. C. 803.

**Finding of Fact Not Supported by Reasons or Supported by Bad Reasons.**—Held that the High Court is not bound, in second appeal by a finding of a lower appellate Court when such finding is not supported by any reason.—*Purshotam Sakham v. Durgoji Tukaram*, 14 B. 452.

The District Judge having expressed an opinion and recorded a finding without dismissing the several grounds on which the Sub-Judge came to a contrary conclusion. Held that the finding of the District Judge ought not to be accepted.—*Madhav Shanbhog v. Venkatesh*, 16 B. 540. But see *Jatra Mohan v. Pitambar*, 19 C. L. J. 385, where it has been held that the lower appellate Court is not bound to dispose of *seriatim* all the reasons given by the first Court, if it gives special reasons of its own for coming to an opposite conclusion (12 W. R. 361 followed).

The fact that the judgment of an Appellate Court is not drawn up in accordance with the provisions of s. 574, C. P. Code, 1882 (Or. XXI, r. 81), is no ground for a special appeal, unless it can be shown that the judgment has failed to determine any material issue of law.—*Bisvanath v. Vaidyanath*, 12 C. 199. See also *Doolee Chund v. Omda Begum*, 18 W. R. 478.

A finding unaccompanied by the reasons for it, as required by s. 204 C. P. Code, 1882 (Or. XX, r. 5), is not a conclusive finding of fact binding on the Court of second appeal.—*Kamat v. Kamat*, 8 B. 868. See also *Ningappa v. Shivappa*, 19 B. 323.

A finding of fact by a lower appellate Court may be disturbed in special appeal, if, as in this case, the reasonings and the views upon which that finding is based are erroneous in law as where evidence is credited or disbelieved on unreasonable grounds.—*Juggumath v. Mahomed Mokeem*, 17 W. R. 161; *Beharee Lall v. Sree Ram*, 20 W. R. 259; *Kristo Gobind v. Gunga Pershad* 23 W. R. 268; *Putsahee Koor v. Sheo Pershad*, 24 W. R. 61; *Chand Monee v. Obhoy Churn*, 24 W. R. 289; *Hunsa Koor v. Sheo Gobind*, 24 W. R. 491; *Gobindo Chunder v. Madhoosudun*, 25 W.

second appeal lies: *Kadi Sheikh v. Najumaddi*, 44 C. L. J. 190: 97 I. C. 500: A. I. R. 1926 Cal. 1230.

**Question of Title.**—No special appeal lies to the High Court in a suit of the nature cognizable in Courts of Small Causes when the value of the suit is less than Rs. 500, although a question of title has been raised and incidentally tried in the Courts below.—*Manappa Mudali v. McCarthy*, 8 M. 192; *Kahan Dayal v. Kahan Narer*, 9 B. 250. Followed in *Mahadeo v. Budhai Ram*, 26 A. 358; *Mohesh Mahto v. Piru*, 2 C. 470, 1 C. L. R. 33; *Shidu v. Ganesh*, 16 B. 128; *Narayan Bhasker v. Balaji Bapuji*, 21 B. 248; and *Vinayak Gangadhar v. Krishnarao*, 25 B. 625. See also *Rash Behari v. Srihar Belal*, 6 C. W. N. 687 (Followed in *Dinabandhu v. Jagabandhu*, 33 C. L. J. 384); *Manbodh v. Ananta*, 6 I. C. 415; *Kerisang v. Narasang*, 32 B. 56; *Nagendra Nath v. Asutosh*, 41 I. C. 627; *Mahant Prayaga Doss v. Pachella Dorasami*, (1926) M. W. N. 528. 92 I. C. 899: A. I. R. 1926 Mad. 656.

In applying s. 102 of the C. P. Code, the original character of the suit is to be regarded rather than the character it may subsequently assume by operation of the finding of the Court. The mere fact that a question of title arose for decision is immaterial; *Kanram v. Raoji*, 50 I. C. 629.

Where a suit is brought in a form cognizable by a Court of Small Causes, that Court cannot decline jurisdiction because a question of title to immoveable property is incidentally raised. It is the nature of the suit as brought by the plaintiff and not the nature of the defence that determines whether or not the Court of Small Causes has jurisdiction.—*Bapuji Raghunath v. Kunarji Edulji*, 15 B. 400.

A suit for damages for an amount not exceeding Rs. 500 is within the competency of a Small Cause Court to decide, notwithstanding that it involves an enquiry into a question of title. No special appeal lies in such a case.—*Luckhee Debia v. Manick*, W. R. 1864, 237; *Khandu Valad v. Totia Valad*, 8 Bom. H. C. 23. See also *Keshub Chunder v. Brommomojee*, 1 W. R. 35; *Hedaetallah v. Karloo*, 7 W. R. 73; *Ram Dyal v. Huro Soonduree*, 10 W. R. 272.

There is no second appeal from the decree in a suit for recovery of the price of fish removed from a tank after declaration of title, when the value of the suit does not exceed Rs. 500; *Aradhan Mandal v. Abhoyacharan*, 68 I. C. 628.

Where the plaintiff brought a suit to recover a certain sum of money on the allegation that a particular tank was the joint property of the parties and that the defendant had caught fish from the said tank and appropriated the entire fish by selling them for his own benefit. Held, that the suit was one of the nature of Small Causes and that therefore no second appeal lay; *Narain Das v. Harakh Narain*, 31 I. C. 797.

A suit for the price of trees cut down and removed is a suit for damages, notwithstanding that it involves an enquiry into a question of right. Such a suit is cognizable by a Court of Small Causes, and no special appeal will lie.—*Shib Deen v. Bukshee Ram*, W. R. (1864) Mis. 3; *Narayanappa v. Venkataratnam*, 20 M. L. T. 281: (1916) M. W. N. 215. But when tenant's customary right to cut down trees in the locality is enquired into and decided, a second appeal will lie.—*Sitab Rai v. Dubal Nagaria*, 6 C. L. J. 218. Referred to in 10 M. L. T. 500.

ed in *Hamid Ali v. Gaya Din*, 26 A. 827. See also *Parvati v. Ganpati*, 23 B. 518, where it has been held that the High Court can only interfere if the lower Court has exercised its discretion capriciously or arbitrarily; *Bachint Singh v. Harnam Singh*, 94 I. C. 396; A. I. R. 1926 Lah. 445.

The High Court in special appeal has power to look into the grounds which a Judge has given for admitting an appeal after the lapse of the period allowed by the Limitation Act.—*Mowni Bewa v. Surendra Nath*, 2 B. L. R. A. C. 184; 10 W. R. 178. See also *Ohunder Dass v. Boshoon Lall*, 8 C. 251; 11 C. L. R. 177.

An objection that there had been such delay that the Court in its discretion under section 27 of the Specific Relief Act would not give relief in a suit for specific performance was not allowed to prevail in second appeal.—*Mokund Lall v. Chotay Lall*, 10 C. 1061.

Where the lower Courts refused to admit a document not produced at the first hearing, the High Court will not interfere in second appeal with such discretion; *Jamala Sahai v. Abdul Ghani*, 11 I. C. 289.

The exercise of the discretion under s. 90 of the Evidence Act for or against the genuineness of a document may be challenged in second appeal where it is shown that the exercise of the discretion was made arbitrarily and not on judicial grounds; *Mahadin v. Bikrama*, 93 I. C. 18; A. I. R. 1926 Oudh 862.

**Non-joinder or Misjoinder of Parties or Causes of Action.**—On account of the addition of the words misjoinder of parties or causes of action in s. 99, no second appeal lies on those grounds unless the decision has affected the merits of the case or the jurisdiction of the Court. See notes and cases under section 99. See also *Gur Prosad v. Gur Prosad*, 19 C. L. J. 816.

An objection as to non-joinder of parties cannot be entertained for the first time in second appeal; *Hriday Nath v. Akhoy*, 52 I. C. 463.

**Question of Valuation and Stamp.**—An error of valuation, which does not affect the jurisdiction of the Court in which a suit is tried, and does not lead to defect in the decision on the merits, is not sufficient ground for interference in special appeal.—*Kisto Churn v. Dwarka Nath*, 10 W. R. 32; *Nandram v. Balaji*, 5 Bom. H. C. 153. See also *Govinda Menon v. Karunakara Menon*, 24 M. 43.

A plea that the memorandum of appeal in the lower Appellate Court was insufficiently stamped, and that such deficiency was not made good within the period of limitation, cannot be raised at the hearing of the second appeal, when it has not been taken in the memorandum of appeal.—*Ram Kishen v. Dipa Upadhai*, 13 A. 580.

An Appellate Court, after disposing of an appeal, directed the appellant to pay additional Court-fee on memorandum of appeal. Held that the order was *ultra vires*, and liable to correction in second appeal under s. 584, C. P. Code, 1882 (s. 100).—*Mahadei v. Ram Kishen*, 7 A. 528.

An objection to jurisdiction on the ground of wrong valuation cannot be taken for the first time in second appeal.—*Muthusami v. Nallakulanthas*, 18 M. 418. Nor the objection to jurisdiction can be taken for the first time in second appeal, where the question is not a pure question of

v. *Radha Nath*, 11 C. W. N. 861. See also *Atwari v. Maiku Lal*, 31 A. 1; *Dattada Bhimaraju v. Sreerama Sastrulu*, 37 M. L. J. 308: 26 M. L. T. 256; *Ramakrishna v. Vengurla Municipality*, 41 B. 367: 19 Bom. L. R. 83; *Jaminibala v. Karali Prasad*, 34 C. L. J. 477.

A suit valued at less than Rs. 500 was brought in a Court of Small Causes, and that Court passed a decree and transferred it for execution to the Munsif who passed an order in execution, and the order was confirmed in appeal. Held, that no second appeal will lie from the Munsif's order; and that s. 586, C. P. Code, 1882 (s. 102), controls s. 228, C. P. Code, 1882 (s. 42), in a case of this kind.—*Lala Kandha Pershad v. Lala Lal Behary*, 25 C. 872 (12 A. 579 approved). See also *Nazar Husain v. Keesu Mal*, 12 A. 581; and *Shyama Charan v. Debendra*, 27 C. 484: 4 C. W. N. 269. Followed in *Narayan v. Nagindas*, 30 B. 118: 7 Bom. L. R. 641. See also *Khati Jan Bibi v. Saroda Prasad*, 4 C. L. J. 13-n.; *Sami Rao Appa v. Viravan Chettiar*, 32 I. C. 712; *Sant Prasad v. Bhagwani Prasad*, 48 A. 403: 19 A. L. J. 72.

An order refusing to execute a Small Cause Court decree transferred for execution to Munsif is appealable.—*Perumal v. Venkatarama*, 11 M. 180.

Where the amount sought to be recovered from a defaulting purchaser under Or. XXI, r. 71, C. P. Code, is less than Rs. 500, an order passed on the application is not subject to second appeal; *Rajacharya v. Chemanna*, 45 B. 223.

**Order of Remand.**—No appeal lies against an order of remand in a suit of a nature cognizable by a Court of Small Causes valued at less than Rs. 500, as no second appeal is allowed against the decree of the lower Appellate Court in such a suit. The rule laid down under the old Code in, 10 C. 525, 11 C. W. N. 861, 19 M. 391, 3 A. 18, 21 A. 291, 24 C. 774, 7 B. 292, is no longer good law, as the law has been changed by the Code of 1908, *Haradeb Das v. Ananda Sheik*, 22 C. L. J. 97; *Sarup v. Kunder*, 36 I. C. 398; *Amba Prasad v. Mushtaq Husain*, 42 A. 200: 18 A. L. J. 167.

**Other Cases Bearing upon the Section.**—A suit brought by an auction purchaser to recover the purchase-money, when it is found that the judgment-debtor had no saleable interest in the property sold, is not a suit of a nature cognizable by a Small Cause Court, and therefore special appeal is not barred.—*Pachayappan v. Narayana*, 11 M. 269. See also *Rustomp v. Vinayak*, 12 Bom. L. R. 723. But see *Makund Ram v. Bodh Krishan*, 20 A. 80.

**Order granting a review in a suit of Small Cause Court nature valued at less than Rs. 500 was passed by an Appellate Court without recording any reasons for it.** Held that second appeal lay against the order.—*Gyanund v. Bepin*, 22 C. 734.

Where a suit, cognizable by a Small Cause Court, was tried both in the Munsif's and District Judge's Court without objection to the jurisdiction—held, on second appeal, that both parties having submitted to the jurisdiction, it was not competent to either of them on special appeal to plead the want of jurisdiction so as to render the proceedings taken in the suit void.—*Suresh Chunder v. Kristo Rangini*, 21 C. 249.

For the jurisdiction of Small Cause Courts, see notes under Order XLVI, rule 6.

A point of limitation can be taken in second appeal for the first time notwithstanding that it has not been taken earlier, if there are sufficient findings of fact on record by the lower Courts to enable the point being argued as a pure question of law; *Panchanan v. Aparna*, 63 I. C. 785.

When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it was not only competent but expedient in the interests of justice to entertain the plea; *Nuri Mian v. Ambica Singh*, 44 C. 107: 20 C. W. N. 1099.

The High Court will allow, on second appeal, a new point to be raised for the first time, provided it is purely a question of law arising on the findings of the Courts below, and not affected by any facts outside those findings.—*Nagesh v. Gururao*, 17 B. 803. But see *Rachawa v. Shiva-yogapa*, 18 B. 679 where a point of law raised for the first time in second appeal was not allowed to be taken. See also *Pedda Olu v. Chinna Reddi*, 5 M. L. T. 79. 2 I. C. 618.

A point of law arising from the pleadings and the evidence in the case can be raised for the first time in second appeal; *Sadananda v. Bai Kuntha*, 2 Pat. L. T. 299: 63 I. C. 833.

A pure question of law arising out of the findings of the Court below and which is patent on the record can be raised for the first time in second appeal; *Lachman v. Santa*, 14 P. L. R. 1922: 64 I. C. 850.

An objection involving a point of law as well as of fact, if not taken in the Court below, cannot be entertained in second appeal.—*Vasanji Haribhai v. Lallu Akhu*, 9 B. 285; *Digambar v. Lahyadeo*, 25 Bom. L. R. 245.

An objection that preliminaries to institute the suit had not been taken was not allowed to be taken for the first time in second appeal.—*Bhikaji Baji v. Pandu*, 19 B. 48.

On second appeal the appellant should not be allowed to raise an entirely new point, if it is one for the right determination of which it is necessary to go into evidence which has not been produced in the lower Courts, or unless it is a pure point of law going to the question of the jurisdiction of the lower Courts, and capable of being determined without the consideration of any evidence other than that on the record, and even if it falls within the above exception, it is purely discretionary with the Court whether to consider it or not.—*Fakir Chand v. Anunda Chunder*, 14 C. 686.

Where the question of limitation was raised for the first time in second appeal, held that, it could not be decided in favour of the plaintiff.—*Shibapa v. Dod Nagaya*, 11 B. 114; *Para Dekkan v. Ameeruddin*, 72 I. C. 181.

Held that, not only may the plea of *res judicata*, though not taken in the memorandum of appeal, be entertained in second appeal, under the provisions of s. 542, C. P. Code, 1882 (Or. XLI, r. 2), but that, even when such plea has not been urged in either of the lower Courts or in the memorandum of appeal, if raised in the second appeal it must be considered and determined either upon the record as it stands or after a remand for findings of fact.—*Muhammud Ismail v. Chaitar Singh*, 4 A.



to a definite conclusion on a set of facts, the High Court has the power of determining the issue left undermined by the lower Appellate Court on the evidence on the record or of remitting the case to the lower Court for a finding on that issue, with liberty to the parties to adduce additional evidence; *Chidambara Sivaprakasa v. Veeranna Reddi*, 45 M. 586 P. C.: 48 M. L. J. 640: 49 I. A. 286.

Previous to the amendment made by Act VI of 1926, as stated above, it was held that where a question of fact had been determined by the lower appellate Court, but the decision could not be supported because it was based in part on evidence *improperly admitted*, the High Court could not look into the evidence to decide whether the remaining evidence, after exclusion of the evidence erroneously admitted, was sufficient to warrant the finding of the Court below, and the proper course was to remand the case to the lower Court; *Jagadis v. Hanhar*, 40 C. L. J. 39: 78 I. C. 219: A. I. R. 1924 Cal. 1042. The section has now been amended by Act VI of 1926 and the effect of the amendment is to enable the High Court, in second appeal, to come to the necessary finding of fact in all cases where the finding of the lower appellate Court is vitiated by reason of any illegality, omission, error or defect such as is referred to in s. 100 (1). In view of the alteration made in this section by Act VI of 1926, a Judge of the High Court sitting in second appeal has jurisdiction to decide finally any matter which was not decided by the lower Court or which had been decided in a manifestly wrong manner; *Brojendra Kishore v. Mohini*, 31 C. W. N. 92.

### APPEALS FROM ORDERS.

**104.** (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:—

*Orders from which  
appeal lies.*

- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the Court;
- (b) an order on an award stated in the form of a special case;
- (c) an order modifying or correcting an award;
- (d) an order filing or refusing to file an agreement to refer to arbitration;
- (e) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
- (f) an order filing or refusing to file an award in an arbitration without the intervention of the Court;
- (ff) an order under Section 35-A;
- (g) an order under Section 95;

An objection that mesne profits ought to have been settled in the execution-proceeding, and that no separate suit lies, cannot be taken for the first time in second appeal. The point which was not raised in the pleadings or before either of the lower Courts cannot be raised in second appeal.—*Azizuddin v. Ramanugra*, 14 C. 605 (19 W. R. 90 followed).

**Point Expressly Abandoned in Lower Court If can be Taken in Second Appeal.**—Where the appellant expressly abandons a point in the Court below he ought not to be allowed to take it in second appeal; *Jadu v. Gopal Chandra*, 69 I. C. 44; *Sadhuram v. Uttam Das*, 3 Lah. L. J. 516.

**New Point or Issue When can be Raised in Second Appeal.**—A point which is a new one and taken for the first time in second appeal should not be allowed to be raised when there is no evidence on the record and no finding to support it; *Chandra Mohan v. Sasibala*, 3 Pat. L. T. 623: A. I. R. 1922 Pat. 39: 65 I. C. 277; *Syed Nayajan v. Midnapore Zemindary Co.*, 67 I. C. 70; *Chandbhai v. Hasanbhai*, 46 B. 213: 64 I. C. 205: A. I. R. 1922 Bom. 150.

The Court will allow a party to raise a new point of law on appeal or second appeal when no further investigation of facts is necessary and when there is no surprise to the other side. If however the new plea raises a question of fact or mixed question of fact and law, the Court will not allow it to be raised; *Secy. of State for India v. Upendra Narain*, 86 C. L. J. 336; *Durga Charan v. Ambika Charan*, A. I. R. 1927 Cal. 393.

The question of the sufficiency or insufficiency of the sum tendered cannot be allowed to be raised for the first time in second appeal; *Jag Saha v. Ram Sakhi Kuar*, 1 Pat. 350: 3 Pat. L. T. 832: 65 I. C. 668.

It is not open to the appellant to raise for the first time in second appeal, an issue which would depend on facts; *Hriday Nath v. Tala Bewa*, 65 I. C. 706.

When a point of fact was not raised in the Courts below nor had any issue been framed with reference to it, it cannot be raised for the first time in second appeal; *Nayajan Ali v. Midnapore Zemindary Co.*, A. I. R. 1923 Cal. 285.

**101.** No second appeal shall lie except on the grounds mentioned in section 100. [S. 585.]  
 Second appeal on no other grounds.

This section exactly corresponds with s. 585 of Act XIV of 1882. No change has been made in this section.

**102.** No second appeal shall lie in any suit of the nature cognisable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees. [S. 586.]  
 No second appeal in certain suits

## COMMENTARY.

This section exactly corresponds with s. 586 of Act XIV of 1882. There has been no change in the wording or in the language.

*Clause (ff)*—This clause is new and has been added by the C. P. Code Amendment Act IX of 1922.

*Clause (g)*—This clause refers to an order under s. 95 of the Code, that is an order awarding compensation for obtaining arrest, attachment or injunction on insufficient grounds.

*Clause (h)*—This clause refers to orders passed under Order XVI, rules 10, 12, 16, 17, 18, 21 and Order XXI, rule 98.

*Clause (i)*—This clause refers to orders passed under Order XLIII, rule 1 of the First Schedule. The proviso to this clause is new and has been added by the C. P. Amendment Act IX of 1922.

“Save as otherwise expressly provided in the body of this Code.”—In the body of the Code there is express provision that orders falling under section 47 are appealable; so also there is express provision in section 145. The effect of s. 104 is, not to take away a right of appeal given by clause 15 of Letters Patent, but to create a right of appeal in cases where clause 15 of the Letters Patent is not applicable. Section 104 is materially different from s. 588 of the Code of 1882; *Mathura Sundari v. Haran Chandra*, 23 C. L. J. 443.

“Or by any law for the time being in force.”—These words which have been added in this section save the provisions of clause 15 of the Letters Patent, which provide that an appeal will lie from every judgment of a single Judge of the High Court in the exercise of Civil jurisdiction to the other Judges of the Court.—See, *Toolsseemoney v. Sudevi*, 28 C. 361: 3 C. W. N. 847. See also *Sabhapati v. Narayanaswami*, 25 M. 555. The provisions of this section therefore do not restrict the right of appeal given by s. 15 of the Letters Patent.

*Clause (a)*.—Under s. 104, cl. (a) of the C. P. Code, no appeal lies where the arbitration is not superseded under Sch. II, cl. (8) of the Code; *Budh Singh v. Ramnath*, 125 P. R. 1912: 251 P. W. R. 1912.

*Clause (b)*.—The parties referred their disputes relating to the properties in suit to the arbitration of two persons, who differed on a question of law and each of them expressed his opinion on the question and referred it to the opinion of the High Court in the form of a special case, under Sch. II, r. 11 of the C. P. Code, 1908. It was decided by the chamber Judge. An appeal was preferred against his decision. Held, that no appeal lay, since the special case was in no sense an award within the meaning of r. 11, Sch. II of the C. P. Code; *Purshatamdas v. Ram Gopal*, 12 Bom. L. R. 852.

*Clause (c)*.—The provision in cl. (c) that an appeal shall lie from an order modifying or correcting an award, does not confer an unrestricted right of appeal; and where an order has been made modifying an award, the validity of the whole award cannot be called in question in an appeal against that order, but the appeal is allowed against the order only in so far as it modified the award; *Raibans Sahay v. Soorja Lal*, 17 C. W. N. 617: 15 I. C. 519.

Where a decree is passed in terms of an award but costs are refused the order in effect modifies the award of the arbitrator and is appealable, but there is no right of second appeal; *Mani Lal v. Sajjad Hussain*, 13 O. L. J. 144: 93 I. C. 272: A. I. R. 1926 Oudh 870.

## APPEALS FROM APPELLATE DECREES

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*sident of the Vengurla Municipality*, 41 B. 367; 88 I. C. 381; *Mikkil Ankaya v. Alapatti*, 23 L. W. 518; 94 I. C. 77; A. I. R. 1926 Mad. 622.

"Value of the subject-matter does not exceed Rs. 800."—For the purposes of an appeal, whether from a decree in a regular suit or from an order passed in execution of such decree, the pecuniary test of jurisdiction is the valuation of the original suit in which the decree was passed, and not merely the actual amount affected by the order sought to be appealed. A decree or order in which a second appeal would lie is not subject to revision.—*Nazar Husain v. Kesri Mal*, 12 A. 591.

In a suit for mesne profits, the plaintiff valued his claim at Rs. 300 and offered to pay additional Court fee for excess amount to be found by the commissioner. The commissioner ascertained Rs. 580 as mesne profits; but the plaintiff neither amended his valuation nor paid the additional Court fee. Held that for the purposes of second appeal the value of the suit must be taken to be Rs. 300 and therefore second appeal was incompetent, *Kali Kamal v. Fazlur Rahaman*, 15 C. W. N. 454 (457).

Where the damages claimed in a suit exceeded Rs. 500, and the Court gave the plaintiff less than Rs. 500 as damages, held that the right of appeal was not taken away by Act XXIII, of 1861, s. 27.—*Neeslmonjee Singh v. Gordon, Stuart & Co.*, 1 Ind. Jur. N. S. 356; 6 W. R. 152.

## SPECIAL CASES.

Account.—Where a suit for a balance due on account of rents collected from the plaintiff's zemindaries by the defendant's father acting as agent of the plaintiffs for an amount under Rs. 500 was entertained by the Civil Court within the local jurisdiction of a Small Cause Court, a special appeal lay to the High Court.—*Dyebukce Nandan v. Maddu Mutty*, 1 C. L. 123; 24 W. R. 478. But see *Huri Narain v. Joy Durga*, 2 C. L. R. 17; and *Mahadeo v. Budhai Ram*, 26 A. 358 (1 C. 123 dissented from).

A suit to recover the balance, unaccounted for by an agent who had been employed as a law agent to conduct and look after law-suits is cognizable by a Small Cause Court, and therefore a special appeal would not lie.—*Joogul Kishore v. Raghoo Nath*, 20 W. R. 4.

A suit by one co-sharer to recover money from another on account of occupation and enjoyment of certain lands in a *mouzah* in exclusion of the other co-shares is cognizable by a Small Cause Court, and therefore no special appeal lies under this section.—*Asman Singh v. Doorga*, 6 C. 284; 7 C. L. R. 94.

In a suit upon a bond executed by a Hindu, the plaintiff made the debtor's sons defendants along with their father, and a decree was passed against the father and sons jointly for payment of the debt. Held that the suit, as against the sons, was not a suit of the nature cognizable in a Court of Small Causes within the meaning of this section.—*Narasingha v. Subba*, 12 M. 139, F. B.

Contribution.—Clause 41, Schedule II, of the Provincial Small Cause Court Act (IX of 1887), excludes a suit for contribution from the jurisdiction of the Small Cause Court.—*Bhatoo Singh v. Ramoo Nakhon*, 23 C. 169. See also *Rajanikanta v. Rama Nath*, 20 C. L. J. 200; *Bafuk Nath v. Bepin Behare*, 16 C. W. N. 975. But see *Krishna Kamini*

directing the award to be filed and if the latter is set aside, the decree must be declared inoperative; *Khetra Nath v. Usabala*, 18 C. W. N. 881, *Hari Kunwar v. Lakhmi Ram Jani*, 38 A. 880: 14 A. L. J. 481. *Lakhmi Narain v. Sheo Nath*, 42 A. 185: 18 A. L. J. 78. See also *Sita Ramiah v. Pitchayya*, (1911) 2 M. W. N. 223, where it has been held that under s. 104 (f), the order directing the award to be filed is appealable, but not the decree passed in accordance with the award. See also, *Raghavendra v. Gururao*, 37 B. 442.

An appeal lies against an order refusing to grant an application to file an award made between the parties without intervention of Court. *Ramdhari v. Ram Charittar*, 38 C. 143.

Under s. 104 (f) of the C. P. Code, no appeal lies from an order refusing to set aside an award made and filed under the provisions of the Arbitration Act; *Campbell & Co. v. Jeshbaj Giridhari Lal*, 45 C 502 46 I. C. 687.

An order filing an award from which an appeal is provided for in s. 104 (f) C. P. Code is one which is passed after objections to the award have been disposed of. It does not mean the order by which the arbitrators are directed to bring the award to Court; *Ghulam Mustafa v. Ghulam Sadiq*, 73 I. C. 820.

Pending an appeal before a District Judge, the parties referred their disputes to arbitration without the intervention of the Court. An award in which the pendency of the appeal was set out was passed and on application by the successful party, the Munsif ordered that the award should be filed and made the basis of the decree. On appeal the District Judge set aside the award on the ground that private reference pending litigation was incompetent and that the award was invalid. Held that appeal to the District Judge was competent; *Rahim Manjhi v. Sheik Ekbar*, 22 I. C. 690.

The effect of s. 104 (1) (f) seems to give a right of appeal against the decision of the Court on the question whether the award should be filed or not; *Maung Tun U v. Maung Po Shok*, 1 Rang. 265: A. I. R. 1923 Rang. 199.

Under section 104, cl. (f) of the C. P. Code, an appeal is allowed only from an order filing or refusing to file an award in an arbitration without the intervention of the Court. These words refer to paras. 20 and 21, Sch II of the Code, and section 104 (f) does not apply to cases falling under paras 17-19 of Sch. II.—*Jagannath v. Nanakchand*, 9 P. R. 1913: 16 I. C. 996: 248 P. L. R. 1918; *Tehla Mal v. Dhana Mal*, 60 I. C. 590.

An appeal lies from an order filing an award made in an arbitration without the intervention of the Court, in spite of the fact that the Court has under cl. 21 (1) of the Second Schedule proceeded to pronounce judgment according to the award; *Ram Devi v. Amar Singh*, 172 P. L. R. 1911: 123 P. R. 1912: 103 P. W. R. 1911. Per Rattigan, J. who held that the intention of the legislature expressed in cl. 21 (2), Sch. II is to all intents and purposes nullified by the provision in s. 104 (f).

Clause (ff).—This clause is new and has been inserted here by the C. P. Code Amendment Act IX of 1922. Section 35 A is also a new section and has been added to the Code by the C. P. Code Amendment Act

A suit for damages for defamation of character in the absence of any pecuniary loss is cognizable by the ordinary Civil Courts and, therefore, in such a suit a special appeal lies.—*Bhairab Chandra v. Mahendra*, 4 B. L. R. App. 59: 13 W. R. 118; *Pran Krishna v. Nadiar Chand*, 4 B. L. R. 35-note 10 W. R. 115 But see *Nadiar Chand v. Balkant*, 4 B. L. R. 33-note

A suit for damages, not exceeding Rs. 500, on account partly for injury to reputation and partly for loss in business and professional position, was held to come within the provisions of s. 6, Act XI of 1865, and was not open to special appeal.—*Brojo Soondar v. Eshan Chunder*, 15 W. R. 170

A suit to recover money said to have been taken by the police as stolen property from a person suspected of having committed an offence and not returned to him after he had been acquitted of the charge brought against him, but made over wrongly to another person, is a suit of the nature cognizable in Courts of Small Causes, and when the amount claimed does not exceed Rs. 500, no second appeal would lie.—*Moti Lal v. Secretary of State*, 1 C. L. J. 355.

A suit to recover money paid as rent by a *putnidar* to save his tenure from sale under Bengal Regulation VIII of 1819, where he had already paid the rent due from him, is cognizable by a Court of Small Causes, and therefore no special appeal lies.—*Krishna Kishore v. Bireskur*, 4 C. 595; 3 C. L. R. 177

A *durputnidar* executed a *kabuliyat* in favour of his landlord (*putnidar*) agreeing to pay rent payable to the superior landlord of the *putnidar* out of his *durputni* rent. The *durputnidar* failed to pay rent payable to the superior landlord. Held that the suit by the *putnidar* for recovery of the said sum of money, is a suit for damages and not for rent.—*Hemendra Nath v. Kumar Nath*, 32 C. 169: 9 C. W. N. 96 (11 C. 221 followed; 27 C. 67: 4 C. W. N. 3 distinguished)

A suit to recover a share of *malikana*, which the defendant had realized from the Collector, is a suit for recovery of a sum of money which has been taken away by the defendants to the damage of the plaintiff, and is therefore cognizable by the Small Cause Court, no special appeal lies from a judgment passed in appeal in such a suit.—*Rash Monee v. Mahomed Hafeezulla*, 3 B. L. R. Ap. 96: 12 W. R. 29.

The plaintiff sued for cancellation of a *kabuliyat*, as against first defendant and for damages against second defendant. In second appeal, the plaintiff claimed damages only. Held that no second appeal lay against the defendant as the claim for damages was matter cognizable by a Court of Small Causes; *Ramthal v. Ganoo*, 34 I. C. 909

The plaintiff, in a suit for damages laid at Rs. 200, claimed Rs. 50 on account of medical expenses caused by an assault committed on him by the defendants, Rs. 50, as the costs of a criminal prosecution which he had brought against them, and Rs. 100, for injury to his reputation and feelings. Held that, inasmuch as part of the claim related to alleged actual pecuniary damage, resulting from an alleged personal injury, the whole suit was of the nature cognizable by a Court of Small Causes, and that, under this section no second appeal in such suit would lie.—*Jiva Ram Singh v. Bhola*, 10 A. 49 (18 W. R. 434 referred to).

ing the case under Or. XLI, r. 23, no appeal lies from such order; *Naubat v. Baldeo*, 33 A. 479; *Bhawani v. Harbans*, 2 Lah. L. J. 587; *Nulkanth v. Balvant*, 27 Bom. L. R. 635; 89 I. C. 753; A. I. R. 1925 Bom. 431.

It was not intended by s. 104 (2), C. P. Code to override the express provision of the Letters Patent or to take away by implication, a right of appeal conferred thereunder; *Ruldu Singh v. Sanwal Singh*, 3 L. 188; 67 I. C. 383.

An order passed by an appellate Court under rule 20 of the Second Schedule allowing a party to file an award and directing the first Court to pass a decree in accordance therewith is not open to second appeal under sub-section (2) of section 104; *Sunder Das v. Nanak Chand*, 280 P. L. R. 1914; 143 P. W. R. 1914. See also *Ahmad Din v. Atlas Trading Co.*, 66 P. R. 1915; 146 P. W. R. 1915.

A Munsif returned a plaint for presentation to the proper Court, and on appeal against that order the District Judge transferred the appeal to a Sub-Judge, who remanded the case to the Munsif for trial on the merits *Held*, that no appeal would lie from the appellate order of remand. This sub-section contemplates only one appeal from order, and not two appeals; *Naubat Singh v. Baldeo*, 33 A. 479; 8 A. L. J. 312. See also *Chhubu Mian v. Harcharan*, 119 P. R. 1912.

A Court can remit an award to an arbitrator upon the ground that the award has left undetermined one of the matters referred but if the Court after considering the objection made upon this ground refuses to remit the award for reconsideration, no appeal lies from such order of refusal; *Annada Prasad v. Jogesh Chandra*, 23 I. C. 862.

An order passed under Or. XXI, r. 92, C. P. Code, is not open to second appeal, *Tungnath v. Kanhaiya Lal*, 4 O. L. J. 372; 41 I. C. 121

No second appeal lies from an order under Or. XLIII, r. 1 (j); *Musht. Gul Bano v. Muhammad Zikar Khan*, 3 Lah. L. J. 463; but an appeal lies to the King in Council under s. 109; *Tekair Krishna v. Moti Chand*, 40 I. A. 140; 40 C. 635; 19 I. C. 296.

No second appeal lies from an order passed in appeal under Or. XXI, r. 90 of the Code; *Babu Lal v. Chandra*, 38 P. L. R. 1915; 6 P. W. R. 1915; 27 I. C. 589; *Das Narayan v. Mir Mahammad*, 6 Pat. L. J. 319.

Where a first Court refuses to file a private award and that order is set aside in appeal, the appellate order is not appealable; *Ma Kyaing v. Ma Shwe Thin*, 25 I. C. 7.

No appeal lies under s. 104 against an order under s. 73 refusing rateable distribution as it will affect other decree holders; *Chennama v. Raja of Karvetinagar*, 23 I. C. 422; 1 L. W. 234

No appeal is competent from the order of an Appellate Court remanding for fresh decision a case on appeal against an order setting aside or refusing to set aside a sale in execution of a decree because there is no second appeal from the final decision of such Court as is laid down by s. 104 (2) of the C. P. Code; *Asanand v. Jhangiram*, 29 P. L. R. 1919; 2 P. W. R. 1919.

No second appeal lies against an order passed in appeal upon a petition by an auction-purchaser to set aside a sale on the ground that the judgment

The plaintiff sued to recover from the defendant a certain sum of money alleging that the defendant had illegally levied the money on the plaintiff's land on account of enhanced summary settlement and local fund cess, and obtained a decree in the first Court. On appeal, the District Judge reduced the amount of the plaintiff's claim, but upheld the decree of the first Court in other respects. *Held*, that no second appeal lay, as the suit was one cognizable by a Small Cause Court.—*Musa Miya v. Gulab Husein*, 7 B. 100.

A suit to recover a sum of money forcibly taken out of the possession of the plaintiff by defendant is cognizable by a Court of Small Causes, and where the amount involved is less than Rs. 500, there is no second appeal; *Choky Bharti v. Baldeo Gir*, 2 U. P. L. R. 212; 57 I. C. 505.

Suit for recovery of money, wrongly distributed under s. 73 (2) is a suit of Small Cause nature and no second appeal lies from the decree passed in such a suit when the amount does not exceed Rs. 500; *Kesho Saran v. Khairati Lal*, 45 A. 359; 21 A. L. J. 248.

Suit for recovery of money for failure to give possession under a *zurpeshai* lease is cognizable by a Small Cause Court and no second appeal therefore lies; *Ram Saran v. Dalip Singh*, 6 I. C. 704.

**Mortgage.**—A suit brought to enforce a debt or demand not exceeding Rs. 500 which is secured upon, and must in law be primarily satisfied out of immoveable property, is not a suit of a nature cognizable in Courts of Small Causes, so as to exclude a right to special appeal. This is so though the plaint on the face of it seeks recovery in the alternative either from the mortgagor personally or from the mortgaged property.—*Atma Ram v. Sada Shiv*, 2 Bom. H. C. 1.

A suit by the assignee of a registered mortgage-bond hypothecating certain crops to enforce the hypothecation is not a Small Cause Court suit in which a second appeal would be barred by s. 586, C. P. Code, 1882 (s. 102).—*Kalka Prasad v. Chandan Singh*, 10 A. 20. (7 A. 855, *folld.*: 9 W. R. 186; 2 M. H. C. 47, *refd.* to).

A suit only for the interest on the mortgage money due to the mortgagee is one triable by a Court of Small Causes and there is no second appeal from the decision in the case; *Parduman Chand v. Ganga Ram*, 68 I. C. 285.

**Money had and received.**—A suit for the recovery of a share in the profits of a *Kulkarni vatan* is a suit for money had and received by the defendant for the plaintiff and the amount of claim being under Rs. 500; it is a suit of Small Cause nature in respect of which no second appeal lies; *Bhikaji Hari v. Radhabai*, 37 B. 700; 15 Bom. L. R. 803 (7 B. 191 and 17 B. 42 *folld.*) See also *Luchman Prasad v. Chammi Lal*, 4 A. 8; *Collector of Cawnpore v. Kedari*, 6 A. 19

**Moveable Property.**—A suit to recover possession of a share of a boat by establishment of the plaintiff's right is a suit for personal property, and therefore no special appeal lies in such a case.—*Mahomed Asim v. Mahomed Somee*, 21 W. R. 418.

A suit to recover the value of the fruit of certain mango trees alleged to have been misappropriated by the defendants, is a suit cognizable



Sub-section (2) is new. It has been inserted to compel litigants to appeal from an order of remand, and on their failure to do so, they are precluded by the express provision of this sub-section from disputing the correctness of such remand order when subsequently appealing from the decree. "Though the remarks of the Privy Council in *Moheshur Singh v. The Government of Bengal* (7 M. I. A. 283: 3 W. R. 45 P. C.) are wide enough to embrace an appeal from an order of remand, the Committee think those orders were probably not in their Lordships' contemplation when they condemned the view that a failure to appeal from an interlocutory order should deprive the person aggrieved of his right to object to such order when subsequently appealing from the decree. And the Committee think there are good reasons on the score of delay and expense from treating an appeal from an order of remand as a special case and precluding an appellant from taking, on an appeal from decree, any objection that might have been urged by way of appeal from an order of remand."—*See the Report of the Special Committee.*

The following are the remarks of the Privy Council in 7 M. I. A. 283: 3 W. R. 45, P. C. referred to by the Special Committee: "We are not aware of any law or regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved under the penalty, if he does not so do, of forfeiting for ever the benefit of the consideration of the Appellate Court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that nothing would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing, whereby on the one hand he might be harassed with endless expense and delay, and on the other, inflict upon his opponent similar calamities. We believe there have been very many cases before this tribunal in which their Lordships have deemed it to be their duty to correct erroneous interlocutory orders, though not brought under their consideration until the whole cause had been decided, and brought hither by appeal for adjudication." This case has been followed in *Sheonath v. Ram Nath*, 10 M. I. A. 413: 5 W. R. 21, P. C. and in *Forbes v. Ameeroonnissa*, 10 M. I. A. 340: 5 W. R. 340, P. C.

Sub-section (2) is a legislative reversal of what had been the settled rule for many years as laid down by cases of the highest authority (7 M. I. A. 283 p. 302; 10 M. I. A. 340 and 413; and 12 M. I. A. 157). In these cases it was ruled by the Judicial Committee that the validity of an order of remand might, at the option of the party aggrieved, be tested by an immediate appeal against it or an objection taken in an appeal against the final decree. But they are not no longer good law, as they have been superseded by the addition of sub-section (2).

**Meaning of the word "Decree" in this Section.**—The word "decree" in this section should be construed as meaning a decree passed by the Court which made the order which is alleged to be erroneous, defective or irregular. It is not open to a Court of appeal to review its own order of remand by the appellate Court and the subsequent decision by the original Court; *Jammalamadaka Subba v. Jammala*, 32 M. 318: 5 M. L. T. 75 (14 W. R. 235, 21 W. R. 199, 3 A. 755, 14 A. 348, 32 B. 432, *resd. to*).

"Save as otherwise expressly provided no appeal shall lie from any order," etc.—This section provides that no appeal shall lie from any

Act IX of 1887, and is therefore not entirely a suit of the nature of a Small Cause Court suit; a second appeal therefore lies in such a suit.—*Dewan Roy v. Sundar Tewari*, 24 C. 163. See also *Pamu Sanyasi v. Zemindar of Jayapur*, 25 M. 540, and *Mathura Das v. Murlidhar*, 24 A. 517.

A suit for arrears of *Kuttabdi* and *Kanumas* emoluments, valued at less than Rs. 500, is a suit of Small Cause Court nature, and therefore no second appeal lies in such a suit—*Mullapudi v. Venkatanarasimha*, 19 M. 329; and *Venkatarama v. Maharajah of Vizianagram*, 19 M. 103; *Bhuvanapalli Subbaya v. Raja of Venkatagiri*, 14 L. W. 349.

A suit under section 75 of the Bengal Tenancy Act (VIII of 1885) for the recovery of a sum which the plaintiff, the tenant of the defendant, claims in respect of excess payments made by him in respect of the rent of his holding is cognizable by Small Cause Court and under s. 586, C. P. Code, 1882 (s. 102), no second appeal lies—*Rango Roy v. Holloway*, 4 C. W. N. 95: 26 C. 842.

A suit to recover arrears of rent of a holding is not cognizable by a Small Cause Court and a second appeal in such a suit is not barred by s. 102, *Sadanand v. Debnath*, 1917 Pat. 287: 3 P. L. W. 270.

Where there would have been no second appeal, if two different suits had been instituted for the recovery of rent and the recovery of damages for breach of a contract, it could not be evaded by amalgamating the two claims in one suit for rent; *Jamadar Singh v. Jagat Kishore*, 23 C. L. J. 557.

A suit for recovery of rent other than house-rent is a suit of the nature cognizable in Courts of Small Causes, within the meaning of s. 586, C. P. Code, 1882 (s. 102), and second appeal lies from the decision therein when the value of the suit is less than Rs. 500.—*Soundaram Ayyar v. Sennia Naickan*, 23 M. 547, F. B. (22 M. 229 overruled). Explained and distinguished in *Sahodora v. Sarbojyobha*, 20 C. L. J. 494: 42 C. 638.

A suit by land-holder to recover damage charges from a tenant is excluded from the jurisdiction of the Small Cause Court and a second appeal therefore lies; *Basanta Kumar v. Ram Chandra*, 17 C. W. N. 499.

**Suit for Rent or in the Alternative for Damages.**—A suit was framed in the alternative for recovery of rent or of damages for use and occupation. The sum claimed was less than Rs. 100. *Held*, that no second appeal lay to the High Court. If the suit be treated as one for rent, the appeal was barred under s. 153, Bengal Tenancy Act and if a suit for damages for use and occupation, no appeal lay under s. 102, C. P. Code; *Mahin Chandra v. Mirza Ahmed Ali*, 22 C. L. J. 564.

**Suit for Recovery of Grazing Fee.**—No second appeal lies under s. 102 for recovery of less than five hundred Rupees claimed as grazing fee; *Jafindra Mohan v. Abdul Aziz*, 32 C. L. J. 83.

**Suit for Price of Paddy Cut and Misappropriated.**—A suit for the price of paddy alleged to have been cut and misappropriated by the defendant, not amounting to a criminal offence, is a suit of a nature cognizable by Courts of Small Causes, and if under the value of Rs. 500,

The Allahabad decisions in 18 A. 19 and 22 A. 366 have not been followed by the Madras High Court in *Raja Dhamara Kumara v. Bakkanam*, 34 M. 228; 8 M. L. T. 52, where, following *Googlu Sahoo v. Prem Lall*, 7 C. 148, it has been held that an appeal will lie though the only reason for the appeal was the erroneous decision in regard to the interlocutory order. In the above decision of the Madras High Court, the case in 23 M. 260 was dissented from.

**Scope of the Section.**—The policy of the Legislature in enacting s. 103 C. P. Code was to give finality to orders of remand; *Bisai Nath v. Tara Nath*, 72 I. C. 588; 1923 C. 385.

**Indirect Appeals from Non-appealable Orders.**—While section 104 grants immediate and direct appeals from certain orders specified therein, section 105 although it precludes a party from directly and immediately preferring appeals from any orders other than those mentioned in s. 104, grants indirect appeals from non-appealable orders, by providing that any defect, error, or irregularity in such non-appealable orders may be challenged in an appeal from the final decree in the suit, provided the defect, error or irregularity is such that it affects the decision of the case on the merits. In other words, this section indirectly grants the same effective remedy in cases of non-appealable orders, as it grants in cases of appealable orders specified in s. 104.

Therefore even in cases of non-appealable orders, where an appeal is preferred from the decree in the suit in which such order was made, if the appellant can show that the error, defect or irregularity is such that it affects the decision of the case on the merits, he would get the same remedy had he been allowed to appeal directly and immediately from the order. This section in substance provides for an indirect appeal from non-appealable orders and herein lies the distinction between sections 104 and 105.

**"Any error, defect or irregularity."**—Any error, defect or irregularity within the meaning of this section means, error, defect, or irregularity in procedure or in law, and not in matters of fact; and even then it should be such as to affect the decision of the case; *Sankali v. Murlidhar*, 12 A. 200. Applied in 27 B. 162 (188). Hence the validity of an order under Or. XXII, r. 9 (2), C. P. Code, cannot be questioned under s. 105, C. P. Code; *Niddha Lal v. Collector of Bulandshuhr*, 14 A. L. J. 610. Where a Court sets aside the abatement of a suit under Or. XXII, r. 9, C. P. Code, ignoring the objections of a party, it is open to him on appeal from the decree passed in the suit to object to the order setting aside the amendment (31 M. 345 and 34 A. 562 *folld.*); *Ajudhia Parshad v. Imamuddin*, 71 I. C. 587.

**"Affecting the decision of the case."**—The words "affecting the decision of the case" mean affecting the decision of the case on its merits. It has accordingly been held by the High Courts of Calcutta, Allahabad and Lahore that an order under Or. IX, r. 18, setting aside an *ex parte* decree which merely ensures a hearing on the merits, cannot be considered to be an order that affects the merits of the case. Hence the propriety of such an order cannot be questioned in an appeal from the final decree in the suit; *Tasadduq v. Hayatunnissa*, 25 A. 280: (1903) A. W. N. 89; *Chintamoney v. Raghoo Nath*, 22 C. 981; *Golab Kunwar v. Thakur Das*, 24 A. 464; *Krishna v. Mohesh*, 9 C. W. N. 584; *Mohamed*

A suit to recover arrears of *malikana* allowance is not cognizable by a Court of Small Causes, as in such a suit a question of title to immoveable property is directly involved; and consequently s. 586, C. P. Code, 1882 (s. 102), does not apply, and a special appeal will lie.—*Churaman v. Balli*, 9 A. 591 (5 B. 463; 4 A. 134; 2 C. L. R. 388, distinguished).

In a suit for damages for trespass laid at a sum under Rs. 100, a special appeal will lie to the High Court if the title to the land trespassed upon has been raised in the Courts below.—*Lukhy Narain v. Gorachand*, 9 C. 116; 12 C. L. R. 89 But see *Chintala Raghav v. Chintala Krishna*, 23 M. L. J. 193; 12 M. L. T. 206; 16 I. C. 201.

**Declaratory Suit.**—A second appeal lies against a decree for mesne profits valued at less than Rs. 500 in a suit in which the claim *inter alia* was for a declaration of title. S. 102 is no bar in such a case. A Court is not bound by any technicalities in regard to the form of the statement of claim; *Sheikh Yakub v. Tazimuddi*, 26 C. L. J. 105.

**Suit for Recovery of Money Advanced to partnership Business.**—Plaintiff sued for Rs. 40 advanced by him for the purpose of a partnership business which had since ceased to exist and also for Rs. 9 as approximate profits arising out of the dealings with the money put into the business. *Held*, that no second appeal lay as the value of the suit was under Rs. 500 and the suit not being one for the balance of partnership accounts did not fall within the description of suits given in cl. (c) of Art. 29 of the Prov. Small Cause Court Act; *Narain Prasad v. Rameswar Adya*, 51 I. C. 435.

**Orders in Execution of Decree.**—The expression "suit" in this section includes execution proceedings and hence no second appeal lies from a regular appeal from an order made in execution of a decree passed in a suit of the nature cognizable by a Small Cause Court where the subject-matter does not exceed Rs. 500; *Din Doyal v. Patra Khan*, 18 A. 481; *Harakh v. Ram Sarup*, 12 A. 579; *Sribullov v. Baburam*, 11 C. 169; *Aithalla v. Subbanna*, 12 M. 116; *Bichuck Singh v. Nageshar*, 2 A. 112; *Manya v. Diwakar*, 11 N. L. R. 99; *Kashmiri Bank Ltd. v. Jagmohan*, 18 I. C. 245; *Warish Munshi v. Aftabuddin*, 16 C. L. J. 96; 10 I. C. 412 (25 C. 872; 27 C. 484; 4 C. W. N. 269; 18 A. 181; 39 B. 113; 30 M. 212, *relied on*); *Gudar Singh v. Kandhai Lal*, 5 O. L. J. 187; 46 I. C. 82; *Rajacharya Seshacharya v. Chemnna Gurusantappa*, 22 Bom. L. R. 1193; *Kunja Behari v. Panchanan*, 54 I. C. 429; *Manager Singh v. Khobari Rai*, 1917 Pat. 80; 3 Pat. L. W. 132; *Surajmal v. Anjone Shukul*, 21 A. L. J. 861; *Muthu Karuppa Chetty v. Paiya Kovundan*, 45 M. L. J. 210.

In the case of execution proceedings the test to find out whether a second appeal lies is the value of the suit and not the amount sought to be recovered in execution; *Mohna Mal v. Tulsi Ram*, 3 Lah. 141; A. I. R. 1922 Lah. 290; *Bulluv v. Baburam*, 11 C. 169. Similarly in determining whether a second appeal lies, the nature of the suit in which the decree sought to be executed was passed and not the nature of the proceedings in execution should be looked into; *Narayan v. Nagindas*, 30 B. 113.

Where a Small Cause Court decree is transferred to a regular Court for execution and an order is passed under s. 244, C. P. Code, 1882 (s. 47)—*held*, that an appeal lies to the District Court. But when the value is less than Rs. 500, the second appeal is barred by this section.—*Peary Lal*

of the case within the meaning of the section and may be urged as a ground of objection in an appeal from the final decree; *Pandhar v. Mahadeo*, 7 N. L. R. 162.

An order setting aside an arbitration award and deciding that the case shall be tried by the Court, is an order affecting the decision of the Court, and can therefore, be challenged in appeal against the decree; *Ram Autar v. Deoki*, 37 A. 456; (2 A. 181: 26 B. 551: 31 M. 345; 14 W. R. 327 *folld.*; 28 A. 408 *dissented from*; 8 C. W. N. 390 *refd. to*).

The words "affecting the decision of the case" in s. 105 of the C. P. Code, mean affecting the decision of the case with reference to the merits of it. An order superseding an arbitration is not an order which affects the decision of the case with reference to the merits of it and even if such an order is erroneous, the error cannot be made a ground of objection in the appeal from the final decree in the case; *Firm of Budhu Ram v. Ramzan*, 2 Lah. L. J. 59: 59 I. C. 676.

**Compliance with Interlocutory Order is Not a Bar to Questioning the Propriety of the Order on Appeal.**—The right conferred by s. 105 C. P. Code, is unqualified and by complying with the directions or findings of an intermediate order, a plaintiff is not deprived of the right to raise in appeal the question of the propriety of such order and to attack its correctness; *Shah Jahan v. Inayat Shah*, 53 I. C. 644.

**This Section does Not Control Rules 7 and 9 of Or. XLVII.**—This section does not control s. 629 (Or. XLVII, rr. 7, 9) and does not, where a review is granted and final decree passed, confer a right of appeal when such appeal is not based on one of the grounds mentioned in Or. XLVII, rr. 7, 9. When review is granted for any other sufficient reason, the sufficiency or otherwise of the reason is not a good ground of appeal against the order and is not, notwithstanding the general provisions of s. 105, a good ground of appeal against the final decree.—*Gopala Aiyar v. Ramasami*, 31 M. 49: 17 M. L. J. 603.

An order by an appellate Court granting a review of judgment in a suit of Small Cause Court nature, valued at less than Rs. 500, in contravention of the provisions of Or. XLVII, r. 3, is appealable to the High Court under Or. XLVII, rr. 7, 9, the provisions of which are not controlled or superseded by this section, *Guanund Azram v. Bepin Mohun*, 22 C. 734.

**Whether Revision Petition can be Entertained Against Non-appealable Interlocutory Orders.**—An application under s. 115, cannot be entertained in the case of those interlocutory orders against which, though no immediate appeal lies, a remedy is supplied by s. 105 which provides that they may be made a ground of objection in the appeal against the final decree.—*Moti Lal v. Nana*, 18 B. 35. See also *Nand Ram v. Bhopal Singh*, 84 A. 592: 10 A. L. J. 130: 16 I. C. 1.

Where a party has another effective remedy against a wrongdoer, the High Court will not interfere in revision. For instance, an erroneous order refusing to allow the amendment of plaint, can be questioned by way of an appeal under s. 105 (1); the High Court will not interfere in revision; *Penumarū v. Reddi Subbamma*, 14 M. L. T. 588: 22 I. C. 39 (1914) M. W. N. 98 (10 M. L. T. 188 *folld.*).

**Sub-section (2).—Appeal from Order of Remand.**—This sub-section is new and it has been added to preclude the appellant from disputing the

103. In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal *which has not been determined by the Lower Appellate Court or which has been wrongly determined by such Court by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of section 100.* [New.]

Power of High Court to determine issues of fact.

### COMMENTARY.

**Amendment of the Section.**—The italicized words in the section were substituted by the C. P. Code Amendment Act (VI of 1926) for the words "but not determined by the Lower Appellate Court," which occurred after the words "of the appeal."

**Principle and Object.**—This section is new and its object is to save the parties from unnecessary expense, trouble and delay by a remand. It gives legislative sanction to the view expressed by PETHERAM, C. J., in *Balkishan v. Jasoda*, 7 A. 763, which was approved in *Deekishan v. Bansi*, 8 A. 172 F. B.; but was subsequently overruled by the Full Bench case of *Girdhari Lal v. Crawford*, 9 A. 147. Thus the section overrides the Full Bench case in 9 A. 147 and gives effect to the view expressed in 7 A. 763.

The provision of this section is a very useful one, and although the power to determine the question of fact is discretionary with the High Court, the High Court should in every case where the evidence on the record is sufficient, exercise the discretion given, of which the only object is to avoid remand and to save delay, expense and trouble.

"As regards appeals from appellate decrees the only substantial departure from the existing Code is the insertion of s. 103. Experience has shown the desirability of this clause, the effect of which will be to avoid remands, with their consequent delay and expense."—*See the Report of Special Committee.*

**Power of High Court to Determine Issues of Fact.**—S. 103 C. P. Code which has been newly added has widened the power of the Appellate Court to go into evidence and determine any issue not determined by the Court below, *Lochan Rai v. Lala Sant Prasad*, 3 Pat. L. T. 303 65 I. C. 258.

The High Court can determine a question of fact in second appeal when all the evidence is before it and when the lower Appellate Court has not given any finding thereon; *Seturatnam Iyer v. Venkatachala Goundan*, 38 M. L. J. 476 P. C.: 47 I. A. 76 P. C.

A Court of second appeal is within its rights in cases where the appropriate issue has not been framed, but in which there is sufficient evidence on the record for deciding that issue, in raising and deciding such issue itself; *Damusa v. Abdul Samad*, 47 C. 107 P. C. 24 C. W. N. 81: 46 I. A. 140 P. C.

To avoid gross miscarriage of justice resulting from the omission by the lower Appellate Court to determine any issue of fact or to

**106.** Where an appeal from any order is allowed, it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court. [S. 589.]

*What Courts to hear appeals.*

### COMMENTARY.

This section corresponds with the first part of Section 589 of Act XIV of 1882: the only change made in the section is that the word *where* has been substituted for the word "when."

The proviso to s. 589, C. P. Code, 1882, which related to appeals in insolvency matters, has been omitted, inasmuch as the chapter on insolvency has been repealed by the Provincial Insolvency Act (III of 1907). The rulings in 23 A. 56, 12 M. 472, 15 M. 89, 21 B. 45, 27 B. 604, have therefore become obsolete and inoperative.

"It shall lie to the Court to which an appeal would lie."—As regards the *forum* of appeal, see notes under s. 96 under heading "*Courts authorized to hear appeals.*"

### GENERAL PROVISIONS RELATING TO APPEALS.

**107.** (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—

*Powers of Appellate Court.*

- (a) to determine a case finally;
- (b) to remand a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein. [S. 582.]

### COMMENTARY.

Sub-section (1) is new, and it contains a general provision about the powers of an Appellate Court. "We think it desirable to have in the body of the Code a general provision about the powers of an appellate Court."—*See the Report of Select Committee.*

Sub-section (2) corresponds with the first part of section 582 of the Code of 1882. The latter part of section 582 of the same Code has been embodied in Order XXII, r. 11. The second clause of s. 582 of the Code of 1882 has been omitted.

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;

(i) any order made under rules from which an appeal is expressly allowed by rules :

Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.

(2) No appeal shall lie from any order passed in appeal under this section. [New.]

### COMMENTARY.

This section is new. The general rules with regard to appeals from orders have been summarised in this section, and the detailed provisions relating to appeals from orders are to be found in Order XLIII, rule 1.

As regards the finality of decrees passed in accordance with the award of arbitrators, *see* the provisions contained in the second schedule.

"As regards appeals from orders a comparison of this section with section 588 of the Code of 1882, would support a *prima facie* inference that the right of appeal from orders had been materially curtailed. But this inference is dispelled on looking at sub-section (i) of section 104, which allows an appeal from any Order made under Rules from which an appeal is expressly allowed by Rules. We have gone carefully into the question of the cases in which an appeal should be allowed from these Orders and our conclusion is expressed in the Rules themselves."—*See the Report of Special Committee.*

Clause 104, sub-section (1) (b) has been added in order to give a right of appeal against the decision of the Court on a special case. This is in accordance with the recommendation of the Special Committee.—*See the Report of Select Committee.* The provisions with regard to special case, are to be found in section 90 and in Order XXXVI, rules 1 to 5 of the First Schedule.

Clause (a)—This clause refers to an order passed under clause 5 (2) of the Second Schedule.

Clause (b)—This clause refers to the decision of the Court on a special case passed under Order XXXVI, rule 5 of the First Schedule.

Clause (c)—This clause refers to an order passed under rule 12 of the Second Schedule.

Clause (d)—This clause refers to an order passed under rule 17 (4) of the Second Schedule.

Clause (e)—This clause refers to an order passed under rule 18 of the Second Schedule.

Clause (f)—This clause refers to an order passed under rule 21 of the Second Schedule.



it is subject to the conditions prescribed by the Rules; *Moni Mohan v. Ram Taran*, 43 C. 148: 33 I. C. 829; *Nabin Chandra v. Pran Krishna*, 41 C. 108: 18 C. L. J. 613.

The general power given by s. 107 of the Code, to the appellate Court, of remanding cases for trial by the original Court is not governed or limited by Or. XLI alone, but it is subject to such conditions and limitations as may be prescribed in the rules and orders and the amendment of a plaint and the addition to parties in a Court of appeal is one of the conditions so prescribed; *Meah Uzir Ali v. Sivai Behara*, 43 C. 938: 20 C. W. N. 547; Apart from the inherent jurisdiction of the Court, the power of remand under s. 107 of the C. P. Code is limited to the case described in Or. XLI, r. 23 of Sch. I thereof. The relation of the body of the Code to the rules, discussed; *Ghuanavi, v. The Allahabad Bank Ltd.*, 44 C. 929 F. B.: 21 C. W. N. 877.

See notes and cases noted under Or. 41, r. 23.

**Appellate Court's Power to Add or Substitute Parties.**—An Appellate Court has discretionary power to substitute or add a new appellant or respondent after the period of limitation prescribed for an appeal.—*Court of Wards v. Jaya Prasad*, 2 A. 108; and *Ranjit Singh v. Sheo Prasad*, 2 A. 487.

Both under s. 107 of the C. P. Code and under its inherent powers, an appellate Court has power to add as parties to the suit persons who were not parties in the first Court; *Srimati Hemangini v. Haridas Banerji* 3 Pat. L. J. 409: 5 Pat. L. W. 216. 1918 Pat. 276; *Jafar Ali v. Har Gobinda*, 41 I. C. 65; *Velammal v. Laksumi Ammal*, 31 I. C. 814.

When an appeal was filed by a person not aggrieved by an order in insolvency, the Court acting under powers given by s. 107, Or. I. r. 10 (2) (3) and Or. XLI, r. 33 added a person really aggrieved to be made a party; *Mahomed Haji Essack v. Saikh Abdul Rahman*, 41 B. 312: 17 Bom. L. R. 989.

There is no power in the Civil Procedure Code to make a party to the suit a co-appellant. Ss. 32 and 582 of the C. P. Code, 1882 [Or. I, rr. 8 (2), 10 (2), (3), (5), 11, and s. 107], give to an Appellate Court power only to strike out the name of a party, or to direct new parties to be added to the suit, whether as plaintiffs or defendants.—*Vasudev Balkrishna v. Salubai*, 10 B. 227.

Section 27, C. P. Code, 1882 (Or. I, r. 10) read with s. 582, C. P. Code 1882 (s. 107) does not apply to appeals.—*Dwarka Nath v. Debendra Nath* 4 C. W. N. 58.

**Appellate Court's Power to Amend Plaint.**—Or. VI, r. 17 permits amendment of the plaint before judgment and not after. The larger powers conferred on appellate Courts by this section do not authorize such a material transformation of a suit in appeal.—*Bai Shri Majirajba v. Magan Lal*, 19 B. 303. See also *Percival v. Collector of Chittagong*, 30 C. 516.

An appellate Court has power, under this section to allow an amendment of the plaint, where such amendment does not change the character of the suit.—*Rajah Peary Mohan v. Narendra Krishna*, 5 C. W. N. 273.

The appellate Court has power to amend a plaint by adding new parties; *Meah Uzir Ali v. Sivai Behari*, 43 C. 938: 20 C. W. N. 547.

**Clause (d).**—Where an application for reference is made in a pending case and the Court finding one of the defendants unwilling to refer to arbitration rejects the application, despite plaintiff's readiness to discharge the unwilling defendant from the array of the parties, no appeal lies from such an order of rejection; *Janki Prasad v. Balmakund*, 27 I. C. 721.

An order of a Court filing agreement to arbitrate presented by the parties to a suit is a decree and is appealable under the old Code, as well as under s. 104 (d) of the new Code; *Venkatachala v. Rangiar*, 30 M. 353.

An application was made under para 17, Sch. II of the C. P. Code for filing an agreement to refer to arbitration and when the award was filed, the parties filed objection, the Court allowed only those filed by the defendants and declared the award invalid on the ground of misconduct. Against this order the plaintiff appealed under s. 104 C. P. Code. *Held* that neither cl. (d) nor cl. (f) of s. 104, C. P. Code, applied to the case, and therefore no appeal lay as an appeal from an order; *Ram Jawaya Mal v. Devi Ditta Mal*, 117 P. R. 1916: 107 P. W. R. 1916.

**Clause (e).**—This clause is to be read with rule, 18, Sch. II of the C. P. Code, which provides for stay of suits where there is an agreement to refer to arbitration. To understand the scope of this clause, the cases noted under the above rule should be consulted.

Under s. 104 (e) of the C. P. Code, an appeal lies from an order granting or refusing stay of a suit, where there is an agreement to refer to arbitration whether under the C. P. Code or under the Arbitration Act—*Messrs Kodumal Kalumal v. Messrs Volkart Bros.*, 12 S. L. R. 34: 43 I. C. 434.

No appeal lies under s. 104 C. P. Code from an order passed under s. 19 of the Arbitration Act staying a suit; *Firm of Menghraj Khilaldas v. Messrs Langhy Billimoria & Co.*, A. I. R. 1923 Sind 38; *Soda Water-works v. Valkart Bros.*, A. I. R. 1923 Sind. 25

**Clause (f).**—The provisions of this clause apply to arbitration under the C. P. Code, and not to appeals under the Indian Arbitration Act IX of 1889; *Ripley v. Nahapiet*, 6 L. B. R. 88: 5 Bur. L. T. 155: 17 I. C. 902.

Though no appeal lies from the decree in accordance with the award obtained without intervention of Court, an appeal is competent under s. 104 (f) from the order filing an award; *Ghulam Mustafa v. Halima Bibi*, 176 P. W. R. 1913: 310 P. L. R. 1913: 21 I. C. 298.

The fact that the decree is drawn up on the basis of the judgment which follows the order filing an award in arbitration without the intervention of the Court, cannot take away the right of appeal of the party aggrieved by the order. If the appeal is allowed, the decree will become infructuous and the appellate Court can declare the decree vacated, *Saudamini v. Gopalchandra*, 21 C. I. J. 273.

An appeal lies against an order filing an award passed on arbitration without the intervention of the Court under section 104 (f) of the C. P. Code even after the decree is passed upon the award. The decree based upon the award is no doubt final if it is in accordance with the award but the validity of the decree depends upon the validity of the

*See notes under Order XXII, r. 10.*

**Sub-section (2).**—The word " powers " in this section was not synonymous with, and did not comprehend, jurisdiction.—*Kali Krishna v. Harihar*, 1 B. L. R. A. C. 155: 10 W. R. 160.

Under section 107 of the Code, 1908, the appellate Court has the same power as the Court of the first instance, and in making the final determination of the case, the appellate Court must pass a decree that is in conformity with law; *Ambika Prasad v. Perdip Singh*, 42 C. 451.

Where a memorandum of appeal being insufficiently stamped, the pleader requested the Court to give time to make the necessary payment. The Court refused to grant the time and rejected the memorandum of appeal. Held that the Court ought to have granted the time; for Or. VII, r. 11, which primarily refers to plaints, applies also to memorandum of appeals by sub-section (2) of s. 107.—*Achut Ram Chandra v. Nagappa*, 88 B. 41: 15 Bom. L. R. 902.

Powers and duties of an Appellate Court under this section are the same as are conferred and imposed on the Court of the original jurisdiction, of appointing a proper person as guardian of a minor.—*Panchanan v. Dwarka Nath*, 3 C. L. J. 29.

Under the provisions of s. 107, power is given to the Appellate Court to pass under the second clause of Or. XLI, r. 6, any order which the Court of original jurisdiction could pass.—*Tribeni Shau v. Bhagwat Bun*, 34 C. 1037, F. B.: 6 C. L. J. 298: 11 C. W. N. 1030, F. B.

**108.** The provisions of this Part relating to appeals from original decrees shall, so far as may be, apply to appeals—

Procedure in appeals from appellate decrees and orders.

(a) from appellate decrees, and

(b) from orders made under this Code or under any special or local law in which a different procedure is not provided. [Ss. 587, 590.]

## COMMENTARY.

**Changes Introduced in the Section.**—The first part of this section corresponds with s. 587 of the Code of 1882, with the following changes: for the words " as far as may be " in the old Code, the words " so far as may be " have been substituted; and the words " and to the execution of decrees passed in such appeals " contained in the old Code have been omitted.

The second part of this section, i.e., cl. (b), corresponds with s. 590 of the Code with some verbal alterations in the language.

The object of this section is to avoid repeating some of the provisions relating to first appeals, in the chapter relating to second appeals.

" So far as may be."—The words " as far as may be " in s. 587 C. P. Code 1882 (s. 108), by which the provisions relating to first appeals are made applicable to appeals from appellate decrees, must be taken to mean

IX of 1922. It authorizes the Court to award compensatory Costs to the objector in respect of false or vexatious claims or defences

**Clause (g).—**A Small Cause Court has power to award compensation when it issues an *interim* injunction and dismisses it after the other side is heard and such an order can be questioned in appeal: *Karumuru v. Lanka*, 26 I. C. 359.

**Clause (h).—**An order for arrest and detention made in execution of a decree is an order made under s. 47 of the Code, being an order for the execution of the decree. Such an order is a decree which is appealable under s. 96 of the Code. The exception in cl. (h) is entered therein because provision is made elsewhere for an appeal from an order of arrest in execution of a decree. S. 104 only relates to appeals from orders which do not amount to a decree; *Ardeshirji Framji v. Kalyan Das*, 3 P. 6.

An order directing the arrest of a surety passed by a Court exercising ordinary civil jurisdiction, in execution of a Small Cause Court decree, transferred to it, is appealable; *Adhar Chandra v. Pulin Behary*, 20 C. L. J. 129.

**Clause (i).—**There is no appeal from an order granting a review except on any of the grounds mentioned in Or. XLVII, r. 7 of the Code; *Tiprura Charan v. Shoroshibala*, 22 I. C. 773. An appeal under r. 7 of Or. XLVII, from an order granting an application for review is not controlled by sub-section (2) of section 104; *Shamsher Ali v. Jagannath*, 16 I. C. 203.

There is no appeal from an order granting a review of an *ex parte* judgment passed on appeal except on any of the ground mentioned in Or. XLVII, r. 7; *Jagar Nath v. Ramavatar*, 14 I. C. 39.

The C. P. Code of 1882, did not give a second appeal from an order refusing an application to have an award made a rule of Court, but the Code of 1908 does grant such an appeal, *vide* s. 104 (f); *Gajraj Lal v. Ramdin Lal*, 7 A. L. J. 1070.

No appeal lies from an order passed in execution of a decree under s. 9 of the Specific Relief Act. Therefore an order passed in execution of such a decree directing the arrest of the judgment-debtor is not appealable either as a decree or as an order under s. 104 (1) (h) of the C. P. Code; *Jehangir Singh v. Hira Singh*, 5 P. W. R. 1917: 18 P. L. R. 1917.

**Proviso.**—The proviso was added to the section by the C. P. Code Amendment Act IX of 1922.

**Sub-Section (2).—**This sub-section has taken away the right of second appeal in some cases where a second appeal could lie under the provisions of section 588 of the C. P. Code, 1882. For instance, no second appeal lies from an order passed in first appeal from an order under rules 89 and 92 of Or. XXI of the C. P. Code, 1908; but under the former Code a second appeal could lie in cases under section 310-A read with section 244 of the Code, 1882. See *Asimaddi Sheikh v. Sundari Bibi*, 39 C. 339: 15 C. W. N. 844: 14 C. L. J. 224. No second appeal lies from an appellate order setting aside a sale under Or. XXI, r. 90; *Kuar Radhika v. Guzanikuar*, 19 I. C. 147. Similarly, if an appeal is preferred under Or. XLIII, r. 1 (a) from an order under Or. VII, r. 10, returning a plaint for presentation to the proper Court, and an order is made in appeal remand-

Where a lower Appellate Court, instead of remanding a suit under s. 566 C. P. Code, 1882 (Or. XLI, r. 25), erroneously remands it under s. 562, C. P. Code, 1882 (Or. XLI, r. 23), and the party aggrieved by its order appeals to the High Court, under s. 588, cl. (28), C. P. Code, 1882 (s. 104; Or. XLIII, r. 1), the High Court cannot deal with the case as if it were a first appeal from a decree. All that the High Court can do is to rectify the procedure of the lower Appellate Court, and to direct that it decide the case itself on the merits.—*Sahan Lall v. Azizunnissa*, 7 A. 136.

### APPEALS TO THE KING IN COUNCIL.

**109.** Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council—

When appeals lie to King in Council.

- (a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction;
- (b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction; and
- (c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council. [S. 595.]

### COMMENTARY.

**Changes Introduced in the Section.**—This section corresponds to section 595 of the C. P. Code of 1882. The material changes made in this section are:—The words “*decree or final order*” have been substituted for the words “*final decree*” in clauses (a) and (b); and the words “*or order*” have been added after the word “*decree*” in clause (c). The word “*final*” which preceded the word “*decree*” in clauses (a) and (b) has been omitted.

The omission of the word *final* will set at rest what was a somewhat debatable point as will appear from the following cases; 15 B. 155 P. C.; 17 A. 112, P. C., and 22 C. 928.

The word “*final*” seems to have been omitted from the present Code, in view of the extended definition of the word “*decree*” in section 2 cl. (2), which includes preliminary as well as final decree. According to the Code, only the final decrees were appealable, but according to the present Code, both final and preliminary decrees are appealable, as the present definition of the word *decree* includes both.

The expression “*final order*” means the order by which the whole cause or suit is determined, that is, comes to an end; it does not include interlocutory order, which determines only a part of it leaving other matters to be determined. The expression “*final order*” therefore means an order which affects the merits of the question between the parties by deter-

doctor had no saleable interest in the property; *Sundara Singh v. Pazhamali Padayachi*, 45 I. C. 701.

A second appeal does not lie under the Code of 1908 against an appellate order confirming an order of refusal to set aside a sale in execution on the ground of fraud; *Raj Mohan v. Gobinda*, 14 I. C. 53; *Fulsunimanessa v. Halamaddi*, 25 C. L. J. 899.

An order passed under Or. II, r. 4 refusing to restore a suit dismissed for default of appearance of both parties is not appealable; *Shaddi Lal v. Karam Din*; 9 I. C. 238.

An order under s. 148 of the Code, is not an appealable order covered by section 104.—*Suranjan Singh v. Ram Bahal*, 35 A. 582.

Where a Subordinate Court passed a decree in accordance with a compromise agreement after recording it, first and second appeal lies from such decree: *Ayyagari Veerasalingam v. Basvavareddy*, 27 M. L. J. 173; 16 M. L. T. 125; 25 I. C. 556.

An appeal lies under the C. P. Code, 1908, as it did under the former Code, from an order returning a plaint to be presented to the proper Court; the present Code has made no alteration in this respect; *Dalip Singh v. Kundan Singh*, 36 A. 58.

An appeal from the order granting an application for review can be preferred at once, such an appeal is not controlled by sub-section (2) of section 104; *Shamsher Ali v. Jagarnath*, 16 I. C. 203.

105. (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal. [S. 591.]

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness. [New.]

## COMMENTARY.

**Changes Introduced in the Section.**—The first part of this section corresponds with section 591 of the C. P. Code of 1882. The words *save as otherwise expressly provided*, have been substituted for the words "except as provided in this chapter"; and the words *where a decree is appealed from*, have been substituted for the words "if any decree be appealed against." Another important change has been made by deleting the word "such" which preceded the word "order" in the old Code. The Committee have deleted the word "such" to remove a difficulty it creates (10 M. I. A. 840: 5 W. R. 47, P. C.: 10 M. I. A. 418: 5 W. R. 21, P. C.)—See the Report of the Special Committee.

criminal jurisdiction, if it is a final judgment, decree or order of the Court, made on appeal or in the exercise of its original jurisdiction. An order sanctioning prosecution, made in the course of a disciplinary proceeding against an attorney under cl. 10 of the Letters Patent 1865, is not governed by cl. 39, and therefore against such an order no leave to appeal to His Majesty can be given; *In the matter of an Attorney*, 41 C. 734.

A decree of the High Court dismissing an appeal with costs on the ground that it was filed out of time and that the delay could not be excused under s. 5 of the Limitation Act is one passed on appeal within the meaning of s. 109 (a) of the C. P. Code; *Promotha Nath v. W. A. Lee*, 83 C. L. J. 128.

An appeal does not lie to the Privy Council from a consent decree even where such decree reverses the decree of the first Court and where the value of the subject matter of the appeal is above Rs. 10,000; *Lachmi Narain v. Bal Mukund*, 5 Pat. L. J. 388.

"Final order."—There is no definition given of the term "final order" in the Code and it is evident from what their Lordships said in *Muzhar Hossein v. Bodha*, 17 A. 112: 22 I. A. 1, that it is not always an easy matter to distinguish between what is final and what is an interlocutory order. The expression "final" is used in contradiction to "interlocutory"; *Radha Kishan v. Collector of Jaunpur*, 23 A. 220, 227: 28 I. A. 28. To determine whether an order is final or not, it is necessary in each case to ascertain the nature of the proceedings; *Muzhar Hossein v. Bodha*, 17 A. 112: 22 I. A. 1. A final order is an order which finally decides any matter which is directly at issue in the case in respect of the rights of the parties. If the order decides in effect, finally, the cardinal point in the suit—if it decides an issue which goes to the foundation of the suit and therefore is an order which would never, while the decision stands, be questioned again in the suit—it is a "final order" within the meaning of this section, notwithstanding that there may be subordinate inquiries to be made, *Rahimbhoy v. Turner*, 15 B. 155 P. C.; *Muzhar Hossein v. Bodha*, 17 A. 112 P. C.; *Saratmani v. Bata Krishna*, 10 C. L. J. 536; *Haris v. Nawab Bahadur of Murshidabad*, 13 C. L. J. 688; 15 C. W. N. 879; *Damra Coal Co. v. Benares Bank*, 21 C. L. J. 281; 23 I. C. 569; *Sultan Singh v. Murlidhar*, 5 Lah. 329 F. B.: 80-I. C. 366; A. I. R. 1924 Lah. 571; *Ram Chand v. Goverdhan*, 47 C. 918 P. C.

An order of remand, being an interlocutory order, cannot ordinarily be the subject of an appeal to His Majesty in Council, but if such order has the effect of deciding finally the cardinal point in the suit, it becomes a final order and capable of appeal; *Radha Kishan v. Collector of Jaunpur*, 23 A. 220: 28 I. A. 28; *Muzhar Hossein v. Bodha*, 17 A. 112, *Rajinath v. Rameswar*, 3 Pat. L. J. 339: 45 I. C. 192; *Ananda Gopal v. Nafar*, 12 C. W. N. 545: 35 C. 618.

It was held by their Lordships of the Privy Council in *Rahimbhoy v. Turner*, 15 B. 155: 18 I. A. 6, that where an order directing the taking of accounts, which the defendant contends ought not to be taken at all, decides in effect that if the result should be found to be against the defendant, he is liable to pay the amount, the order is final within the meaning of this section for the purposes of appeal.

The word "final" in s. 109 C. P. Code, is used in its ordinary sense and therefore means an order which puts an end to the litigation between

order made by a Court in the course of a suit or appeal, unless right of appeal from any such order is expressly given by the provisions of this Code. Section 104 and Or. XLIII, r. 1 expressly mention the orders which are appealable and unless an order falls within any of the provisions of the sections mentioned above, no appeal lies. The orders which do not fall within the provisions of the above two sections are non-appealable orders. This section applies equally both to appealable and non-appealable orders. If an order is appealable, the party against whom the order is made may prefer immediate appeal from the order under the provisions of the above sections, but if he does not prefer immediate appeal, (which he is not bound to do) against the order; then he can make the error, defect or irregularity of the order a ground of objection in the memorandum of appeal where an appeal is preferred against the decree in the suit in which the order was made. Similarly in the case of non-appealable orders, the party against whom the order was made may make the error, defect or irregularity of the order a ground of objection in the memorandum of appeal against the final decree. Thus by this section both appealable and non-appealable orders are placed in the same footing; the only advantage of the appealable order is that an immediate appeal can be preferred against it.

This section enables the Court, when dealing with an appeal from a decree, to deal with any question which may arise as to any error, defect, or irregularity in any order affecting the decision of the case, though an appeal from such order might have been and has not been preferred.—*Har Narain v. Kharag Singh*, 9 A. 447.

But in the case of appeals from decrees, the rule is quite different as will appear from section 97, which provides that a person aggrieved by a preliminary decree is bound to prefer immediate appeal against it; otherwise he will be precluded from disputing its correctness in an appeal which may be preferred against the final decree.

**"Any order."**—The order must be under this Code. An order for attachment for contempt is not an order in the exercise of the High Court's civil jurisdiction and therefore does not come within the provisions of this section; *Navinahoo v. Narotam Das*, 7 B. 5

Section 15 of the Letters Patent is not controlled by this section; *Sabhpathi v. Narayanasami*, 25 M. 555 (22 M. 68: 26 C. 361 *refd to*).

**Requirements of this Section.**—This section contemplates two things; there being a regular appeal about something else, and in that appeal the insertion of a ground of objection under the section itself; *Sher Singh v. Diwar Singh*, 22 A. 366. See also *Sheonath Singh v. Ram Din*, 18 A. 19 F. B., where it has been held that an order in a suit from which an appeal lies under the Code, but from which no appeal has been preferred can be questioned under this section in an appeal from the decree in the suit, if the ground of objection is stated in the memorandum of appeal; in other words, in order to take advantage of the provisions of this section, the ground must be set out in the memorandum of appeal. In *Tilakraj Singh v. Chakradhari*, 15 A. 119, it was held that an objection which may be heard under this section must be set forth in the memorandum of appeal. In *Bansi Lal v. Ramji Lal*, 20 A. 370 p. 372, it has been held that unless such objection is not taken in his memorandum of appeal, it is not open to an appellant at the hearing of an appeal from the decree, to question the validity of an order, adding a person as defendant previously made in the case.



further appeal to the Privy Council; *Po Kin v. Ma Sein Tin*, 12 Bur. L. T. 87: 10 L. B. R. 22.

**"Passed on appeal."**—An order passed by the High Court in the exercise of its revisional jurisdiction under s. 115 of the Code of 1908, or its power of superintendence under section 15 of the High Courts Act of 1861, is an order made on appeal within the meaning of section 89 of the Letters Patent. To constitute appellate jurisdiction, there must exist the relation of superior and inferior Court, and the power on the part of the former, to review decisions of the latter (cases on the subject exhaustively reviewed and discussed); *Secretary of State v. British Indian Navigation Co.*, 13 C. L. J. 90: 15 C. W. N. 848. This case has been followed in *Harish Chandra v. Nawab Bahadur of Moorshidabad*, 13 C. L. J. 688 where it has been held that two essential elements are to be considered in deciding whether an order was passed on appeal within the meaning of cl (a) of section 109 of the C. P. Code, viz., (1) whether there exist the relation of superior and inferior Court; and (2) whether there exists the power, on the part of the superior tribunal, to review, affirm, modify or reverse the decision of the inferior tribunal.

An order passed by the High Court in the exercise of its revisional jurisdiction reversing that of the Court of first instance allowing the applicant to sue in *forma pauperis*, is an order passed on appeal within the meaning of clause (a) of section 109 of the Code of 1908. An order cannot be deemed to have been passed on appeal unless it is an order passed by a superior Court in reversal, modification or affirmance of an order of an inferior Court. To constitute appellate jurisdiction, there must exist the relation of superior and inferior Court and the power on the part of the former to review the decision of the latter. An order deciding that circumstances have not been established such as would justify an order for stay of execution of a decree under appeal is not a final order (but an interlocutory order), "nor an order passed on appeal" within the meaning of cl (a) of Section 109 of the C. P. Code; *Srinivasa Prasad v. Kesha Prasad*, 18 C. L. J. 681.

An order made by the High Court on an application to review its judgment in a case of appeal to the Privy Council previously heard is not an order made on appeal within the terms of clause 89 of the Court's charter, so as to enable the Court to admit an appeal against such order to Her Majesty in council. The distinction between the words "made on appeal" and "made in the exercise of its appellate jurisdiction" pointed out; *Rajah Enact Hossein v. Ranees Rowshum Jahan*, 10 W. R. (F. B.) 1. Followed in *Sunder Koer v. Chandeswar Prasad*, 30 C. 679.

Order rejecting appeal for failure to furnish security for costs under Or. XLI, r. 10 was not "final order passed on appeal" within the meaning of this section; *Radha Kishan v. Jamna Prasad*, 13 O. C. 59.

A final order passed on appeal falls within the purview of s. 109 of Act V of 1908 although the appeal has been rejected as barred by limitation; *Brij Indra Singh v. Lala Kanti Ram*, 127 P. W. R. 1917: 131 P. L. R. 1917.

The words "final order passed on appeal" in this section mean orders disposing of an appeal at the hearing and not any final order passed in the exercise of final appellate jurisdiction. An order rejecting an application or review of an appeal which has been disposed of, though final

v. *Monohar*, 40 C. L. J. 588; A. I. R. 1925 C. 473; 85 I. C. 100; *Nishi Kanta v. Umar Lal*, 41 C. L. J. 186; A. I. R. 1925 C. 711; 86 I. C. 1029; *Sayma Bibi v. Madhusudan*, 52 C. 472; A. I. R. 1925 C. 766; *Fazal v. Hushmati*, 40 P. R. 1926; 183 P. W. R. 1926; *Dhondu v. Vaman Govind*, 51 B. 495; A. I. R. 1927 Bom. 455; *Sundar Singh v. Nighaiva*, 6 Lah. 94; A. I. R. 1925 Lah. 466; 88 I. C. 920. But in *Gopala Chetti v. Subbier*, 26 M. 604; *Nand Ram v. Bhopal Singh*, 84 A. 592; 10 A. L. J. 130; *Athamsa v. Ganesan*, 47 M. L. J. 641, A. I. R. 1924 Mad. 890; *M. S. Mahomed v. Collector of Toungoo*, 5 Rang. 80; A. I. R. 1927 Rang. 150, a contrary view was taken. In these cases it has been held that an order setting aside an *ex parte* decree can be attacked in appeal from the final decree. But if orders setting aside *ex parte* decrees are of the nature mentioned in *Gopala Chetti v. Subbier*, 26 M. 604 and *Athamsa v. Ganesan*, A. I. R. 1924 M. 890, they will affect the decision of the case and can be challenged in appeal against final decree. An order of remand in appeal from an order returning a plaint under Or. VII, r. 10, is not an order affecting the decision of the case within the meaning of s. 105 (1), and therefore its propriety cannot be questioned in second appeal under s. 105 (1); *Venkatanarasu v. Kotayya*, 51 M. L. J. 119; 97 I. C. 790; A. I. R. 1926 Mad. 900. The dismissal for default of an application to set aside an *ex parte* decree is no bar to the decree being questioned in an appeal preferred against the final decree; *Golap Singh v. Indra Comar*, 13 C. W. N. 493; 9 C. L. J. 367.

An order setting aside on abatement under Or. XXII, r. 9, does not affect the decision of the case on the merits; it cannot therefore be challenged in appeal from the final decree; *Mohamed v. Monohar*, 40 C. L. J. 588; 85 I. C. 100; A. I. R. 1924 Cal. 473; *Babu Ram v. Banke*, 47 A. 555; 87 I. C. 211; A. I. R. 1925 All. 426, but it can be so challenged if the order is passed simultaneously with the final decree; *Hem Kumar v. Amba Prasad*, 22 A. 430. The Calcutta High Court has held that an order setting aside an abatement cannot be challenged in an appeal from the final decree whether it is passed before or simultaneously with the final decree; *Mohomed v. Monohar*, 40 C. L. J. 588; *Sayma Bibi v. Madhusudan* 52 C. 472; A. I. R. 1925 Cal. 476.

A Court has no jurisdiction, reading ss. 372 and 647, C. P. Code, 1882, (Or. XXII, r. 10 and s. 141), to bring in a party after decree, and make him a judgment-debtor for the purposes of execution. Where a Court had so acted, by an order which might have been, but was not, made the subject of appeal under s. 588, C. P. Code, 1882 (s. 104), held, that the party aggrieved was competent to object thereto on appeal from a subsequent order enforcing execution against him as a judgment-debtor.—*Goodall v. Mussoorie Bank*, 10 A. 97.

Although no appeal lies against an order passed under s. 831, C. P. Code, 1882 (Or. XXI, r. 99) numbering and registering as a suit a complaint made at a time beyond a month from the time of the obstruction in an application under s. 828, C. P. Code, 1882 (Or. XXI, r. 97), such order can be objected to when the final order which is appealable, is appealed against.—*Lala v. Narayan*, 21 B. 392.

Where a mortgagee applies for decree absolute, but is opposed by an application for extension of time, the question whether time should be granted or not, and if granted, on what terms, is one affecting the decision

During the pendency of a suit under s. 92, C. P. Code, for removing a trustee and for framing a scheme, the trustee died, and the Court below held that the whole suit had abated. On appeal, the High Court held that in so far as the suit related to the framing of the scheme, there was no abatement and remanded the suit for trial. *Held*, it was not a "final order" within the meaning of s. 109 (a) and was not appealable; *Vythilinga v. Arumaga*, 50 M. L. J. 552: 94 I. C. 966: A. I. R. 1926 Mad. 748

An order refusing to issue a temporary injunction against the execution of a mortgage decree, is not a final order within the meaning of this section; *Damra Coal Co., v. Benares Bank*, 21 C. L. J. 281.

An order of the High Court, directing execution to proceed, is not a "final" decree, judgment or order within the meaning of clause (a). s. 595, C. P. Code, 1882 (s. 109), and therefore no appeal lies to the Privy Council.—*Jogessur Sahai v. Muracho Kooer*, 1 C. L. R. 354

Certain persons interested in an award applied under s. 525, C. P. Code 1882 (the Second Schedule) to have it filed in Court. The Court made an order under s. 526, C. P. Code, 1882 (the Second Schedule), "that the claim of the plaintiffs be decreed." On appeal, the High Court held that the appeal would not lie, and suggested to the plaintiffs to apply to the lower Court to give judgment according to the award. Thereupon the plaintiffs made an application to lower Court, styling it one for review of judgment, and the application was granted. The defendants appealed from the order of the lower Court, contending that the "review of judgment" had been improperly granted. The High Court held that the order of the lower Court was not appealable, not being one passed on review of judgment, but on an application to give judgment in accordance with an award. The defendants applied for leave to appeal to Her Majesty in Council. *Held* that such an order was not a "final decree" within the meaning of s. 595, clause (a), C. P. Code, 1882 (s. 109), and was therefore not appealable to Her Majesty in Council.—*Ramadhin Maton v. Ganesh*, 4 A. 238.

There is no appeal to Her Majesty in Council against an order refusing the appointment of a Receiver in a suit. Such order is not final within the meaning of clauses (a) and (b) of s. 595, C. P. Code, 1882 (s. 109)—*Chundi Dutt v. Pudmanund Singh*, 22 C. 928 (8 B. L. R. 433: 17 C. 455: 18 C. 182, and 15 B. 155. P. C., referred to). See also, *Mahomed Musaji v. Ahmed Musaji*, 13 C. L. J. 507.

The District Judge of Ghazipur recalled to his own file certain execution proceedings pending in the Sub-Judge's Court at Shahabad, and disallowed an application for the execution of the decree which had been preferred to that Judge. On appeal, the High Court annulled the order, and remitted the case for disposal by the Sub-Judge of Shahabad. On an application for leave to appeal to Her Majesty in Council from the order of the High Court, held that such order was in the nature of an interlocutory order, and was therefore not appealable to Her Majesty in Council.—*Palakdhari v. Radha Prasad*, 2 A. 65.

An order rejecting an application for review cannot be regarded as an order appealable under s. 109 (a) of the C. P. Code; *Mahabir Baksh v. Sheeraj Singh*, 16 O. C. 264: 22 I. C. 259.

In the exercise the High Court rejecting an application for bringing on record application representative of a deceased party to a pending appeal is not final

correctness of the remand order, on an appeal from the final decree. Under s. 591 of the old Code, it was held that the illegality of the remand order and the subsequent proceedings could be questioned in appeal from the decree in the suit, though no appeal had been preferred against the order itself (*see*, 12 A. 510, 14 B. 232, 23 C. 335, 18 M. 421, 32 P. L. R. 1906, 6 C. L. J. 547). This sub-section is a legislative reversal of the cases above referred to and other similar cases as the Privy Council cases in 7 M. I. A. 283 p. 302; 10 M. I. A. 340 and 413 and 12 M. I. A. 157.

Under Or. XLI. r. 23 an order remanding a case is appealable under Or. XLIII, r. 1 (a). This sub-section provides that where any party aggrieved by a remand order from which an appeal lies, does not appeal therefrom, he shall thereafter be precluded from agitating or disputing its correctness.

Where an order of remand purports to be made under Or. XLI, r. 23, C. P. Code, it is the duty of a party adversely affected, to appeal against the order, otherwise the order would be final; *Musst. Niamat Bibi v. Mahomed Faiz*, 65 I. C. 745.

Where it was open to the persons aggrieved by an order of remand to appeal against it, but they failed to do so, they are precluded from further contesting the correctness of that order; *Maung Po Kuang v. Ma Tok*, 1 Bur. L. J. 231; 70 I. C. 893.

Where a party to an appeal objected to the admissibility of a document in the lower appellate Court before remand on the ground that it had not been proved, but eventually consented to the remand to enable the other party to show that the document was admissible, and did not appeal against the order of remand, he cannot subsequently, in second appeal, object to its admissibility by reason of s. 105 (2); *Joyal v. Mulluk Chand*, 91 I. C. 287; A. I. R. 1926 Cal. 509.

The test is not whether a decision has been given upon the points raised in the appeal against the order but whether the party has availed himself of the appropriate remedy of appealing against the order; *Nanu Nair v. Kantar*, 29 M. L. J. 772. 29 I. C. 386.

Where a suit has been remanded on appeal, an appeal from the order after the suit has been taken up by the First Court on remand and finally disposed of is incompetent. S. 105 (2) of the new C. P. Code has no bearing on this question but applies to the converse case; *Janki Nath v. Pro-motha Nath*, 15 C. W. N. 830.

Under s. 105 (2), a lower Court cannot treat an order of remand of the Appellate Court as a nullity owing to the want of jurisdiction in the latter to pass it. A party who omits to raise the question of the jurisdiction of the Appellate Court at the hearing of an appeal and to appeal from the decision reached, cannot be allowed to object to that decision in the subordinate Court to which the matter in dispute is remanded; *Dharm Chand v. Gonalal*, 47 I. C. 886.

**Sub-section (2) Is Not Applicable to Privy Council Appeals.**—This sub-section is, not applicable to Privy Council appeals and does not operate to give a new meaning to the word "final" in s. 109, or supply a guide to the interpretation of that section, *Venkataranga v. Narasimha*, 38 M. 509; 26 M. L. J. 96; (1914) M. W. N. 64. 21 I. C. 842; 14 M. L. T. 560; *Ahmed Hossein v. Gobinda Krishna*, 33 A. 391. 8 A. L. J. 193; 9 I. C. 932.

**Remand Order When Not Final.**—Where a suit for possession was dismissed by the lower Court as barred by Or. II, r. 2 of the C. P. Code, and on appeal the High Court set aside the order of the lower Court and remanded the case under Or. XLI, r. 23, such an order is not a final order and is therefore not appealable to His Majesty in Council; *Ahmed Husam v. Gobind Krishna*, 33 A. 391 (10 M. I. A. 345; 8 B. 548; 23 A. 220 referred to). See also *Nayasi Venkataranga v. Venkataranga*, 26 M. L. J. 96; 21 I. C. 842.

An order of remand which determines only a part of the case and leaves other matters to be determined is not a "final order," within the meaning of this section; *Baij Nath v. Sohan Bibi*, 31 A. 545; 6 A. L. J. 786.

Where the High Court on appeal remanded a case and directed that defendants who had been sued in their individual capacity should be sued as executors as well and that one of the defendants should be sued as a residuary legatee and heir, and on such amendment of the suit being made the questions between the parties should be adjudicated upon.—*Held* (per Sanderson, C. J.) that this was not a final order within the meaning of s. 109 C. P. Code; *Kumar Birendra Nath v. Kumar Nripendra Nath*, 22 C. W. N. 640.

Where the High Court reverses the decree of the Court below, and remands the case for re-trial on the merits, and for a new decree to be passed by the Court below, no appeal lies as a matter of right, under s. 595, C. P. Code, 1883 (s. 109), to the Privy Council, albeit the value of the subject-matter admittedly exceeds Rs. 10,000, as such a decree of the High Court is not a final but an interlocutory decree.—*Ishvargar v. Chudasama*, 8 B. 548. See also *Tirunarayan v. Gopalasami*, 18 M. 349, *Raghubir Dayal v. Champa Kunwar*, 33 I. C. 756.

When the High Court reversed and remanded a suit to the lower Court for further trial on the merits, it would not amount to a final judgment within s. 109 (a) to enable leave being granted to appeal to the Privy Council.—*Mangayya v. Venkataramanamurthy*, (1918) M. W. N. 844; 48 I. C. 182.

Appeals on matters interlocutory in their nature should be allowed to be preferred to His Majesty in Council only when their decision will put an end to the litigation and finally decide the rights of parties. When therefore a suit was dismissed by the Subordinate Judge as barred by *res judicata* but his decision was reversed by the High Court who remanded the cases, *held*, that leave to appeal to Privy Council should not be given.—*Sajjad Ali Khan v. M. Ishaq Khan*, 42 A. 174; 18 A. L. J. 83, *Hirdal Murwari v. Tafazal Hussain*, 1918 Pat 1: 4 Pat. L. W. 342, *Sri Krishna Das v. The Benares Hindu University*, 23 O. C. 329; *Melu Chand v. Labhu Ram*, 2 Lah. 106; 60 I. C. 522.

An appeal does not lie to His Majesty in Council against an order of remand under Or. XLI, r. 23 of the C. P. Code, as it is not a final order within the meaning of s. 109; *Sultan Beg v. Sukdeo Nandram*, 46 I. C. 922.

The High Court remanded one case on the ground that the District Judge had wrongly held the pleadings to be insufficient, and another case on the ground that he was wrong in applying s. 43 of the C. P. Code in bar

"Subject to the conditions and limitations as may be prescribed."

This section confers upon the Appellate Court the powers as those of the original Court, but the Appellate Court must exercise the powers given by this section subject to the conditions and limitations contained in the rules prescribed in the Schedule. The sections of the present Code lay down general principles, and the rules provide the means by which they can be applied; in other words, the rules restrict the provisions contained in the sections. Section 107 (1) (b) confers on an Appellate Court a power to remand a case, and then proceeds to limit this power by Or. XLI, r. 23. See *Nabin Chandra v. Pran Krishna*, 41 C. 108. For instance, the Appellate Court has power to allow amendment of plaint under Or. VI, r. 17, but it cannot allow such amendment as would change the character of the suit. Thus the Appellate Court must exercise the powers conferred by this section subject to the conditions and limitations prescribed by the rules.

**Clause (a).**—The Appellate Court has power to determine a case finally, that is, where the evidence on the record is sufficient, the Appellate Court can finally determine the suit, instead of remanding the case. See Or. XLI, r. 24 and the cases noted thereunder.

**Clause (b).**—The Appellate Court has power to remand a case. See notes and cases noted under Or. XLI, r. 23.

**Clause (c).**—The Appellate Court has power to frame issues and refer them for trial. See Or. XLI, r. 25 and the cases noted thereunder.

**Clause (d).**—The Appellate Court has power to take additional evidence or to require such evidence to be taken. See Or. XLI, rr. 27 and 28 and the notes and cases noted thereunder.

The power to admit additional evidence should be exercised by a Court of appeal with much caution, and only in suits where it is satisfied that in the interests of justice it should be exercised, and that such additional evidence when admitted, will be evidence which, if produced at the trial, would have been admissible; *Muhammad Khaleef v. Les Tanneries Lyonnaises*, 53 I. A. 84: 49 M. 435: 31 C. W. N. 1: 94 I. C. 767: A. I. R. 1928 P. C. 34.

**Appellate Court's Power of Remand.**—The powers of a Court of appeal under the Code of 1908 are much wider in respect of remand than the powers of a Court of appeal under the Code of 1882. This is due to the circumstance that section 564 of the Code of 1882 which prevented a Court of appeal from making an order of remand except as provided in s. 562, is not reproduced in the Code of 1908; *Gora Chand v. Basanta Kumar*, 15 C. L. J. 258. A similar view seems to have been taken in *Zobra Bibi v. Zobada Khatun*, 12 C. L. J. 368. But in *Nabin Chandra v. Kali Kumar*, 41 C. 108: 18 C. L. J. 612, a quite different view has been taken. In that case it has been held that an appellate Court has no wider powers of remand under s. 107 of the Code, 1908, than it had under the old Code. S. 107 (1) (b) confers on an appellate Court a power to remand and then proceeds to restrict this power by Or. XLI, r. 23. When an Act is divided into sections and rules, the proper canon of interpretation is that the sections lay down general principles and the rules provide the means by which they are to be applied, and they cannot be otherwise applied.

The power of reversing and remanding a case is limited to the cases mentioned in Or. XLI, r. 23, for though s. 107 (1) (b) is general in its terms

is not to be interpreted as restricted in its application to cases of "final orders," precisely in the same manner as clauses (a) and (b); *Srinirasa Prasad v. Kesho Prasad*, 13 C. L. J. 681. (23 A. 227 P. C. followed). *Mahabir Baksh v. Gauraj Singh*, 22 I. C. 239: 16 O. C. 261; *Biney Krishna v. Satish*, 31 C. W. N. 540: A. I. R. 1927 Cal. 481.

What is contemplated in cl. (c) of this section is a class of cases in which there may be involved questions of public importance or which may be important precedents governing numerous other cases, or in which, while the right in dispute is not exactly measurable in money, it is of great public or private importance; *Hirjibhai v. Jamshedji*, 15 Bom. L. R. 1021; *Kripasindhu Panigrahi v. Nandacharan*, 1 Pat. L. T. 239: 1929 Pat. 209; *Alagappa Chetty v. Nachiappan*, 16 L. W. 517: 43 M. L. J. 723; *Mahomed Karim Khan v. Sadik Husain*, 10 O. L. J. 289: 71 I. C. 339, *Raja Rajeswara Sethupathi v. Tirunelakantam Serrai*, 44 M. L. J. 217.

Under clause (c) certificate for leave to appeal to Privy Council should be granted only in cases in which the decision will be of general importance or affects any large body of persons or threatens the religious or civil rights of any class of the community, and not where it is to serve as a precedent for similar subsequent cases; *Tahilram Maniram v. Blackwell*, 23 I. C. 793. 7 S. L. R. 92; *Mohanlal Balbhadra v. Bissessaradas*, A. I. R. 1923 Nag. 272; 73 I. C. 221.

Where there was a substantial question of law, viz., whether it was within the competence of the District Judge to dismiss an application having regard to the provisions of s. 15 of the Provincial Insolvency Act, it was a case which could properly be certified to be a fit one for appeal to His Majesty in Council.—*Chhatrapat Singh v. Kharag Singh*, 17 C. L. J. 547. 17 C. W. N. 752: 40 C. 685. But see, *Mritunjy v. Bal Makund*, 6 Pat. L. J. 125.

For leave to appeal to the Privy Council being granted under s. 109 (c) some substantial question of law of general importance must be involved in the case.—*Raja Rajeswara Sethupathi v. Arunachalam Chettiar*, 44 M. L. J. 424.

Held, that the question whether the fraud of the mortgagor would vitiate registration and disentitle the mortgagee to enforce his mortgage was a substantial question of law and therefore the case was fit for appeal to the Privy Council.—*Dirpal Singh v. Pahladi Lal*, 42 A. 176: 18 A. L. J. 187.

Where the value of the question at issue cannot be numerically ascertained, but the commercial and financial position of a company might be seriously affected by the questions at issue, the case ought to be certified as a fit one for appeal to His Majesty in Council.—*Bombay, Burmah Trading Corporation v. Dorabji*, 27 B. 415. Referred to in *Raghunadha v. Tirurangada*, 18 M. L. T. 366: (1915) M. W. N. 1916.

The mere fact that the High Court have certified the sufficiency of the amount and the value of the suit for an appeal to the Privy Council, cannot make appealable an order which does not fulfil the statutory conditions.—*Rai Radha Kishen v. The Collector of Jaunpore*, 5 C. W. N. 153, P. C.: 23 A. 220, P. C. See also *Radha Krishen v. Rai Krishen*, 23 A. 415, P. C.: 5 C. W. N. 689 P. C.

**Appellate Court's Power to Return Plaint for Amendment.**—Having regard to the provisions of s. 578, C. P. Code, 1882 (s. 99), read with s. 582, C. P. Code, 1882 (s. 107), it is open to a party to raise the objection in a second appeal and it is equally open to the High Court, in such appeal to make an order under s. 53 (b), C. P. Code, 1882 (Order VI, r. 17), if good grounds are made out.—*Sarala Sundari v. Sarada Prosad*, 2 C. L. J. 602 (20 W. R. 240; 18 A. 131 followed).

**Appellate Court's Power to Reject Plaint or Memo. of Appeal.**—An order rejecting a plaint is treated by section 2 as a decree; the order rejecting an appeal must also be treated as a decree under the provisions of s. 582, C. P. Code, 1882 (s. 107), and therefore a second appeal lies against the order.—*Ayyanna v. Nagabhooshanam*, 16 M. 285 (7 A. 42 followed).

When a memorandum of appeal is summarily rejected, whether under s. 543, C. P. Code, (Or. XLI, r. 3), or under s. 54 (Or. VII, r. 11), read with s. 582, C. P. Code, 1882 (s. 107), the reasons of such rejection should be recorded, unless it appears from the memorandum of appeal taken by itself that a second appeal does not lie.—*Rudra Prosad v. Baijnath*, 15 A. 367.

Clauses (a) and (b) of s. 54, C. P. Code, 1882 (Or. VII, r. 11) which are declared by s. 638, C. P. Code 1882 (s. 120; Or. XLIX, r. 3) to be inapplicable to the original and civil jurisdiction of the High Court, are also inapplicable to its appellate jurisdiction notwithstanding the provisions of s. 582, C. P. Code, 1882 (s. 107)—*Balkaran Rai v. Gobinda Nath*, 12 A. 129.

**Appellate Court's Power to Summon Witnesses.**—Section 582, C. P. Code, 1882 (s. 107) read with s. 568, C. P. Code, 1882 (Or. XLI, r. 27), does not enable the Appellate Court to exercise the general power given by Section 171, Civil Procedure Code.—*Srinivasachariar v. Itangammal*, 18 M. 94.

**Appellate Court's Power to Set Aside Ex Parte Decree.**—After an appeal is filed against the decree of the lower Court, the power to set aside the original decree on an application under s. 108, C. P. Code, 1882 (Or. IX, r. 13), becomes vested in the Appellate Court by virtue of s. 582, C. P. Code, 188 (s. 107).—*Sankara Bhatta v. Bhubraya Bhatta*, 30 M. 535; 17 M. L. J. 436 (27 M. 602 referred to).

**Appellate Court's Power to Allow Withdrawal of Suit.**—An Appellate Court has no power under Or. XXIII, r. 1 (2) of the C. P. Code, to allow a suit to be withdrawn in appeal as distinguished from the appeal itself, with liberty to institute a fresh suit as that would be tantamount to setting aside the decree in the suit; *Wadeso Rasool Bux v. Allabux*, 13 S. L. R. 72. 51 I. C. 579 *Saiyed Ghazanfur v. Lala Ram Ratan*, 20 I. C. 17.

See notes under Order XXIII, rule 1

**Appellate Court's Power to Make Reference to Arbitration.**—See notes under the Second Schedule, rule 1.

**Appellate Court's Power of Substitution in case of Death, Marriage, etc., of Parties to Appeal.**—With regards to Appellate Court's power of substitution in case of death, marriage, etc., express provision is now made in Or. XXII, r. 1, see the cases noted thereunder.

See notes under Order XXII of the First Schedule.



order " after the word " decree " in paras. 2 and 3 . For the expression " final order," see notes under s. 109.

**Scope of the Section.**—While section 109 of the right of appeal to His Majesty in Council, from a decree passed by the High Courts in the exercise of their jurisdiction and lays down the conditions and upon which such appeals may be brought, section 110 lays down those conditions: (1) that the amount or value of the suit in the Court of the first instance, or the subject in dispute on appeal to His Majesty in Council, in cases mentioned in clauses (a) and (b) of section 109, be Rs. 10,000 or upwards; (2) or that the decree or final order must involve indirectly some claim or question to or respecting property of value; and (3) that where the decree or final order is a decision of the Court immediately below the Court passing the decree or final order, the appeal must involve some substantial question of law. In the case mentioned in clause (c) of s. 109, the question of value is immaterial.

It would thus appear that in cases mentioned in paras. 1 and 2 of s. 110, the right of appeal to his Majesty in Council does not depend upon the presence or want of any substantial question of law, but is entirely dependent upon the amount or value of the subject-matter of the suit and the amount or value of the subject-matter in dispute in appeal to His Majesty in Council. In the case mentioned in para. 3 of s. 110, not only the amount or value must be Rs. 10,000 or upwards, but, in addition, the appeal must involve some substantial question of law.

**Construction of the Section.**—It must always be kept in view that no real mischief can arise from not allowing a very wide construction of the section, because such cases, if worthy of being tried by a higher tribunal, can always be dealt with under sub-sec. (c) of s. 109; *Joddy Chand v. Guzdar*, 52 I. A. 207: 52 C. 650: 88 I. C. 445: A. I. R. 1925 P. C. 159.

**Distinction between the expressions " value of subject-matter of the suit in the Court of first instance " and the " value of the subject-matter in dispute on appeal."**—There is a clear distinction between the two expressions, viz., (1) the amount or value of the subject-matter of the suit in the original Court, and (2) the amount or value of the subject-matter in dispute on appeal. The former expression refers to the value of the subject-matter of the suit, and the latter to the value of the subject-matter in dispute on appeal; but both the above two elements must combine to give right of appeal to His Majesty in Council, as is apparent from the use of the word " and " in the first para. of s. 110. See *Motichand v. Ganga Prasad*, 24 A. 174 P. C.: 6 C. W. N. 362, where it has been held that before a case can be certified as a fit one for appeal to His Majesty in Council, the conditions prescribed in this section as to the amount of the subject-matter of the suit in the Court of the first instance and the amount in dispute on the appeal must both be fulfilled. The word " and " in that portion of the section cannot be read as " or." See also, *Clarke v. Brajendra Kishore*, 13 C. W. N. 1127 and *Subramanya v. Sellammal*, 1975 M. W. N. 941: 18 M. L. T. 1450.

"as far as is consistent with the principles on which appeals from appellate decrees are admitted and determined."—*Hinde v. Ponnath Brayan*, 7 M. 52, not followed in *Beni Pershad v. Nund Lal*, 24 C. 98.

S. 108, does not mean that the provisions relating to first appeals, are to be applied indiscriminately or in their entirety to second appeals, and implies no warranty for the decision by the High Court of questions of fact in any shape, or at any stage of the second appeal.—*Balkishen v. Jasoda Kuar*, 7 A. 705 (7 A. 649, *rejd. to*). Referred to in *Beni Pershad v. Nund Lal*, 24 C. 98.

Clause (a).—This section makes Or. XLI, r. 1 applicable to second appeal, as well.—*Chuni Lal v. Dahyabhai*, 32 B. 14 (17).

Observations by *Mahmood, J.*, upon the distinction between the duties of the Courts of first appeal and those of the Courts of second appeal in connection with the provisions of ss. 574, (Or. XLI, r. 31) and 578 (s. 108), C. P. Code, 1882 and with the remand cases for trial *de novo*.—*Sohawan v. Babu*, 9 A. 26 (9 A. 29 *note*: 5 A. 14 *rejd. to*).

The Court on second appeal is competent to bring on the record persons who had been originally joined in the suit but were not joined in the lower Appellate Court.—*Paya Matabhil v. Konamee Amina*, 19 M. 151 (16 A. 5 *dissented from*).

A question of limitation, when it arises upon the facts before a Court, must be heard and determined, whether or not it is directly raised in the pleadings or in the grounds of appeal. The fact that a Subordinate Court has decided that the suit or appeal before it was brought within time, or that there was sufficient cause, within the meaning of section 5 of the Limitation Act, for the appellant in that Court not presenting the appeal within the period of limitation prescribed, does not preclude the High Court from considering that decision in appeal.—*Bechi v. Ashanullah*, 12 A. 461.

Article 175 C. of the Limitation Act. 1877 (now Art. 177) applies as well to appeals from appellate decrees as to appeals from original decrees — *Madhuban Das v. Narain Das*, 29 A. 535: 4 A. L. J. 397 (28 M. 498 *folld.*). See also, *Upendra Kumar v. Sham Lal*, 34 C. 1020: 11 C. W. N. 1100: 6 C. L. J. 715. But see *Susya Pillai v. Aiyakannu* 29 M. 529, F. B. (29 M. 498 *overruled*: 9 M. 1 *folld.*).

Clause (b).—The procedure as to appeal from orders under the Civil Procedure Code, is not made applicable by s. 108, to appeals from orders under the Insolvent Act. No particular form is prescribed for petition of appeal under the latter Act.—*In the matter of Brown*, 12 C. 629.

The decree-holder, respondent, in an appeal from an order refusing an application by the judgment-debtor for declaration of insolvency under s. 344, C. P. Code, 1882 (repealed by the Provincial Insolvency Act, 1907), died and the judgment-debtor, appellant, took no steps to have the legal representative of the deceased substituted as respondent in this place. Held, per *MAHMOOD, J.*, that whatever the position of the parties might have been in the regular suit, in the insolvency proceedings the judgment-debtor occupied a position analogous to that of a plaintiff, and the decree-holder occupied the position of defendant.—*Rameshar v. Bisheshur*, 7 A. 734 (7 A. 693, *distd.*).

**Meaning of the Word Value.**—In s. 596, C. P. Code of 1882 (s. 110), "the value of the subject-matter in dispute," for the purpose of appealing to the Privy Council, means the real market value of the property in dispute, and not a nominal value such as is assessed under the provisions of the Suits Valuation Act VII of 1887.—*Karam Singh v. Khem Singh*, 60 P. R. 1905: 150 P. L. R. (1905); *Mohun Lal v. Bebee Dass*, 7 M. I. A. 428; *Nawaz Ali v. Allu*, 4 L. 185: 75 I. C. 520: A. I. R. 1924 Lah 82.

Civil Courts Act (Madras) III of 1873 does not control the construction of s. 596, C. P. Code, 1882 (s. 110), and under that section the real market-value of the matter in dispute is the test as to whether or not an appeal lies to the Privy Council.—*Pichayee v. Sivagami*, 15 M. 237; *Poosa Thorai v. Kannappa Chetty*, (1917) M. W. N. 422; 5 L. W. 422.

A party who, in observance of the rules of valuation prescribed by the stamp law of the country in which he sues, has paid stamp-duty upon a sum lower than the appealable amount, is not thereby precluded from obtaining leave from the Courts of that country to appeal to Her Majesty in Council, if he can show that the value of the property in dispute does reach the appealable amount—*Lekhraj Roy v. Kanhya Singh*, L. R. 1 I. A. 317 (*Reversing* 18 W. R. 494). See also *Rachappa Subrao v. Shidappa Venkatro*, 19 C. W. N. cxxv (125-n.)

In a suit for an injunction it is open to the applicant for leave to appeal to His Majesty in Council to show what the real value of the subject-matter of the suit is, notwithstanding the fact that for the purposes of the Court Fees Act (VII of 1870) the value of the suit was fixed at a sum less than the appealable amount.—*Hari Mohan v. Surendra Narain*, 31 C. 301 See also 19 C. W. N. cxxv (125-n.).

The valuation made in conformity with the stamp law does not prevent a party from obtaining leave to appeal, by proving that the real value of the subject-matter does not fall short of the appealable amount; *Kumar Basanta Kumar v. Secretary of State*, 14 C. W. N. 872: 6 I. C. 792.

The amount or the value of a subject-matter of a suit cannot be larger than what the Court in which that suit is brought has jurisdiction to try. In a suit for accounts valued at Rs. 101 for Court-fees and filed in a second class Subordinate Judge's Court, it may be open to the plaintiff to show that its value is in excess of Rs. 101, but not beyond Rs. 5,000, which that Court could not have decreed; *Hirjibai v. Jamshedji*, 15 Bom L. R. 1021: 21 I. C. 783.

Section 110 of the C. P. Code, applies to the value of an annuity which is sought to be recovered, not to the value of the property upon which that annuity is charged; *Mirza Abid Hussain v. Ahamed Hussain*, 26 O. C. 216 P. C., 10 O. L. J. 288: 28 C. W. N. 289

Special leave to appeal granted, notwithstanding that no application had been made for such leave to the Court below, upon the allegation that, though the amount decreed was much under the appealable value, the original demand being necessarily limited by the jurisdiction of the Court in which the suit was originally instituted, yet the subject-matter at issue exceeded in value the appealable amount—*Muttuswamy v. Venkatasawara*, 10 M. I. A. 818: 1 Ind. Jur. N. S. 205,

mining some rights or liabilities. An interlocutory order determines only a part of the suit or cause and leaves other matters to be determined by the final decree. By interlocutory order the suit or cause does not come to an end, but the trial proceeds notwithstanding the interlocutory order.

"From any decree."—The word "decree" as used in Chapter XIV of the Code of 1882, was defined as including judgment and order, but no such definition is to be found either in sections 109 to 112 or in Or XLV of Act V of 1908, *Baij Nath v. Sohan Bibi*, 31 A. 545 p. 550.

The definition of "decree" in section 2<sup>d</sup> of the Code is not applicable to chapter XLV of the Code of 1882 (relating to appeals to His Majesty in Council) For the purposes of that chapter a definition of "decree" has been therein adopted, which is special, and differs from the meaning it bears elsewhere in the Code. The word "decree" in that chapter must be read as being equivalent to "decree, judgment or order." So read, final order may be appealed against to His Majesty in Council under section 595, and that provision cannot be restricted by the provisions of section 589 (12) that such orders passed in appeal "shall be final"; *Krishna Pershad v. Moti Chand*, 40 C. 635 P. C.: 17 C. L. J. 573; 17 C. W. N. 637; 11 A. L. J. 517; 15 Bom. L. R. 515; 25 M. L. J. 140; 14 M. L. T. 37.

An order passed by the High Court determining a question under section 47, is a decree within the meaning of this section; *Ramkripal v. Rup Kuar*, 3 A. 633.

This section is to be read with clause 39 of the Letters Patent of the High Court of judicature at Fort William in Bengal dated 28th December 1865, as the right of appeal from the High Court to the Privy Council rests on cl. 39 of the Letters Patent of 1865 read with ss. 109 and 110 and Or. XLV, r. 3 of the C. P. Code (*see* 40 C. 685). Clause 39 of the Letters Patent is therefore reproduced below:—

"And We do further order that any person or persons may appeal to Us, Our heirs and successors in Our or their Privy Council, in any matter not being of Criminal jurisdiction from any final judgment, decree or order of the said High Court of Judicature at Fort William in Bengal made on appeal and from any final judgment, decree or order made in the exercise of original jurisdiction by Judges of the said High Court or of any Division Court, from which an appeal shall not lie to the said High Court under the provisions contained in the 15th clause of these presents; *Provided* in either case that the sum or matter at issue is of the amount or value of not less than Rs. 10,000, or that such judgment, decree or order shall involve directly or indirectly some claim demand or question as to respecting property amounting to or of the value of not less than Rs. 10,000; or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors, in our or *their* Privy Council. Subject always to such rules or orders as are now in force or may from time to time, be made, respecting appeals to *Councils* in a Council from the Courts of the said Presidency, except as far as the said existing rules and orders respectively are hereby varied, and subject also to such further rules and orders as We may, with the *advice* of Our Privy Council, hereby make in that behalf."

Clause 39 of the Letters Patent empowers the High Court to determine the fitness of an appeal to the Privy Council in any *matter, not being*

In a suit for recovery of possession of immoveable property, the subject-matter to be valued would include mesne profits claimable from the institution of the suit to the date of delivery of possession or until the expiration of three years from the date of the decree with interest; *Kumar Basanta Kumar v. Secretary of State*, 14 C. W. N. 872: 6 I. C. 792. As to mesne profits, see also 33 C. 1286; *Mahabir Prasad v. Anup Narain*, 8 Pat. L. J. 377: 5 Pat. L. W. 327; *Imamuddin v. Kishundeo Narain*, 6 Pat. L. J. 246.

In estimating the value of the subject-matter of an appeal to the Privy Council, only the land which existed when the suit was instituted is to be taken into consideration, and not also the land which possibly may be formed by alluvion in the course of future years. The amount or value of the subject-matter in dispute on appeal is dependent on the amount or value of the subject-matter in the Court of first instance, and, the High Court will not take into account the increase in the value of the lands in the interval between the institution of the suit and the filing of the application for leave to appeal to the Privy Council; *Administrator General of Bengal v. Ashutosh Roy*, 5 I. C. 645.

**A Party Cannot Both Approbate and Reprobate.**—A defendant, who had previously adopted the value given in the plaint for the purpose of an appeal preferred by him, should not be allowed to contest that valuation, on the principle that a party cannot both approbate and reprobate; *Kumar Basanta Kumar v. Secretary of State*: 14 C. W. N. 872: 6 I. C. 792; *Bhagwati Prasad v. Achhaibar*, 26 O. C. 24: 74 I. C. 214.

Where a defendant, having the means of proving the real value of property, made no objections to the plaintiff's under-valuation, and also herself in special appeal knowingly undervalued the property by valuing the subject-matter at Rs. 675, held that she could not be heard to represent the real value of the property to be over Rs. 10,000 for the purpose of securing admission for an appeal to Her Majesty in Council.—*In the matter of Bhuggobutty Debia*, 14 W. R. 62. The correctness of this decision was doubted in 18 W. R. 494 and eventually impliedly overruled by *Lakraj v. Kanhya Singh*, L. R. 1 I. A. 317. See also, *Rash Mohan v. Ram Mohan*, (1919) Pat. 241.

In determining the value of the subject-matter of a suit for the purpose of s. 110 (2), C. P. Code, its value at the date of the decree from which the appeal is to be made to His Majesty in Council, and not the value at the institution of the suit, is to be taken into account. A plaintiff who brought his suit in the Munsif's Court paying Court-fees on the annual rent of Rs. 4-4-0 is not debarred from asserting afterwards (when applying for leave to appeal to the Privy Council) that the property in dispute is in fact worth Rs. 10,000 or more; *Surendranath Roy v. Dwarkanath*, 44 C. 119: 21 C. W. N. 530: 24 C. L. J. 350.

Special leave to appeal granted in a suit which had been consolidated by consent of both parties. A defendant in a suit, having adopted a certain valuation, cannot, in the same suit, object to that valuation.—*Kristo Indro v. Huromonee*, L. R. 1 I. A. 84.

**The Decree or Final Order Must Involve Directly or Indirectly Some Claim or Question to or Respecting Property of Like Amount or Value.**—The plaintiff in a suit for damages for libel cannot ensure an appeal to the Privy Council by merely placing his damages at a sufficiently high figure.

the parties or at all events disposes substantially of the matters in issue between them as to leave merely subordinate questions for decision; *Shankar Bharati v. Narasimha*, 24 P. M. L. J. 272.

An order of the High Court based on the ground that the application in an application to sue in *forma pauperis* does not disclose any cause of action, is a "final order" within the meaning of the section, notwithstanding whether the character of finality can be rightly claimed; *Shankar Bharati v. Narasimha*, 24 P. M. L. J. 272. The character of finality, however, should be determined with reference to the particular proceeding in which it stands to the proceeding before the Court. *Hans v. Nand Lal*, 13 C. L. J. 689; 15 C. W. N. 579.

An order by which a decree of dismissal of a suit is made under Or. IX, r. 8 of the C. P. Code, is not a final order within the meaning of s. 109 of the Code; *Meghraj v. Bhatnagar*, 21 C. L. J. 275 (18 C. L. J. 124 distd.). See also *Seth Jai Daulat v. Bhagwat*, 24 C. L. J. 107; *Ram Karan v. Madhukar*, 13 A. L. J. 623. So also an order setting aside the order of dismissal of a suit for want of prosecution under XVII r. 2 is a final order under s. 109 C. P. Code; *Lakshmi Narain v. Palamchand*, 2 Pat. L. T. 155; 6 Pat. L. J. 110.

The term "final order" denotes an order which finally decides any matter directly at issue in the case in respect of the rights of the parties. If the order decides an issue which goes to the foundation of the suit, and therefore, is an order, which can never, while the decision stands, be questioned again in the suit, it is "final" within the meaning of the section, notwithstanding that there may be subordinate questions to be made. If an order decides a question the solution of which carries, whatever view may be taken of it, terminate the proceeding before the Court, it cannot be called a final order. Whether a particular order is a "final order" for the purpose of the grant of leave to His Majesty in Council, depends upon its nature and contents and its relation to the proceedings in which it has been made; *Secretary of State v. British Indian Navigation Co.*, 13 C. L. J. 90.

An order setting aside a decision of a lower Court as to the respective shares of the parties to a partnership suit and directing fresh accounts to be taken is a final order; *Dwarka Nath v. Haji Mahomed*, 15 C. W. N. 60.

Where the matter in issue in a suit was held to be *res judicata* by the lower Court but the High Court disagreeing with this view remanded the case for trial on the merits, the Calcutta High Court on an application for leave to appeal to the Privy Council held that the order was final; *Khagendra v. Sahayram*, 25 C. W. N. 836; 62 I. C. 776. But the Allahabad High Court in *Sajjad v. Ishag*, 18 A. L. J. 63; 54 I. C. 504, took a contrary view. Where the High Court reversing the decision of the lower Court that a suit is barred by limitation remands the case for trial to that Court; the order of the High Court is final; *Sathappa v. Subramanian*, 43 M. L. J. 758; 71 I. C. 334; A. I. R. 1922 Mad. 510; *Santi Lal v. Raj Narain*, 45 A. 74; 79 I. C. 87; A. I. R. 1924 All. 119. But in the following cases it was held that the order is interlocutory; *Baij Nath v. Sohan Bibi*, 31 A. 515; *Habibunnissa v. Munawarunnissa*, 25 A. 629; *Hyder v. Badshah Khanam*, 60 L. J. 270; 49 I. C. 520.

An order passed by the High Court upon an appeal made to it under s. 56 of the Probate and Administration Act is final and is not open to

involved a question respecting property of the value of Rs. 10,000 or upwards. Further, it was not necessary that at the time of presenting the application for leave, there should be pending in a Court a dispute respecting other property of the value of Rs. 10,000; *Srikrishan Lal v. Kashmiro*, 35 A. 445: 11 A. L. J. 654 (*Macfarlane v. Leclaire*, 15 Moo P. C. 181: 9 B. L. R. 423 referred to). See also, *Musst. Aliman v. Musst. Hasib*, 1 C. W. N. 93-n., which was a case of construction of a deed of gift concerning property worth five lacs. But see *Kulsumunnissa Bibi v. Chaube Basdeo*, 26 I. C. 6 (35 A. 445, distinguished).

The aggregate value of three suits brought by different plaintiffs against the same defendant respecting the same property, amounted to more than Rs. 10,000, though the value of each suit was below that sum. The plaintiffs in these suits obtained decrees in all the Courts. The defendant applied for leave to appeal in each case to Her Majesty in Council. Held, that under the second clause of s. 596, C. P. Code, 1881 (s. 110), he was entitled to appeal in each of the three cases, as the decree in each case involved indirectly a question of title to property of the value of Rs. 10,000—*Ashanulla v. Karoonamoyi*, 4 C. L. R. 125.

In certain applications for leave to appeal to the Privy Council, the subject-matter of the appeals, when taken together, did not amount to Rs. 10,000, but the appellants urged that the decree would indirectly affect a large number of other resumed lands which were not the subject-matter of the present suit, but whose value would be over Rs. 10,000. Held, that on the present applications it was not possible to hold that the decree involved directly or indirectly a claim or question respecting property of the statutory value, because in order to do that, it would be necessary to investigate the terms and conditions of leases in respect of lands which were not included in these suits; *Bhupendra Narayan Singh v. Nurput Singh*, 27 C. W. N. 205.

Several suits tried together and dealt with in one judgment—the value of each case was below Rs. 10,000, yet the aggregate value reached that amount—Held that the cases fell within this section and leave to appeal was granted in each case.—*Deonarain Singh v. Guni Singh*, 34 C. 400, (4 C. L. R. 125: 8 C. 210 and 11 C. 740, referred to).

Special leave to appeal given in a case involving a question of tenure service called *chakran* although the subject-matter in dispute was below the appealable value; there being many other suits depending on the decision of the case; *Joykissen v. Collector of Burdwan*, 8 M. I. A. 265

Special leave to appeal to the Privy Council may be granted, if consolidated suits, following a single judgment, do involve directly, in part, and indirectly to a greater extent, claims to and respecting property of the value of Rs. 10,000 or upwards; *Rajajajveera Rama v. Suppanasari*, (1914) M. W. N. 162; 22 I. C. 390 (8 M. I. A. 265 followed).

A and B purchased the same properties deriving title through different persons. The value of the properties with mesne-profits was over Rs. 10,000. B granted two *nutni* leases of the properties to different persons. A was therefore obliged to bring two suits for the recovery of the properties, and the value of the subject-matter in each suit was less than Rs. 10,000. Held that an appeal would lie to the Privy Council; *Jooqul Kishore v. Jotendro Mohun*, 8 C. 210. See also *In the matter of Khwaja Muhammad*, 18 A. 196 and *Deonarain v. Guni Singh*, 34 C. 400.

order under Or, XLVII, r. 7 of the Code, is not a final order passed on appeal, as the appeal had been disposed of before the application for review; *Mahabir Baksh v. Sheoraj Singh*, 22 I. C. 259; 16 O. C. 264.

An order passed by the High Court under s. 622, C. P. Code, 1882 (s. 115) deciding that a certain party should be allowed to sue *in forma pauperis* is not a final decree passed on appeal within the meaning of s. 595, C. P. Code, 1882 (s. 109), and the High Court has therefore no power to grant a certificate as to the fitness of the appeal.—*Babu Sakan Singh v. Gopal Chandra*, 8 C. W. N. 290.

An order passed by the High Court, rejecting an application under s. 206 C. P. Code, 1882 (s. 152), to amend a certain decree of the Court, is not an order "made on appeal" and is therefore not appealable to His Majesty in Council.—*Sunder Koer v. Chandeshwar Prosad*, 30 C. 679 [6 W. R. (Mis.) 102, and 10 W. R. 1 F. B. referred to].

An order of the High Court refusing to admit an appeal after the prescribed period of limitation, is not a decree passed on appeal, and the High Court, therefore, cannot grant leave to appeal therefrom to the Privy Council under clauses (a) or (b) of s. 595, C. P. Code, 1882 (s. 109).—*Karsondas v. Gangabai*, 32 B. 108; 8 Bom. L. R. 566 (30 C. 679 followed) on appeal from 30 B. 329; 7 Bom. L. R. 965.

An appeal against an order dismissing petition praying to be adjudged insolvent lies to His Majesty in Council under cl. (39) of the Letters Patent and s. 109 of the C. P. Code. The Provincial Insolvency Act does not interfere with any right of appeal to His Majesty in Council that might otherwise exist, *Chhatraput Singh v. Kharag Singh*, 17 C. L. J. 547; 17 C. W. N. 752; 40 C. 685.

**Order Not Final.**—An order deciding that the suit as framed was not barred under s. 91 of the Chota Nagpur Tenancy Act and remanding the case for trial on the merits is not a final order within the meaning of the section and hence no appeal lies to His Majesty in Council; *Krishna Chandra v. Ram Narain*, 18 C. L. J. 124 (18 C. L. J. 90 and 681 referred to).

An order of the High Court, in so far as it decides that certain portions of the award of the Land Acquisition Collector, are not embraced within the scope of the investigation by the Special Judge, is not a "final order" for the purpose of an appeal to His Majesty in Council; *Secretary of State v. British Indian Steam Navigation Co.*, 18 C. L. J. 90.

An order made by a High Court reversing an order of the lower Court under Or XXIII, r. 3 recording a compromise, and directing the lower Court to proceed with the suit in the ordinary course, is not a final order; *Shankar v. Narsinha*, 47 B. 106; 69 I. C. 80; A. I. R. 1922 Bom. 383; *Surendra v. Tarubala*, 29 C. W. N. 832; 89 I. C. 94; A. I. R. 1925 Cal. 857; *Bhagwati v. Dhan Kunwar*, 48 A. 329; 92 I. C. 1027; A. I. R. 1926 All. 311. Where the High Court reversed the order of the lower Court refusing to aside an abatement of a suit on the ground of limitation and directed the lower Court to rehear the application for permission to implead the heirs, it was held that the order of the High Court was interlocutory and not final; *Mumtazuddaula v. James Skinner*, 7 A. 335; 86 I. C. 161; A. I. R. 1925 All. 263.



specting property of Rs. 10,000 in value or upwards, the reference is to suits in existence and not to suits in *græmio futuri*. Where therefore the question decided by a decree was a question of title which may possibly affect the title of persons who are not parties to the decree to property not the subject-matter of the suit in which the decree was passed, and concerning the title to which property there is no litigation pending, held that no appeal lay to the Privy Council; *Hanuman Prasad v. Bhagwati Prasad*, 24 A. 236; *Abdul Karim v. Allah Baksh*, 90 P. R. 1918; 84 P. L. R. 1918, *Bon Kwi v. S. K. R. Firm*, 5 Bur. L. J. 45; 95 I. C. 377; A. I. R. 1928 Rang. 128; see also, *Sri Krishna Lal v. Kashmiro*, 85 A. 445, where it has been held that it is unnecessary that at the time of presenting the application for leave to appeal there should be pending in a Court a dispute respecting other property of the value of Rs. 10,000—*Macfarlane v. Leclair*, 1862, 15 Moo. P. C. 181 (referred to). See also, *Chinnam Rajamannaru v. Radha Krishniah*, 32 M. L. J. 400.

“Where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree.”—The word “decision” in this section, means merely the decision of the suit by the Court, and cannot, like the word “judgment,” be defined as making the statements of the grounds on which the Court proceeds to make the decree. A decree of an Appellate Court will be regarded as affirming the decision of the Court immediately below, within the meaning of s. 595, C. P. Code, 1882 (s.110), if it only affirms the decree of that Court. It need not also affirm the grounds of fact upon which the lower Court passed its judgment.—*Tassaduq Rasul v. Manik Chand*, 7 C. W. N. 177, P. C.; 25 A. 109, P. C. Distinguished in 31 C. 57, P. C.; 8 C. W. N. 41, P. C.

Where there is no point of law involved in a case, the mere fact that the finding of the Appellate Court does not in terms coincide with the finding of the original Court is not sufficient, where the findings of fact of the two Courts are in effect the same, to give a right of appeal to the Privy Council, notwithstanding that the value of the suit is above Rs. 10,000—*Thompson v. Calcutta Tramways Co.*, 21 C. 523; and *Ram Anugra Narain v. Chowdhury Hanuman Sahai*, 30 C. 303, P. C. See however, *Ashghar Reza v. Hyder Raza*, 16 C. 287, in which it has been held that where there were questions of law and of fact involved in a case, and the lower Court decided against plaintiff on two issues of fact which it considered sufficient for disposing of the case, without trying the remaining issues, and the High Court decided in favour of plaintiff on those two issues, but decided against him on a further question of fact and finally came to the same conclusion on the fact as the lower Court, though not agreeing with that Court with all its findings and its reasons, held, on an application for leave to appeal to the Privy Council, that the Court did not “affirm” the lower Court’s decision within the meaning of this section and that there were moreover substantial points of law entitling the plaintiffs to appeal although such questions of law might not be material for the decision of the case. This case has been followed by *RANADE, J. In re Vishwambhar Pandit*, 20 B. 699; but dissented from in 48 P. R. (1904). In *Bunga Chandra v. Pukai Bepari*, 13 C. L. J. 501, it has been held that where the decrees are concurrent but the reasons for the decisions are divergent, leave to appeal to His Majesty in Council cannot be granted unless the applicant shows that some substantial question of law is involved in the appeal; it has also been held in this case that the case

but an interlocutory order and that no appeal lies from it to His Majesty in Council under the provisions of section 39 of the Amended Letters Patent; *Gangappa v. Gangappa*, 38 B. 421: 16 Bom. L. R. 195.

**Order of Remand When Final.**—It cannot be affirmed as an inflexible rule of universal application that an order of remand is not a final order for the purposes of this section because it is in the nature of an interlocutory order in the suit. If it decides in effect finally the cardinal point in the suit, if it decides an issue which goes to the foundation of the suit, and, therefore, is an order which can never, while the decision stands, be questioned again in the suit, it is final within the meaning of this section, notwithstanding that there may be subordinate enquiries to be made; *Saratmoni v. Batakrishna*, 10 C. L. J. 336 (15 B. 155. 17 A. 112 P. C., 35 C. 618 followed) See also, *Secretary of State v. British Indian Navigation Co.*, 13 C. L. J. 90.

When the order of remand involves a cardinal point in the case, it is final and is appealable (35 C. 618 *refd. to*). Where the order do not purport to deal with the merits of the case nor even proceed so far as the point where it becomes necessary to determine the rights of the parties which go to the foundation of the suit, the orders are not final and appeals do not lie from them, *Rai Baijnath Goenka v. Maharajah Sir Rameshwar Singh*, 1918 Pat 81: 3 Pat L. J. 339.

A plea of limitation was taken as one of the main defences in a case. The trial Court accepted this plea and dismissed the suit. The Court of the Judicial Commissioner sitting in appeal reversed the decision of the lower Court on this point and remanded the case for trial on the merits. Held that the order of remand was a final order within the meaning of s 109 C. P. Code; *Hyder Mehdi v. Badshah Khanam*, 49 I. C. 520.

An order under s. 562, C. P. Code, 1882 (Or. XLI, r. 23) is not ordinarily capable of being the subject of an appeal to His Majesty in Council, though it may possibly be so if the order in question has the effect of deciding the cardinal point in the suit.—*Habibunnissa v. Munamarunnissa*, 25 A. 629 See also, *Muzhar Hossein v. Bodha Bibi*, 17 A. 112, P. C. 15 B. 155, P. C. followed). Followed in *Ananda Gopal v. Naffar Chandra*, 12 C. W. N. 545. 8 C. L. J. 168: 35 C. 618. See also, *Ram Sarup v. Ram Dei*, A. W. N. (1907) 291 [2 C. W. N. cci (201) referred to].

Where in a suit for the winding up of a partnership business, the first Court directed an account to be taken, and the High Court on appeal disagreed with that Court in respect of the respective liabilities of the parties, and remanded the suit for a fresh taking of the accounts. Held that the decision of the High Court in this cardinal question as to the respective liabilities of the different parties is such a decision as to constitute a final decision on the points in issue and amounts to a decree in suit; *Duarka Nath v. Haji Mahomed Akbar*, 15 C. W. N. 60: 7 I. C. 622; *Sathappa Chetti v. Subramaniam*, 43 M. L. J. 758: 16 L. W. 718.

Where the High Court on appeal reverses the decision of the Court below and remands the case for taking certain accounts for the purpose of determining whether the defendant is liable as a partner and not merely for ascertaining the extent of his liability, the order is a "final order" from which an appeal would lie to His Majesty in Council. *Sanyasi Churan v. Krishnadhan*, 49 C. 560 P. C: 26 C. W. N. 954: 35 C. L. J. 498.

A decree of the High Court dismissing an appeal on account of insufficiency of Court fee is one affirming the decree of the first Court within s. 110 C. P. Code; *Mussi Satto v. Amar Singh*, 1 P. L. R. 1920: 16 P. W. R. 1920.

Having regard to the state of authorities in India on the question of the applicability of s. 10 of the Limitation Act to a suit by a minor against the administrator of his estate for accounts, the question is a substantial question of law within s. 110 C. P. Code; *Janardan Prasad v. Janabhathi Thakurain*, 45 I. C. 182.

An order dismissing an appeal for default is an order affirming the decree of the Court below and the case cannot be certified to be a fit one for appeal to the Privy Council, unless some substantial question of law is involved; *Ram Karan v. Madhukar*, 13 A. L. J. 623. But see *Abdul Majid v. Jawahir Lal*, 36 A. 350 P. C. where it has been held that order dismissing appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognized authoritatively that the appellant had not complied with the conditions under which the appeal was open to him and that therefore he was in the same position as if he had not appealed at all.

When the Chief Court affirms in part the decree of the District Judge, it is a decree of affirmance within the meaning of s. 110 of the Code for the purposes of appeal to the Privy Council; *Bhagat Singh v. Jariam*, 22 P. R. 1915: 66 P. L. R. 1915: 19 P. W. R. 1915: 26 I. C. 402.

An order rejecting an appeal for failure to furnish security for costs under Or. XLI, r. 10 is not one affirming the decision of the Court below within the meaning of the last para of this section; *Radha Krishna v. Jamna Prasad*, 13 O. C. 59.

Where the decree of the lower Court is not wholly affirmed by the judgment of a High Court, but is varied in one particular, the person against whom such variation is made, is entitled as of right to a certificate of appeal to His Majesty in Council; *Narpat Singh v. Kalka Baz*, 9 I. C. 1040 (8 C. W. N. 294: 62 P. W. R. not followed 10 O. C. 65, followed).

A variation not touching the merits of the case but relating only to costs, does not make the decree anything other than an affirming decree; *Vadivelu Ammal v. Rajaratna Mudaliar*, 30 M. L. T. 337.

Petitioner claimed Rs. 15,000 for residence and this claim was entirely disallowed by the first Court. In appeal the claim was allowed but its value was fixed at Rs. 5,000 only. Held that permission to appeal to the Privy Council should be granted. In dealing with such applications petitioner should have the benefit of any doubt.—*Vikrama v. Vikrama*, 18 M. L. T. 387.

"Some substantial question of law."—A substantial question of law does not mean a question of general importance but the words "substantial question of law" mean a substantial question of law as between the parties in the case involved; *Raghunath Prasad v. Dy. Commissioner of Partabgarh*, A. I. R. 1927 P. C. 110. The words "substantial question of law" in this section, mean question of general importance; they do not include a question of the construction of a document in which the parties are alone interested; *Chowdari Wasi Ahmad v. Maina Bibi*, 11 C. W. N. 218-n.

of the suit. *Held* that the orders of remand on both the cases were on preliminary points and not "final" within the meaning of s. 109; *Mayari Venkataranga v. Raja Kusara Venkatarama*, 26 M. L. J. 96: 14 M. L. T. 560: 21 I. C. 842.

Clause (b)—"In the exercise of original civil jurisdiction."—No appeal lies to the High Court from a final decree passed by the Recorder of Rangoon in a suit for grant of probate of a will, in the exercise of original civil jurisdiction, where the value of the subject-matter of the suit is above Rs. 10,000 but an appeal lies to Her Majesty in Council.—*Esoof Hashim Doopley v. Fatima Bibi*, 24 C. 30.

An award of a single judge on the original side of the Chief Court under Part III of the Land Acquisition Act, is not appealable to His Majesty in Council; *Collector of Rangoon v. Chandrama*, 28 I. C. 260.

There is no appeal against a decision of a High Court passed on appeal from an award of compensation made by the Court to which a reference had been made under section 18 of the Land Acquisition Act; *The Special Officer, Salsette Building Sites v. Dassabhai Bezanji*, 17 C. W. N. 42: P. C.: 37 B. 506 P. C.: 14 Bom. L. R. 1194.

No appeal lies to His Majesty in Council from a decision of the Chief Court of Lower Burma on a reference to that Court by the Collector of Rangoon, in proceedings under the Land Acquisition Act on an award made by him as to the value of land required; *Rangoon Batataung Co., Ltd. v. The Collector of Rangoon*, 40 C. 21 P. C.: 16 C. W. N. 961: 16 C. L. J. 245. 14 Bom. L. R. 833; 10 A. L. J. 271; 6 B. L. R. 150; 23 M. L. J. 276: 14 M. L. T. 195. Following in *Ram Shoshi v. C. E. Grey*, 18 C. L. J. 123.

Where the High Court dismissed an application for restoration of an appeal dismissed for default, it is not appealable to His Majesty in Council, in as much as it is not a decree or final order passed in appeal nor an order passed in the exercise of the original civil jurisdiction of the High Court *Bismillah Begam v. Hira Lal*, 37 I. C. 832.

Clause (c)—"From any decree or order."—The term "order" in cl. (c) of s. 109 is intended to cover not merely a "final order" but is wide enough to include an interlocutory order. It has a different meaning to the expression "final order" in cl. (a). In a fit case, the High Court has jurisdiction to grant leave to appeal to his Majesty in Council under cl. (c) from an interlocutory order; *Shiva Prosad v. Rani Prayag Kumari*, 28 C. W. N. 819 (*Radha Krishna v. Swaminatha*, L. R. 48 I. A. 31: 25 C. W. N. 630; *Banarasi v. Kashi*, L. R. 28 I. A. 11: 23 A. 227: 5 C. W. N. 193; *Damra Coal Co. v. Benares Bank*, 21 C. L. J. 281: 28 I. C. 569 referred to).

Clause (c)—"Is certified to be a fit one for appeal."—Clause (c) of this section is intended to meet special cases, such for example, as those in which the point in dispute is not measurable by money though it may be of great public or private importance. The discretion vested in the Court by clause (c) is to be sparingly used. The question whether or not the applicant had established that substantial loss might result to him if execution was not stayed pending the hearing of the appeal presented to the High Court, is not a question of such exceptional importance as would justify a special certificate of fitness under clause (c). Clause (c)

the lower, and the dispute either directly or indirectly relates to an amount of Rs. 10,000. *Banarasi Prasad v. Kashi Krishen*, 23 A. 227, P. C.; 5 C. W. N. 193, P. C.; see also, *Radha Krishen v. Rai Krishen Ohand*, 23 A. 415, P. C.; 5 C. W. N. 689, P. C.; and *Hanuman Prasad v. Bhagwati Prasad*, 24 A. 236. But see *Ayya Raghunadha v. Thirumal*, 18 M. L. T. 366; 1915 M. W. N. 916 (27 B. 415 followed).

Held that an objection that an application for execution was improperly granted by reason of the non-production for the succession certificate before the lower Court did not raise a "substantial question of law" within the meaning of s. 596, C. P. Code, 1882 (s. 110), so as to warrant the High Court in granting leave to appeal to Her Majesty in Council.—*Shuja Ali v. Ram Kuar*, 20 A 118

The question whether a document was validly presented for registration under s. 33 of the Registration Act, is a substantial question of law, *Jambu Prasad v. Nawab Aftab Ali*, 37 A. 49; 19 C. W. N. 282 P. C.

The question whether a suit was not maintainable, because a previous action commenced by the predecessor in interest of the plaintiff had abated under Or. XXII, r. 9, is not a substantial question of law within the meaning of s. 110; *Bu Ali Khan v. Sujan Kuer*, 45 A. 667; 75 I. C. 100; A. I. R. 1924. A. 66.

The question whether a Hindu widow who is an executrix can make a compromise with the members of her husband's family for the purpose of procuring peace in the family, is not a substantial question of law; *Sudhir v. Indumati*, 43 C. L. J. 206; A. I. R. 1926 C. 711.

The question whether s. 48 of the C. P. Code applies to a decree passed under the Code of 1882, is not a substantial question of law within the meaning of s. 110; *Kesho Dyal Gir v. Sakina Bibi*, 39 I. C. 141.

The question of rightful or wrongful exercise of its discretion by the High Court does not involve any substantial question of law within s. 110 (8) C. P. Code; *Govindlal v. Bansilal Motilal*, 46 B. 249; 24 Bom. L. R. 196.

Section 34 of the Code gives the Court discretionary power to allow interest *post litem motam*, at such a rate as it deems reasonable, and if it allows 9 per cent. per annum, it is not an arbitrary and unvarientable exercise of discretion so as to involve such a substantial question of law as is contemplated by this section; *Bhagat Singh v. Jairam*, 22 P. R. 1915; 66 P. L. R. 1915. 19 P. W. R. 1915.

An order of the High Court dismissing an appeal for default in furnishing security for costs under Or. XLI, r. 10, of the Code is not a fit one for granting certificate under s. 109 (c), as the order does not involve a substantial question of law; *Md. Abdul Ghafur v. Secretary of State*, 36 A. 325. 12 A. L. J. 451; see, however, *Radha Krishen v. Jamuna Prasad*, 13 O. C. 59.

Where on a question of law there has been a difference of opinion between the several High Courts and also among the Judges of the same court, the question is a substantial question of law within the meaning of this section; *Bholee Singh v. Jai Govind*, 18 I. C. 32. *Debhendra v. Bibudhendra*, 43 C. 90.

Under s. 595 (s. 109) and s. 600 (Or. XLV, r. 3), C. P. Code, 1882, there is a right of appeal if the High Court certifies that the case is "otherwise" a fit one for appeal. But in all such cases a special certificate to that effect must be granted by the High Court.—*Benarasi Prasad v. Kashi Krishen*, 5 C. W. N. 193: 23 A. 227, P. C.

Leave to appeal to Her Majesty in Council granted in one of six suits tried together, although the amount involved in such suit was under the appealable value; there being important question of law, which did not arise in the five other suits, the suit however, involving other questions of law common to all the six suits, such suits having been, by agreement of Counsel, heard upon the same evidence, and concluded by the same judgment.—*Byjnath v. Graham*, 11 C. 740. But where the suits are not consolidated, although the questions to be decided are the same in all of them, it is necessary to show that in each of the suits, the amount in dispute in the appeal is Rs. 10,000 or upwards.—*The Royal Insurance Co. v. Akhoy Coomar*, 6 C. W. N. 41.

First, Whether the burden lay upon a mortgagee, who had taken a mortgage from the manager of a joint Hindu family to prove that the debt was incurred for family necessity, and secondly whether, if the debt was not so incurred, the interest of the mortgagor alone could be sold in enforcement of the mortgage, are substantial questions of law of general importance, and therefore the case was a fit one for appeal to the Privy Council.—*Anant Ram v. Sheoraj Singh*, 18 I. C. 305.

Where the question in controversy was whether a receiver should or should not be appointed in respect of the subject-matter of the litigation, and the Courts took divergent views upon the matter, certificate as to the fitness of the case for appeal to His Majesty in Council was refused; *Mahomed Musaji v. Ahmed Musaji*, 13 C. L. J. 507.

Before it could be held that the decision involved a question of wide public importance, there should be some evidence that the rights of Zemindars and *putnidars* in Bengal in respect of similar lands are, generally speaking, dependent upon the same facts as appeared in the present suits and that the terms of the leases regulating such rights were similar to the terms of the *pattas* in these suits; *Bhupendra Narayan v. Nurput Singh*, 27 C. W. N. 205.

It is a good ground for granting a certificate of fitness for appeal to His Majesty in Council under section 109 (c) of the C. P. Code that the case in which leave to appeal is sought is an appeal from the same decree and involving the same questions as another appeal in respect of which the same applicant has a right of appeal under sections 109 and 110 of the Code. Where both the appeals arise out of the same suit, and where the decree of the High Court will be wrong in the event of the Privy Council differing from the view of the High Court, leave should be granted in the connected appeal, in which the value is below Rs. 10,000; *Muhammed Walikhan v. Muhammad Mohiuddin Khan*, 37 A. 124.

*Held*, that having regard to all the circumstances, the order of remand in the present case could not be called "a final order" within the meaning of s. 109, C. P. Code, nor was there a question of law of general importance so as to lead the High Court to grant the requisite certificate.—*Nur Miah v. Ganges Sugar Works Ltd., Cawnpore*, 38 A. 150: 14 A. L. J. 50.

appealable to His Majesty in Council, provided the other requirements of the section are fulfilled; *Krishna Prashad v. Moti Chand*, 10 C. 635, P. O.: 17 C. L. J. 573: 17 C. W. N. 637.

**Leave to Appeal in Forma Pauperis.**—An application for leave to prosecute an appeal in *forma pauperis* to His Majesty in Council and exonerate the appellant from depositing the respondent's costs cannot be entertained by the High Court. When such leave is required, it is necessary for a petitioner to apply in England in accordance with the rules that govern such application; *Jagadananda v. Rajendar*, 17 C. L. J. 381.

**Practice with Regard to Concurrent Findings of Facts.**—It is not the practice of the Privy Council to disturb the finding of the Court below upon mere issues of fact, unless it is clearly satisfied that there has been some miscarriage either in the reception or in the appreciation of evidence. In cases that turn upon the credibility of the testimony given, it is disposed to defer to the judgment of those who, with the advantage of local experience, have had the means of seeing the witnesses under examination, and of inspecting the original documents.—*Richarson v. Government*, 1 W. R. 47, P. C.: 7 M. I. A. 207; *Thakur Hanhar v. Thakur Uman Prashad*, 14 C. 296, P. C.: *Kripamoyee v. Ramanath*, 2 W. R. 1 P. C. 8 M. I. A. 467; *Dwarka Dass v. Sita Ram*, 5 C. L. R. 430, P. C.

It is the practice of the Privy Council to abide by the concurrent findings of facts by the two Courts below.—*Krishna v. Sridevi*, 12 M. 512, P. C.: *Thakur Hanhar v. Thakur Uman Prashad*, 14 C. 296, P. C.; *Ram Lal v. Mehdi Husain*, 17 C. 882, P. C.; *Bireswar v. Ardha Chander*, 19 C. 452, P. C.: *Asghar Reza v. Mehdi Hossein*, 20 C. 560, P. C.; *Nilmoni Singh v. Kirti Chunder*, 20 C. 847, P. C.; *Lachman Lal v. Kanhaya Lal*, 22 C. 609, P. C., *Hurri Bhuvan v. Upendra Lal*, 24 C. 1, P. C.; and *Moung Tha v. Moung Pau*, 28 C. 1, P. C. See also, *Sakalboti v. Babu Lal*, 28 C. 190: 5 C. W. N. 455; and *Ram Anugra Narain v. Chowdhry Hanuman Sahai*, 30 C. 303, P. C., where it has been further held that the above rule applies even where the two Courts based their decisions on different grounds.

The Judicial Committee does not ordinarily entertain an appeal from concurrent judgments on a mere question of fact.—*Rajachitpal v. Bhauon*, 10 C. W. N. 225, P. C.: 28 A. 319.

The Judicial Committee will not make a fresh examination of facts for the purpose of disturbing concurrent findings by the lower Courts, specially where such findings are based on facts whose significance is best appreciated by Judges most familiar with Indian manners and customs.—*Kunwar Samuel Singh v. Rani Satrupa Kunwar*, 28 A. 215, P. C.: 3 C. L. J. 86: 10 C. W. N. 230: 16 M. L. J. 77 (21 C. 997 followed).

It would be to misconstrue entirely the provisions as to concurrent findings of fact, if the Judges of India were to have impliedly the duty laid upon them of making their narrative of the circumstances minutely and completely exhaustive, under the penalty that if they failed to do so, the absence from their mind of elementary considerations might be presumed; *Mirza Sajjad Husain v. Wazir Ali*, 34 A. 455, P. C.: 18 C. W. N. 899: 16 C. L. J. 613: 14 Bom. L. R. 1055: 23 M. L. J. 210: 15 O. C. 217: 10 A. L. J. 364.

The amount of the subject-matter of the suit may not always be the same as the amount of the subject-matter on dispute in appeal. The distinction between the above two expressions has been clearly explained by Mookerjee, J. in *Benoy Lal v. Kamalapati*, 13 C. L. J. 505, where it has been held that in a suit to enforce a mortgage security, where the proceedings are entirely *in rem* and the mortgagor is not sought to be made personally liable, the value of the subject-matter in dispute is the amount claimed when such amount falls short of the value of the mortgaged property, while it is the value of the mortgaged property when the amount due under the mortgage exceeds the value of the property (2 A. 698, 5 A. 332, 4 M. 339 and 35 C. 205 referred to).

Where a plaintiff sued for possession of property with mesne profits, and did not include the *wasilat* in the valuation of the suit, and the suit was valued at Rs. 5,815, but with the *wasilat* would have been valued at over Rs. 10,000, held that, on appeal from a decree in favour of the plaintiff, there was matter in dispute in excess of Rs. 10,000.—*Gooroo Dass v. Gholam Mowlah*, Marshall's Report, 24; *Doorga Dass v. Ram Nauth*, 8 M. I. A. 262; *Gooroo Persad v. Juggut*, 8 M. I. A. 166. It was also held that in no case can the costs of the suit be added to the principal in calculating the appealable value; *Doorga Dass v. Ram Nauth*, 8 M. I. A. 262; *E I Ry. Co. v. Badri Narain*, 6 Pat. 444; A. I. R 1927 Pat. 328.

In calculating the amount of the subject-matter of the suit, the Court should include interest from the date of the decree (preliminary) up to the expiry of the period of six months provided in Or. XXXIV, r. 4: *Gajadhar v. Ambica Prasad*, 45 A. 133; 69 I. C. 645; A. I. R. 1923 All. 78. According to the Calcutta and Patna High Courts, such interest should not be included in determining the appealable value; *Nanda Kishore v. Ram Gulam*, 39 C. 1037; 17 I. C. 221; *Ramyad v. Rambilash*, 6 Pat. L. J. 596; 62 I. C. 959.

For the purpose of ascertaining the pecuniary value of an appeal for purposes of leave to appeal to His Majesty in Council, interest from date of suit up to the date of the preliminary decree must be included in the subject-matter; *Raghunathaswami v. Gopal Rao*, 43 M. L. J. 622.

Interest falling due subsequent to the date of the decree in the original Court cannot be taken into consideration in determining the value of the subject-matter of the suit in the Court of first instance; *Motichand v. Ganga Prasad*, 24 A. 174, P. C.; 6 C. W. N. 362; *Maharaja Kesho Prasad v. Shiva*, 3 Pat. L. J. 317; 44 I. C. 475. The High Court of Rangoon has held that interest from the date of the suit up to the date of the decree can be included in calculating the amount of the subject-matter of the suit; *Thamsundaseen v. Chetty*, 8 R. 405; 91 I. C. 647; A. I. R 1926 Rang. 45. *Nand Kishore v. Ram Gulam*, 39 C. 1037; 16 C. W. N. 1089; *Ram Kumar v. Muhammad Yakub*, 42 A. 445; 18 A. L. J. 445; *Ramyad Singh v. Rambilas Singh*, 2 Pat. L. T. 463; 62 I. C. 959.

In a suit for recovery of possession of immoveable property with mesne profits, the value of the subject-matter of the suit consists of the value of the property *plus* mesne profits up to the date of the suit *plus* mesne profits from the date of the suit until the delivery of possession or until the expiration of three years from the date of the decree with interest; *Dalgleish v. Damodar*, 33 C. 1286; *Kumar Basanta v. Secy. of State*, 14 C. W. N. 872; 6 I. C. 792.



Sch. II of the C. P. Code, cannot affect the right of appeal to the Privy Council, where otherwise the case is one in which in accordance with ss. 109 and 111 of the Code, a certificate should be granted; *Amir Begam v. Khawaja Badruddin*, 15 O. C. 55: 15 I. C. 2.

**Appeal from Order Made by a Single Judge Acting in Revision.**—There is no appeal to His Majesty in Council from the order made by a single Judge in revision under s. 115, C. P. Code, and s. 107, Government of India Act; *Sri Raja Bomma Devara v. Venkata Bhashyakarulu*, 46 M. 958 75 I. C. 604 A I. R. 1924 M. 399.

**112.** (1) Nothing contained in this Code shall be deemed—  
*Savings.*

(a) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council or otherwise howsoever, or

(b) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee.

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decree of Prize Courts. [S. 616.]

### COMMENTARY.

The section corresponds to s. 616 of the C. P. Code of 1883. No material change has been made in this section, except the substitution of the words in this Code, for the words "herein contained" and the words herein contained in sub-section (2), for the words "in this chapter" which occurred in the old Code.

The Code of Civil Procedure does not deal with applications for special leave to appeal to His Majesty in Council, though s. 112 declares that nothing in the Code shall be deemed to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council—*Nanda Kishore v. Ram Golam*, 40 C. 953.

This section does not confer a right upon the subject to prefer an appeal to His Majesty in Council. It merely declares that nothing in the Code will affect the exercise of the appellate jurisdiction which the Sovereign in Council undoubtedly possesses by virtue of the Royal Prerogative, *Taga Singh v. Bichiru Singh*, 10 C. L. J. 323.

The Code of Civil Procedure does not limit the prerogative right of the Crown to admit appeals, where leave to appeal is refused by the High Court—*Rahimbhoy Habibhoy v. Turner*, 15 B. 155.

A petition for special leave to appeal being *ex parte*, it is a universal and most important rule of the Court that every fact which is material

In ascertaining whether or not there ought to be an appeal to the Privy Council, the High Court has only to look at the value of the question at issue in the litigation. In a case of conflicting claims to waters of a flowing stream, the matter at issue, so far as regarded the applicant, having been to have her lands irrigated in the way she claimed, the value of that matter was held to be the extent to which her interests would be deteriorated if that right could not be established.—*Ajnas Koor v. Luteefa*, 18 W. R. 21.

**Amount or Value of Subject-matter of Original Suit and the Amount or Value of the Subject-matter in Dispute on Appeal.**—Where the dispute in the suit relates to the income of property of the value of Rs. 10,000, but the value of the subject-matter of the suit and other matters in dispute did not come up to Rs. 10,000 or upwards, the High Court declined to grant leave to appeal to the Privy Council; *Husenbhoy v. Ahmedbhoy*, 28 B. 319. 4 Bom. L. R. 336. *Shrik Mohamed v. Halims Ram Sahai*, 54 I. C. 450.

In the case of a batch of suits, that a common judgment was pronounced in all of them and that the aggregate value exceeds rupees ten thousand are no grounds of leave to appeal. Each must fulfil the requirements of this section; *Ramchandra v. Appayya*, 2 L. W. 916 (6 C. W. N. 41 *folld*. 34 C. 400 *not folld*). See also, *Jaikaran v. Janli Sahu*, 13 A. L. J. 1075.

Special leave to appeal was granted in a suit for damages for Rs. 30,000 instituted on the original side which was dismissed by the first Court and also on appeal by the High Court without an assessment of the amount of damages recoverable and the High Court refused leave to appeal to the Privy Council on the ground that the petition had not shown that the case was necessarily of the proper appealable value.—*Ikramul Huq v. Wilke*, 33 C. 893 P. C.

The defendants having obtained the certificate and admission of their appeal as competent within the C. P. Code, afterwards, in their printed case and at the hearing, withdrew part of their appeal, and thus reduced the claim to below the prescribed limit of appealable amount. Held that this did not render the appeal incompetent.—*Kalka Singh v. Paras Ram*, 22 C. 434 P. C.

For the purposes of valuation within this section, the value of the subject-matter in a partition suit is the value of the entire estate sought to be partitioned. When the value of the whole estate exceeds Rs. 10,000, appeal will lie to the Privy Council, because the decree appealed from would involve directly or indirectly some claim or question to or respecting property of that value. The valuation for the purposes of appeal in such a case is the value of the whole estate and not merely the share claimed by the plaintiff.—*Lala Bhuwat Sahay v. Pashupati Nath*, 10 C. W. N. 564; 8 C. L. J. 257; *Kuldip Narain v. Raghunandan*, 2 Pat. L. T. 880.

For the purposes of appeal to His Majesty in Council under s. 110, the value of the share which the plaintiff claims and not the value of the entire family property is the test. Such value ought to be taken as at the date of the decree of the High Court under appeal; *Raoji Bhikaji v. Lazmibai Anant*, 44 B. 104; 22 Bom. L. R. 243.

There may be exceptional circumstances which will warrant the Judicial Committee in allowing, even after an order of Her Majesty in Council has issued upon their report, a re-hearing at the instance of one of the parties. But this is an indulgence with a view mainly to doing justice when by some accident, without any blame, the party has not been heard, and an order has been made inadvertently, as if he had been heard.—*Venkata Narasimha Appa Raw v. Court of Wards*, 10 M. 73: L. R. 13 I. A. 155.

An appellant, after the transmission of his appeal to England, obtained leave in the High Court to withdraw it. The appeal involved the rights of a minor party to the suit, whose mother and guardian obtained an order for her to be substituted for the withdrawing appellant on the terms that she should give security to the satisfaction of the High Court for costs already ordered, and should undertake to abide by any order as to general costs.—*Gour Mohun v. Tarasundari*, 17 C. 693.

In reference to whether the decree made against one of the respondents could be varied in his favour, he not having filed a cross-appeal the rule prevailed, that he could only be heard to support the decree; s. 561, C. P. Code, 1882 (Or. XLI, r. 22), not applying in an appeal to the Privy Council —*Caspersz v. Kishori Lal*, 23 C. 922.

*See notes under Section 110.*

The other provisions relating to appeals to His Majesty in Council are to be found in Order XLV, rules 1 to 16.

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Where there is a contest as to the true value of the matter in dispute, it has been the invariable practice to ascertain by evidence and enquiry, what the true value is.—*Amrita Nath Mitter v. Abhoy Charan*, 9 C. W. N. 870. See *Ikramul Huq v. Wilke*, 83 C. 893, P. C.

An appeal to the Privy Council involving a question or demand respecting property, which on the whole is of the value of more than Rs 10,000, is admissible, although the portion of the property to which the appeal relates is below that value.—*Onooroop Chunder v. Pertab Chunder*, 6 W. R. Mis 4.

Leave to appeal to the Privy Council granted where the appeal, though valued at less than Rs. 10,000, involved indirectly questions respecting property of the value of Rs. 10,000, inasmuch as the judgment of the High Court would govern the decision in other suits which the plaintiff intended to bring on precisely the same grounds, and in respect of which precisely the same questions would arise as had arisen in the suit sought to be appealed.—*Ananda Chandra v. Broughton*, 9 B. L. R. 423. Distinguished in *Abdul Karim v. Allah Bakhsh*, 90 P. R. 1918. 840 P. L. R. 1918: 229 P. W. R. 1918.

In order to determine the value prescribed by s. 110, the decree has to be looked at as it affects the interest of the parties prejudiced by it and when the detriment to the party seeking relief is estimated at less than Rs 10,000, then the value of the matter in dispute on appeal is not of the prescribed value and the decree itself does not involve any claim or question to or respecting property of the prescribed value and the case does not fulfil the requirements of the Code; *Gossain Bhaunath Gir v. Behari Lal*, 4 Pat. L. J. 415: (1919) Pat. 257; *Maung Bya v. Maung Kyi Nyo*, 66 I. C. 606.

Defendants, who were co-sharers of the plaintiff in the *zemindari* having purchased certain holdings from the tenants, the plaintiff sued them for their share of rent due from one of such holdings amounting to Rs 230. The High Court on appeal dismissed the suit. The plaintiff in applying for leave to appeal to the Privy Council, proved that there were other holdings similarly purchased by the defendants, and that the decision of the High Court would have the effect of depriving him of rents of all such holdings amounting to Rs 800 a year, which capitalized came up to over Rs. 10,000. Held that the decision indirectly involved a claim or question to or respecting property of the value of Rs. 10,000 or upwards, and leave ought to be granted; *Srinath Pal v. Girindra Chandra*, 14 C. W. N. 651: 6 I. C. 598 (9 B. L. R. 423, followed) See also, *Silet Hussain v. Municarunnissa*, 16 I. C. 431.

Where the subject-matter in dispute related to a recurring liability for rent and was in respect of a property considerably above the appealable value, a certificate that the case was a fit one for appeal to His Majesty in Council was properly granted by the High Court; *Surapati v. Ram Narayan*, 28 C. W. N. 518.

The value of the subject-matter of the suit in the first Court was over Rs. 10,000, but the value of the subject-matter in dispute on appeal to His Majesty in Council was below Rs. 10,000. The appeal involved a decision as to the validity of an award which dealt with property of greater value and which had been declared by the High Court to be invalid. Held, that leave should be granted, as the decision indirectly

(c) by a decision on a reference from a Court of Small Causes,

may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit. [S. 623.]

### COMMENTARY.

This section, though it may be called a new one, contains only a brief statement of the Court's general power of review, the details of which are to be found in Or. XLVII, rules 1 to 9. Clauses (a), (b) and (c) of this section correspond with the first part of s. 623 of the C. P. Code of 1882, with some modifications.

**115.** The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

Revision.

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity.

the High Court may make such order in the case as it thinks fit. [S. 622.]

### COMMENTARY.

**Changes Introduced in the Section.**—This section corresponds to s. 622 of the C. P. Code of 1882. The provisions of the old Code regarding the High Court's power of revision have not been altered. But the language of the first part of the section has been slightly changed and made more explicit. To enable the readers to observe the changes introduced in this section, the corresponding section of the old Code is reproduced below:—

*"The High Court may call for the record of any case in which no appeal lies to the High Court; if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity; and may pass such order in the case as the High Court thinks fit."*

**Construction of Clauses (a), (b) and (c).**—The terms of this section are not identical with the terms of s. 622 of the former Code. Under the terms of the present Code, the powers of the High Court are confined more expressly to cases which have been decided by the Subordinate Courts and in which no appeal lies (see 41 C. 632, p. 636)

Leave to appeal to Her Majesty in Council was granted in one of six suits tried together, although the amount involved in such suit was under the appealable value; there being an important question of law, which did not, arise in five other suits, the suit, however, involving other questions of law common to all the six suits, such suits having been, by agreement of counsel, heard upon the same evidence and concluded by the same judgment.—*Byjnath v. Graham*, 11 C. 740. Referred to in *Deonarain v. Guni Singh*, 34 C. 400. See also *Makund Sarup v. R R Skinner*, 5 I C. 583.

Where the fundamental question in the cases, which goes to the root of matter, is common to all the suits and the cases are tried together and decided by the same judgment, the suits will be consolidated for the purposes of the pecuniary valuation under Or. XLV, r. 4 of the C. P. Code; *Banga Chandra v. Jagat Kishore*, 13 C. L. J. 503 (8 C. 210; 4 C. L. R. 125; 11 C. 740; 31 C. 400 referred to). See also, *Lala Ram Lal v. Musst. Wilayeti Begam*, 10 C. W. N. xvi (10-n)

One Mahabir Pershad Singh died leaving two widows and empowering them by will to adopt a son. One of the widows died and the other widow adopted a son. Subsequently on Dhanukdhari Prasad and another the next reversioner, instituted three suits against the widow and the adopted son. The first suit was to obtain immediate possession of the property; the second suit was to obtain possession of the property; and the third suit was to set aside the adoption on the ground that the adoption was invalid on the true construction of the will. The Sub-Judge held that the plaintiff was not entitled to immediate possession but made a declaration that he would be entitled to possession on the death of the widow; he also held that the family was separate, and that the adoption was not authorized by the will. Both parties appealed to the High Court which delivered one judgment. That Court held in the first suit that the plaintiffs were neither entitled to immediate possession nor a declaratory decree and in the second and third suits affirmed the decree, of the Sub-Judge. On plaintiffs' application, the High Court granted leave to appeal in the first suit; but rejected the defendants' application in the second and third suits. Held, that in substance there was only one suit which raised the question of title to the property held by Mahabir Prosad and that the three suits only raised separate issues in connection therewith and leave was granted; *Musst. Bhagwut Koer v. Dhanukdhari Singh*, 19 C. W. N. cxx (120-n).

The word "property" in the second paragraph of s. 110 means rights in property inferior to full ownership where such inferior rights alone are the subject-matter in dispute. The second paragraph means that the suit must, to satisfy its conditions, involve claims and rights to property which rights and claims are worth Rs. 10,000 and upwards; *Appala Raja v. Rangappa Naicker*, 33 M. L. J. 481; 40 I. C. 680; *Dhanna Mal v. Rai Sahib Lala Moti Sagar*, 75 I. C. 654; A. I. R. 1923 Lah. 286, held that in the case of an easement, the value of which fell much below Rs. 10,000, there was no right of appeal although it affected property worth over Rs. 10,000; *Manilal Jugal Das v. Banubai Framjee*, 23 Bom. L. R. 874.

Whether the Expression "Decree must involve direct or indirectly etc." in Para 2, Refer to Suits in Existence or to S Brought in the Future.—When it is laid down in t  
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before the subordinate Courts are properly conducted and the High Court should set matters right if by doing so, it would save unnecessary expense, delay or multiplicity of suits. The primary object of this section, therefore is to prevent the subordinate Courts from acting arbitrarily and capriciously and illegally in the exercise of its jurisdiction. The power conferred by this section is most salutary. See 29 M. L. J. 53: 30 I. C. 41. See also the judgment of Seshagiri Aiyar, J. in *Subramania v. Narayana*, 2 L. W. 280 28 I. C. 189.

S. 115 of the C. P. Code applies to jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved: *T. A. Balakrishna Udayar v Vasudeva Aiyar*, 22 C. W. N. 50 P. C.: 40 M. 793.

S. 115 should not be used in a narrow and technical way. It is a section which gives plenary powers of interference by the High Court which are to be exercised in harmony with the spirit of the provisions of s. 99 of the Code; *Bisandayal Sitaram v. Bodu Lal*, 13 N. L. R. 203: 42 I. C. 706.

**Meaning of the Words "Case" and "Record of Any Case" in the Section.**—There is nothing in s. 115 which prevents the High Court from setting aside an interlocutory order if made without jurisdiction. The word, "case" in that section is wide enough to include such an order, and the words "records of any case" include so much of the proceedings in any suit as relate to an interlocutory order.—*Dhapi v. Ram Pershad*, 14 C. 768. (12 C. L. R. 148: 4 A. 91: 5 A. 293 and 6 A. 233, *Dissented from*). See also, *Bai Atrani v. Deepang*, 40 B. 86: 17 Bom. L. R. 1097 where it has been held: that the word "case" is a word of wide or comprehensive import and clearly covers a larger area than would be covered by such a word as "suit" or "appeal."

The word "case" includes proceedings under the Guardians and Wards Act, 1890, Probate and Administration Act, 1881, Succession Certificate Act, 1889, Provincial Insolvency Act, 1920 etc.; *Buddhu Lal v. Mewa Ram*, 43 A. 564: 63 I. C. 15; *Lalchand v. Behari Lal*, 5 Lah. 288: 84 I. C. 259. A. I. R. 1924 Lah. 425; *Ballu v. Hardwari*, 6 Lah. L. J. 219: 79 I. C. 451 A. I. R. 1924 Lah. 570. It also includes proceedings by petition to a Civil Court in a matter under s. 10 of the Religious Endowments Act 20 of 1863; *Balakrishna v. Vasudeva*, 44 I. A. 261: 40 M. 793: 40 I. C. 650

Proceedings under which a person is ordered to be added as defendant amount to a case within the meaning of section 115 and liable to revision by the High Court; *Md. Jafar v. Md. Raja*, 15 O. C. 304: 16 I. C. 592. See also *Raisat Ali v. Rai Rajeshar*, 13 O. C. 109.

An application for leave to sue a Receiver is a "case" within the meaning of s. 115; *Braja Bhushan v. Sris*, (1918) Pat. 337: 47 I. C. 319. The term case in s. 115 of the C. P. Code is not confined to a litigation in which there is a plaintiff who seeks to obtain particular relief in damages or otherwise against a defendant who is before the Court. *Balakrishna Udayar v. Vasudeva*, 40 M. 793: 22 C. W. N. 51 P. C.

in 16 C. 287 must be taken to have impliedly overruled *Tassaduq v. Kashiram*, 25 A. 109 P. C., in so far as the two decisions cannot be reconciled. See also 21 C. 523 and 20 A. 307 noted above. On this point, see also, *Sajjad Husain v. Wasir Ali*, 34 A. 455 P. C.; 16 C. W. N. 889; 828 M. L. J. 210; 15 O. C. 271 14 Bom. L. R. 1055; 16 O. L. J. 613.

Where the decree of an Appellate Court has affirmed the decision of the Court immediately below it upon an issue of fact, and no substantial question of law is involved, no appeal is open under s. 110 and leave to appeal should not be granted by the High Court in such a case. *Nirbhai Das v. Rani Kuar*, 16 A. 274. See also *Karuppanan Servai v. Srinivasan*, 25 M. 215, P. C.; 6 C. W. N. 241, P. C.; *In re Viswambhar Pandit*, 20 B. 699; *Tulu Pershad v. Benaych Mitter*, 23 C. 918, P. C., *Sakalboti v. Babu Lal*, 5 C. W. N. 455; 29 C. 100, where it has been further held that *Gopinath v. Goluck Chunder*, 16 C. 202, has been overruled by 23 C. 918, P. C., *Banki Lal v. Jagat Narain*, 23 A. 91 (16 C. 202-note, and 20 B. 699, referred to); and *Moran v. Mittu Bibee*, 2 C. 228.

The word "decision" in s. 110 means the decision of the suit by the Court. To constitute an affirming judgment, it is not necessary that the Appellate Court should affirm the ground of facts upon which the judgment was made; *S. N. Sen v. Abdul Aziz*, 1 Bur. L. J. 215.

The last clause of this section relates to the subject-matter of the suit and therefore there is no right of appeal when the two Courts differ only as to costs.—*Thakur Baldeo Bakhsh v. Thakur Lalji*, 10 O. C. 65.

In a land acquisition case, the applicant claimed Rs. 77,000; the Collector assessed the compensation at Rs. 28,000, and the Judge upheld the Collector's award. The High Court modified the decree by awarding an additional sum of Rs. 7,000. Held that the decree of the High Court, in substance, as far as the subject-matter of the appeal goes, a decree of affirmance and leave to appeal was refused.—*Raja Sree Nath Roy v. Secretary of State*, 8 C. W. N. 294; *Chaitanya Charan v. Mohamed Yusuf*, 34 C. L. J. 299, *Chander Shekar v. Mt. Amir Begam*, A. I. R. 1922 All. 243 66 I. C. 721.

If the two Courts, High Court and Lower Court, are at one upon the matter which is to be in debate before the Privy Council then it is a case of a decree which affirms the decision of the Court immediately below. Where, in a suit for partition, the lower Court granted certain share and the High Court increased it further, so that the plaintiff has no further grievance in that matter, he cannot without showing a substantial question of law, have a right to litigate upon other points upon which both the Courts have been in agreement; *Narendra v. Gopendra*, 31 C. W. N. 572; 45 C. L. J. 426; A. I. R. 1927 C. 543.

Where two appeals arose out of the same suit and the amount of both the appeals exceeded Rs. 10,000 and the same question was involved in both the appeals.—Held that leave should be granted, in spite of the fact, that the decree in one was reversed and in the other was affirmed by the High Court; *Md. Walikhan v. Md. Mohiuddin*, 37 A. 124; 18 A. L. J. 57.

An order dismissing an appeal as time-barred is an order affirming the decision of the lower Court and no substantial question of law is involved in it; *Krishnasamy v. Ramasami*, 23 M. L. J. 219; 12 M. L. T. 200;



before the High Court is that of a pending suit and not the record of 564: 19 A. L. J. 558.

On appeal from an order of the first Court, the District Court granted a temporary injunction restraining the defendant (a widow) from adopting pending the decision of the suit. *Held* that the High Court could interfere under s. 115, C. P. Code, and set aside the order of the District Judge since the order was "a case decided in which no appeal lies;" *Bai Atrani v. Deepsing*, 40 B. 86: 17 Bom. L. R. 1097.

To allow a suit to be withdrawn with liberty to bring fresh suit is not deciding a case within the meaning of this section; *Bansi Singh v. Kisshun Lal*, 41 C. 632. The section does not apply where no case has been decided, *Sardhari Sah v. Hukum Chand*, 18 C. W. N. 662: 41 C. 876.

"Any Court Subordinate to the High Court."—A Court subordinate to a High Court is one over which the High Court has appellate jurisdiction; *Balkrishna v. Collector, Bombay*, 47 B. 699: 73 I. C. 354: A. I. R. 1923 Bom. 290. The superintendence vested in the High Court by s. 15 of the Indian High Courts Act can be exercised only over Courts which are subject to the appellate jurisdiction of the High Court. The Court of a Revenue Officer, under the Chota Nagpur Tenancy Act, is not a Court subject to the appellate jurisdiction of the High Court, but is subordinate to the Commissioner, *Uma Charan v. Midnapore Zemindari Co.*, 19 C. L. J. 300. See also, *Golam Najaf v. Panchanan*, 19 C. L. J. 292. The High Court can revise the order of Revenue Courts in those cases in which the course of appeal lies to the District Judge and to the High Court; *Indar Pershad v. Fatehchand*, 14 O. C. 38: 9 I. C. 747; *Sardhari Sah v. Hukum Chand*, 41 C. 876; *Ganesh Rai v. Faizan*, 61 I. C. 890.

A District Registrar is not a Court within the meaning of this section; *Manavala v. Kumarappa*; 30 M. 326; nor is the Rent Controller of Rangoon, *Mohideen v. Bukshi Ram*, 3 Rang. 410: 91 I. C. 617: A. I. R. 1926 Rang. 33.

The High Court at Bombay has power of revision over all the Civil Courts at Zanzibar—*Merali Visram v. Sheriff Deji*, 36 B. 105. The Court of the Political Resident at Eden is subordinate to the Bombay High Court within the meaning of this section; *Rhimbai v. Moriam*, 34 B. 267: 12 Bom. L. R. 149.

The High Court has no jurisdiction under s. 115 to interfere with the decision of the Chief Judge of the Small Cause Court in an election petition; *Navalkar v. Mrs. Sarojini Naidu*, 25 Bom. L. R. 463; But see, *Ramaswami v. Muthu Velappa*, 46 M. 536: 1923 M. W. N. 133. The High Court has no jurisdiction to interfere with the order of a Sub-Court refusing to try an election petition; *Deivanayagam v. P. T. S. Dewan Mohideen*, 44 M. L. J. 39.

A District Judge acting under s. 23 of the Bombay District Municipal Act II of 1894 is not a "court" within the meaning of this section and the High Court has no power to revise his order refusing to set aside an election; *Balaji v. Merwanji*, 21 B. 279, *Gangadhar v. Hubli Municipality*, 60 B. 357: 94 I. C. 600: A. I. R. 1926 Bom. 344.

The High Court of Kumaun is not a Court subordinate to the Allahabad High Court for purposes of revisional jurisdiction under the C. P. Code;

Followed in *Udairaj Singh v. Raja Bhagwan Bahsh*, 10 O. C. 318. See also *Bhagwant Singh v. Niranjana Singh*, 129 P. W. R. 1917; 133 P. L. R. 1917 *Sarsuti Prasad v. Munshi Ehtsam Lal*, A. I. R. 1922 Oudh. 214.

A substantial question of law does not mean a question of general importance but the words "substantial question of law" mean a substantial question of law as between the parties in the case involved; *Raghunath Prasad v. Dy. Commissioner of Partabgarh*, A. I. R. 1927 P. C. 110.

As to the meaning of the words "substantial question of law," see *Munna Lal v. Gajraj Singh*, 17 C. 246 P. C. *Durga Chowdhry v. Jauhar Singh*, 18 C. 23 P. C., referred to in 20 B. 600 p. 703.

In order to come under the last para. of s. 110 of the C. P. Code, a question of law must be one about which there may be doubts or differences of opinion; *Parshottam Saran v. Hargalal*, 43 A. 108; 10 A. L. J. 462.

The judgment of the High Court in an appeal was as follows: "This appeal must, in my opinion, be dismissed with costs, and the judgment of the first Court affirmed: and I do not think it necessary to say more than that we agree with the Judge's reasons." On an application for leave to appeal to Her Majesty in Council, on the ground that the requirements of s. 574, C. P. Code, 1882 (Or. XLI, r. 31) had not been complied with—held that the objection involved no substantial question of law, and that the application for leave to appeal must therefore be rejected.—*Sunder Bibi v. Buneswar Nath*, 9 A. 93.

The rejection of an application under s. 568, C. P. Code, 1882 (Or. XLI, r. 27, to receive additional evidence cannot be said to involve any "substantial question of law" within the meaning of s. 596, C. P. Code, 1882 (s. 110) so as to give the right to an appeal to the Privy Council.—*Upendra Mohun v. Gopal Chandra*, 21 C. 484.

A question of law will not be deemed to be involved in an appeal under s. 110 C. P. Code, if it be not necessary for the disposal of the appeal and if such question is likely to arise only in certain contingencies. The word "involve" as used in s. 100 implies a considerable degree of necessity, *Ghisa Singh v. Gajraj Singh*, 35 1 C. 807.

Where the High Court dismissed an appeal with costs, but yet made one substantial variation which amounted to overruling the decision of the lower Court on that point, it cannot be held, there was an affirmation of the decision of the Court below. Hence a substantial question of law was not necessary for appealing to the Council, *Nagendrabala v. Dinanath*, 26 C. W. N. 651.

The certificate of the High Court that "the case was a fit one for appeal to His Majesty in Council" was held to be correct in form and not subject to the objection that it did not state that a substantial question of law was involved in the case—*Webb v. Macpherson*, 31 C. 57, P. C.; 8 C. W. N. 41. (25 A. 109, P. C., distinguished). Followed in *Amar Chandra v. Shoshi Bhuzan*, 31 C. 305, P. C.; 8 C. W. N. 225.

There is no right of appeal to the Privy Council simply on the ground that a substantial point of law is involved. The presence of such a question does not give a right of appeal when the value is below the mark; the requirements of the section restrict the right when the higher Court affirms

120, 12 C. W. N. 16 and *Lachmi Doyal v. Srikishen Das*, 2 A. L. J. 370; *Hari Krishna Pillai v. Arur Pandithar*, 18 L. W. 105: (1923) M. W. N. 354; *Ralla Ram v. Mtt Raj*, 4 Lah. L. J. 71; *Giribala v. Priyanath*, 65 I. C. 476; *Nil Kanth v. Kasubai*, 63 I. C. 46; See also, *Sree Krishna v. Chandook*, 32 M. 334, where it has been held that the High Court will however interfere, where the right of the party is clear and where the result of non-interference will be only to multiply proceedings by driving the party to a suit, in which there can be no defence.—*Ram Narain v. Muhammad Shah*, 12 A. L. J. 890: 24 I. C. 807; *Somasundaram v. Tirunarayena*, (1914) M. W. N. 738: 25 I. C. 592; *Narain v. Ram Khelawan*, 63 I. C. 545; High Court can interfere in revision though there may be another remedy by way of instituting a suit provided there are exceptional circumstances; *Msst. Inam Bibi v. Fazal Mahomed*, 8 Lah. L. J. 423: A. I. R. 1926 Lah. 612.

As to whether the High Court should exercise its revisional jurisdiction, so long as there is any other remedy by suit or otherwise, see the Full Bench case, *Shiva Nathaji v. Joma Kashinath*, 7 B. 341, in which their Lordships, after reviewing all the authorities on the subject, have laid down seven important propositions of law.

Where the applicant has a remedy by a regular suit, the Court is reluctant to interfere.—*Madhab Chunder v. Sham Chand*, 3 C. 243; *Mahashankar v. Valibhai*, 6 Bom. H. C. 174; *Hurcehur v. Nobin Chunder*, 20 W. R. 202; *Bishno Chunder v. Shoshee Mohun*, 22 W. R. 277; *Khorshed Ali v. Wahid Ali*, 15 W. R. 170; *Doorgasoonduree v. Kashee Kant*, 14 W. R. 212; *Kapileshwar Jha v. Raghunandan*, 1 Pat. L. R. 370: 4 Pat. L. T. 718: 74 I. C. 474.

An order refusing leave to join two claims under s. 44 (a), C. P. Code, 1882 (Or. II, rr. 4, 5) is substantially an order rejecting the plaint, and is therefore appealable as a decree, and not subject to revision by the High Court.—*Bandhau Singh v. Solhu*, 8 A. 191.

Where there is no complicated question of fact or law and the applicant is clearly entitled to obtain possession under Or. XXI, r. 95, of the C. P. Code, the High Court will exercise its power of revision in his favour, notwithstanding the fact that there is another remedy open to the applicant; *Buddher Miser v. Bhagirathi*, 16 A. L. J. 150: 40 A. 216.

An order rejecting a plaint or memorandum of appeal is a "decree" within the meaning of s. 2 of the C. P. Code, and is therefore appealable and not open to revision under (s. 115).—*Gulab Rai v. Mangli Lal*, 7 A. 42. See also, *Musst Sada Kuar v. Buta Singh*, 80 P. R. (1914): 265 P. L. R. 1914; 167 P. W. R. 1914.

An order under s. 335, C. P. Code, 1882 (Or. XXI, rr. 97, 99, 103) is subject to revision by the High Court under s. 622, C. P. Code, 1882 (s. 155)—*Shcoraj Singh v. Banwari Dass*, 6 A. 172. (7 B. 341, followed). See also, *Sabnajt v. Srigopal*, 17 A. 222.

When the lower Appellate Court has dismissed an appeal in a rent suit on the ground that the Munsif had final jurisdiction, a second appeal is barred by section 153 of the Bengal Tenancy Act; but the remedy is by an application under this section.—*Sarat Chandra v. Ramnidhi*, 2 C. L. J. 69-n.

Where the subject-matter in dispute was under Rs. 10,000 in value, but leave to appeal was asked for on the ground that the present suit to set aside the decree obtained by fraud was brought by a person who was not a party to the suit in which the decree was passed, *held*, that the ground raised was not one of such public importance as to justify issue of a certificate under s. 110, *Tan Gam Path v. Sundare San Chetty*, 14 I. C. 626.

The question of the construction to be placed on certain documents, as to whether the transactions evidenced by the documents do or do not amount to a mortgage by conditional sale, is a substantial question of law within the purview of s. 110 of the C. P. Code; *Jhandu Singh v. Wahuuddin*, 14 I. C. 269 38 A. 570, P. C.

Where the only questions of law involved in a case were questions which had been considered in several cases by the Privy Council and by the High Court and the point for decision was only as to the applicability of the law to the particular facts of the case, *held* that the case did not satisfy the requirements of para. (8) of s. 110; *Appala Raja v. Rangappa Naicker*, 33 M. L. J. 481; *Brj Naram Lal v. Mangla Prasad*, 36 I. C. 526; *Ram Niranjan Chaudhuri v. Gobardhan*, 1 Pat. L. R. 814; *Bishambhar v. Muhammad*, 46 A. 227 70 I. C. 218, A. I. R. 1924 All 550. But where the question involved in the appeal is the subject of much litigation and where the law on the subject is not quite clear, the Court will be justified in granting leave to appeal to the Privy Council on the ground that the question in dispute is one of general importance; *Jivan-giri v. Gajanan*, 50 B. 753.

**Appeal to the Privy Council in Execution Cases.**—An appeal lies to Her Majesty in Council from an order passed by the High Court in a case of execution of decree in which the amount involved exceeds Rs. 10,000 *Velaety Begum v. Rughonath*, B L R Sup Vol. 747 2 I. J. N. S. 263: 8 W. R. 147.

An appeal will lie as of right from the order of a single Judge of the High Court as to execution of a decree of the Privy Council, where the property is over Rs. 10,000—*Leelanand Singh v. Luckimput Singh*, 5 B L R. 605 14 W. R., P. C. 23

An order passed by the High Court determining a question under s. 244, C P Code, 1882 (s. 47), is a final decree within the meaning of s. 595, C. P. Code, 1882 (s. 109). *Held*, therefore, where such an order involved a question relating to property of the value of upwards of Rs. 10,000, and reversed the decisions of the lower Courts that notwithstanding the value of the subject-matter of the suit in which the decree was made in the first Court was less than that amount, such order was appealable to Her Majesty in Council, *Ram Kirpal v. Rup Kuar*, 3 A 633.

In execution of a decree in a partition suit involving property of the value of Rs. 10,000 the applicant disputed their liability to three-fourths of an item of Rs. 11,709. *Held*, that such a case did not satisfy both the conditions set forth in section 110, para. 1, nor did it fulfil the conditions mentioned in the second para of that section, *Devī Das v. Narpal Rai*, 60 P W. R. 1915.

Order setting aside or refusing to set aside a sale of immoveable property is a decree within the meaning of this section, and is therefore

L. R. 148; *Bhubaneswari v. Mohan Lal*, 1 P. L. T. 5: 55 I. C. 786; *Gebind Das v. Nityakali*, 51 I. C. 581.

Where a Sub-Judge returned a plaint for amendment on the ground of misjoinder of parties and causes of action, and the order was confirmed on appeal, on an application under this section, the High Court set aside the order.—*Sadu Bin v. Ram Bin*, 16 B. 608.

When a District Court erroneously returns an appeal petition for presentation in High Court under s. 57, C. P. Code, 1882 (Or. VII, r. 10) the order is appealable under s. 588 (c) (s. 104, Or. XLIII, r. 1) and s. 589 (s. 106), C. P. Code, 1882 and not subject to revision by High Court.—*Kurhikutti*, 14 M. 462. See, however, *Mahabir Singh v. Behari Lal*, 13 A. 320.

An order returning an application for restoration to be presented to the proper Court is appealable under Or. XLIII, r. 1 (c) of the C. P. Code, and therefore no revision petition lies against the order; *Sheo Talal v. Karam*, 10 A. L. J. 41; 15 I. C. 34.

An order under section 87, Act IV of 1882, extending the time for payment of the mortgage-money by a mortgagor is a decree within the meaning of ss. 2 and 244, C. P. Code, 1882 (s. 2 and 47) and therefore no application will lie under s. 622, C. P. Code, 1882 (s. 115) for the revision of such order.—*Rahima v. Nepal Rai*, 14 A. 520 (9 A. 500, referred to). See also, *Kedarnath v. Lalji Sahai*, 12 A. 61.

A person became surety under s. 336, C. P. Code, 1882 (s. 55) on behalf of a judgment-debtor, to the effect that the judgment-debtor would appear before the Court when called on, and would, within one month, file an application to be declared an insolvent. The judgment-debtor did so apply, but the Court refused. . . . *Held*, that the surety's liability was discharged . . . . .  
 insolvent, and that the . . . . .  
 but open to revision under s. 115).—*Banna Mal v. Jamna Das*, 15 A. 183 (15 C. 171, referred to).

One, alleging himself to be the undivided brother and, as such, the legal representative of a deceased judgment-debtor, applied to set aside a sale of certain property alleged by him to be joint family-property. He did not make the purchaser a party to such application. The first Court dismissed the application; but the appellate Court, making the purchaser a party, reversed the order of the first Court. On an application under this section, *held* that the appellate Court was wrong, and that the remedy of the applicant was by a regular suit.—*Subharayadu v. Pedda Subharayadu*, 16 M. 476.

Where the lower Court set aside an abatement order and brought on the record the legal representatives of a deceased party more than six months after the death of the person, the High Court refused to interfere as the party was entitled to take his objection by way of appeal against the final decree, *Gaeble v. Ramayi Ammal*, 24 I. C. 781: 1 L. W. 232: (1914) M. W. N. 368.

A Court made an order under s. 308, C. P. Code, 1882 (Or. XXI, r. 86) cancelling the sale, and ordering a re-sale on the ground that the purchaser had not paid the full amount due on his purchase within the time limited, and the purchaser preferred a revision petition under s. 622,

The principle of concurrent findings of fact does not apply to a case of no evidence; according to well-known principles of law a decision that there is no evidence to support a finding is a question of law; *Harindra Lal v. Haridasi*, 41 C. 972, P. C.: 27 M. L. J. 80: 18 C. W. N. 817: 19 C. L. J. 484: 16 Bom. L. R. 400: 12 A. L. J. 774.

Review of or Appeal from Order Granting Leave to Appeal.—See the cases noted under Or. XLV, r. 8.

Limitation for an Application for Leave to Appeal to Privy Council.—See the cases noted under Or. XLV, r. 2.

Application to Appeal to the Privy Council.—See the cases noted under Or. XLV, r. 2.

111. Notwithstanding anything contained in section 109, <sup>But of certain</sup> no appeal shall lie to His Majesty in <sup>appeals.</sup> Council—

(a) from the decree or order of one Judge of a High Court established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court, where such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the High Court at the time being; or

(b) from any decree from which under section 102 no second appeal lies. [S. 597.]

## COMMENTARY.

**Amendment.**—The words "or the Government of India Act, 1915" were inserted by the Amending Act XLII of 1916. This section corresponds with s. 597 of the C. P. Code of 1882. The only changes made in this section are, the substitution of the words *decree or order*, for the word "judgment," which occurred in the old Code, and also the substitution of the words *Indian High Court's Act, 1861*, for the words "24 and 25 Vict., C. 104" contained in the Code.

S. 575, C. P. Code, 1882 (s. 98), does not take away the right of appeal which is given by clause (15) of the Letters Patent. When the judgment of a lower Court has been confirmed under s. 575, C. P. Code, 1882 (s. 98), by reason of one of the Judges of the Appeal Court agreeing upon the facts with the Court below, an appeal will lie against such judgment, notwithstanding the terms of that section.—*Gossami Sri Gridharji v. Porushotum*, 10 C 814. (3 B 204 approved).

Unless a case can be brought within the scope of s. 111 of the Code, it is impossible to contend that a certificate should be refused on the ground that no appeal lies to His Majesty. The provisions of para. 21, cl. 2.

While the High Court will not generally interfere in revision when an equally efficacious remedy is open to the party by way of appeal, it should do so when it would not be possible to put the parties in the same position in appeal as they would have been if the irregularities had been set right in the lower Court by timely interference; *Rahim Sahib v. Kullappa*, 18 M. L. T. 243.

Where a party has another remedy by way of regular suit to enforce an arbitration award, the High Court will not interfere in revision; *Ahmad Din v. Atlas Trading Co. of Delhi*, 66 P. R. 1915.

**Cl. (a).—Exercise of Jurisdiction by a Court Not Vested in it by Law.**—The Court executing a decree granted an injunction under s. 492, C. P. Code, 1882 (Or. XXXIX, r. 1), staying sale of attached property pending the decision of a suit instituted in another Court to establish title to it. *Held*, that the Court executing the decree had no jurisdiction to grant injunction but the Court in which the suit was instituted was alone competent to grant it, and that therefore the order of the executing Court granting the injunction was made without jurisdiction, and should be set aside.—*Brojendra Kumar v. Rup Lall*, 12 C. 515.

Where the Court of execution allowed a reversioner to make a deposit he was not entitled to make, it exercised a jurisdiction not vested in it by law or was acting in the exercise of its jurisdiction illegally or with material irregularity within the meaning of s. 115, C. P. Code; *Mohendra Nath v. Baidya Nath*, 26 C. W. N. 167.

Where a Court professing to act under s. 311, C. P. Code, 1882 (Or. XXI, r. 90), set aside a sale in execution of a decree without proof of substantial injury having been suffered by the applicant, *held* that such order was passed without jurisdiction within the meaning of s. 622, C. P. Code, 1882 (s. 115). *Lakshmana v. Najimudin*, 9 M. 145.

Where a decree was passed without jurisdiction and though an appeal was provided no appeal was filed, *held*, that a revision may be allowed in exceptional circumstances; *Somokanta v. Sarveswar*, 31 C. W. N. 739: A. I. R. 1927 Cal. 578.

The High Court has power to interfere in revision if a Court administering the Succession Certificate Act, 1889, appoints a receiver; *Kanhaiya v. Kanhaiya*, 46 A. 372: 79 I. C. 363: A. I. R. 1924 All. 376; or when the lower Court has no jurisdiction to inquire into a matter and it inquires into it; *Maung Tun U v. Maung Po*, 1 R. 265: 76 I. C. 504: A. I. R. 1923 Rang. 199.

Where a Court assumes jurisdiction on a wrong view of the law, the High Court will interfere in revision; *Mahomed Omar v. Reliance Marine Insurance Co.*, 43 C. L. J. 576: A. I. R. 1926 Cal. 1030.

Where a Court assumes jurisdiction to pass an order for an erroneous view of the law, in a matter where it has in fact no jurisdiction, it is a case for interference of the High Court under s. 115 C. P. Code; *Ramaswami Goundan v. Muthu Velappa Gaundan*, 46 M. 536: 44 M. L. J. 1.

The High Court can under s. 115 revise an order passed by the Rent Controller under the Calcutta Rent Act, when that order is without jurisdiction; *Satya Niranjana v. Karnani Industrial Bank*, 30 C. W. N. 236 9 S. I. C. 56: A. I. R. 1926 Cal. 708.

to the determination of the question raised upon the petition should be truly and fairly stated. The Court discharged an order giving special leave to appeal where an important fact had been kept from it.—*Mohun Lall v. Debee Dass*, 8 M. I. A. 103.

In a case the Privy Council gave leave to appeal, provided satisfactory evidence was supplied by the appellants to the Registrar of the High Court that the market-value of the property in dispute exceeded Rs. 10,000. This order was subsequently discharged as obtained upon an incorrect statement of the facts.—*Mohun Lall v. Debee Dass*, 2 W. R. P. C., 9; 8 M. I. A. 492.

Where a matter has been referred by Her Majesty to the Judicial Committee, which is not strictly an appealable grievance, their Lordships may advise Her Majesty to grant the petitioners leave to appeal.—*Morgan v. Leach*, 2 M. I. A. 428.

The Judicial Committee will not entertain an application for special leave to appeal to Her Majesty in Council from a decree of the High Court where the subject-matter in suit is under appealable value, unless the petitioner has applied to the High Court for such leave and has been refused.—*Gungowra Kome v. Erawa Kome*, 13 M. I. A. 488.

Pending proceedings before the High Court on an application for a review of judgment, that Court altered the then prevailing practice of permitting an appeal within six months from the date of the judgment allowing or refusing a review. In such circumstances, special leave to appeal from the original decree and the order refusing a review was allowed after the expiry of the six months prescribed by the order in Council of the 16th April, 1838.—*Noqendro Chunder v. Mahomed Eusuff*, 12 M. I. A. 107.

Special leave to appeal granted, notwithstanding that no application had been made for such leave to the Court below, upon the allegation that, though the amount decreed was much under the appealable value, the original demand being necessarily limited by the jurisdiction of the Court in which the suit was originally instituted, yet the subject-matter at issue exceeded in value the appealable amount.—*Muttusawmy v. Venkateswara*, 10 M. I. A. 313; 1 Ind. Jur. N. S. 205.

On an appeal to the Judicial Committee from a decree given on first appeal by an Appellate Court, and maintaining a finding of fact by the original Court, the only questions were (1) whether secondary evidence had been properly admitted in a case that had arisen for its admission, and (2) whether the evidence offered constituted secondary evidence of the matter in dispute, which was the making of a document. Held that (no special leave to appeal from the judgment of the first Appellate Court having been applied for), the facts were not open to decision on this appeal; this Committee could only do what the first Appellate Court could have done; and that, as the case stood, they were bound by the findings of facts of the first Appellate Court.—*Luchman Singh v. Puna*, 16 C. 753; L. R. 16 I. A. 125.

The judgment of the Judicial Committee reported to and confirmed by Her Majesty in Council cannot be re-opened only for the reason that new evidence is forthcoming.—*Yarlagaddu Durga v. Malikarjuna*, 14 M. 499.



6, referred to). See also, *Raghu Nath v. Chatrapat Singh*, 1 C. W. N. 633 add *Jogdanund v. Amrita Lal*, 22 C. 767, F. B.

Where the rent claimed by a co-sharer landlord, did not exceed Rs. 50, and the decision of the Munsif, who was specially empowered under cl. (b) of s. 153, B. T. Act, was set aside by the lower Appellate Court relying upon 8 C. W. N. 472, the High Court set aside the lower Appellate Court's decision as one made without jurisdiction—*Bhagabati Bewa v. Nanda Kumar* 12 C. W. N. 835. (12 C. W. 249, P. C., applied). See also, *Haranunda v. Ananto Das*, 9 C. W. N. 492.

Where it appears that a suit cognizable by a Court of Small Causes was tried by the lower Court as well as by the Court of Appeal, as an ordinary civil suit and no objection was raised in either of the Courts, as to the competency of that Court to entertain it, the High Court is bound to interfere under its revisional powers.—*Ramasamy v. R. G. Orr*, 26 M. 176. But see, *Jadunandan v. Jang Bahadur*, where a contrary view was taken.

The decree-holder is a necessary party to an application, under s. 311, C. P. Code, 1882 (Or. XXI, r. 90), and a Court, in making him a party after the expiry of the prescribed period of limitation, acts without jurisdiction and the case therefore comes within the provisions of s. 622, C. P. Code, 1882 (s. 115)—*Ali Gauhar v. Bansidhar*, 15 A. 407.

Where a lower Appellate Court erroneously entertains an appeal against an order from which no appeal is allowed, the High Court can interfere in revision and set aside the decision of the lower Appellate Court; *Bai Mani v. Ranchod Lal*, 25 Bom. L. R. 147; 72 I. C. 256; A. I. R. 1923 Bom. 214; *Hemanta Kumari v. Rajendra*, 97 I. C. 306; A. I. R. 1926 Cal. 1236

A decree in a suit for possession was passed *ex parte* against some of the defendants and against two others who contested the suit, and the decree against the contesting defendants was confirmed in special appeal. The non-contesting defendants in an application under s. 108, C. P. Code, 1882 (Or. IX, r. 13), succeeded in setting aside the *ex parte* decree, and by a later order the contesting defendants were also allowed to defend the suit and to file fresh defences. Held in an application under s. 622, C. P. Code, 1882, (s. 115) that the Court had not jurisdiction to set aside, as against the contesting defendants, the decree which was confirmed in special appeal, and therefore a decree of a superior Court. S. 108, C. P. Code, 1882 (Or. IX, r. 13), contemplates the case of a Court setting aside its own decree and not that of another and a higher tribunal.—*Monmohini v. Nara Narain*, 4 C. W. N. 456. (25 C. 153 distinguished).

**Cl. (b).—Refusal or Failure by a Court to Exercise Jurisdiction Vested in It by Law.**—In an interpleader suit a person applied to be made a party under s. 32, C. P. Code, 1882 [Or. I, rr. 8 (2), 10 (2), (3), (5), 11], but the Court refused his application and referred him to a regular suit. Held that the order, though based upon an erroneous construction of s. 32, C. P. Code, 1882 [Or. I, rr. 8 (2), (3), (5), 11] did not come within the scope of s. 622, C. P. Code, 1882 (s. 115), inasmuch as it could not be said that the Court had failed to exercise a jurisdiction vested in it by law—*Rabbaba Khanum v. Noor Jehan Begum*, 18 C. 90.

## PART VIII

### REFERENCE, REVIEW AND REVISION.

**113.** Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit. [S. 617.]

Reference to High Court.

### COMMENTARY.

This section although a new one, only summarises the general powers of Courts to make reference to the High Court. The detailed procedure relating to reference is to be found in Or. XLVI, rules 1 to 7 (ss. 617 to 621, 646-A, 646-B of the old Code) where all the rulings have been collected.

**Reasonable Doubt.**—Reference cannot be made where the referring Judge entertains no reasonable doubt on the point of law on which opinion is required; *Ganga Sing v. Kashi Ram*, 123 P. L. R. 1913: 61 P. R. 1913: 117 P. W. R. 1913

When there is already a decided and published judgment of the superior Court on the point there can be no reasonable doubt to be entertained by the lower Court so as to justify a reference; *Fillingham v. Dunn*, 8 P. R. 1914.

Where it was perhaps somewhat difficult to hold that the Judge making the reference entertained any reasonable doubt as to whether a decision was correct, but the respondent withdrew any objection on this ground, as he said the question that arose would affect a very large number of cases and must affect a very large amount of money, reference was entertained; *Dawoodjee v. The Municipal Corporation of the city of Rangoon*, 1 Rang. 220· A I R. 1923 Rang. 193.

The Collector hearing an application under the provisions of s. 23 of the Bombay Mamlatdar's Courts Act, has no power to make a reference to the High Court under s. 113 of the C. P. Code, in as much as he is not a Court trying a suit or appeal or executing a decree; *Dalpat Zopdoo v. Patit Mahadu*; 14 Bom. L. R. 259· 14 I. C. 782

**114.** Subject as aforesaid, any person considering himself aggrieved—

Review.

(a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed by this Code, or

in wrongful possession of the trust-property. Where a Sub-Judge, holding that such a suit was of the nature contemplated by s. 539, C. P. Code, 1882 (ss. 92 and 93), returned the plaint for presentation to the District Judge, *held* that the High Court had power, under s. 622 C. P. Code, 1882 (s. 115), to interfere, the Sub-Judge having failed to exercise a jurisdiction vested in him by law.—*Vishva Nath v. Rambhai*, 15 B. 148.

Where a Hindu died leaving a widow and also a daughter (who alleged collusion between the widow and one of the executors applying for probate of an alleged will), the daughter was held to have sufficient interest to entitle her to be made a party to the application, and to oppose the grant of probate; and where the Judge refused to make her a party-defendant, the High Court thought fit to interfere under s. 622, C. P. Code, 1882 (s. 115) and remanded the case for trial as a contested application.—*Khettramoni Dasi v. Shaymachurn*, 21 C. 539. Followed in *Girindra Kumar v. Rajeswari*, 27 C. 5, where it has been held that an order refusing to amend a clerical error in the form of probate might be dealt with under this section.

A Judge having, at the instance of a person not a party to a suit, refused to pass an order for the execution of a decree on the decree-holder's application. *Held*, that in omitting to make such an order, the Judge failed to exercise a jurisdiction vested in him by law, and that s. 622, C. P. Code, 1882 (s. 115), was therefore applicable.—*Nathubhai v. Nana Babu*, 19 B. 544.

Where the lower Court refused to entertain an application for correction of an accidental error or omission in a decree, under s. 152 of the Code, *held* that by refusing to entertain the application the Judge had failed to exercise a jurisdiction vested in him, and the High Court could interfere; *Sahdeogir v. Deo Dutt*, 18 A. L. J. 449.

A Judge cannot assume as a matter of law that which in fact has no existence in law, and so give himself jurisdiction. He cannot by wrongly determining a question give himself jurisdiction and in the same way he cannot by wrong determination of the meaning of the statute deprive himself of the jurisdiction which properly belongs to him, and if he refuses jurisdiction in such a case, the High Court may interfere, whether the question has been rightly or wrongly decided by him; *Shew Prosad v. Ramchunder*, 14 C. 323 (341). See also, *Brohmanand v. Hem Chandra*, 18 C. W. N. 1016.

The law expressly imposes upon a Court, the duty of throwing out a suit or application filed after the period prescribed therefore, and if a Court were to decree a suit or allow an application, which was in fact time-barred, without considering whether it was so or not, it can be said to have failed to exercise a jurisdiction vested in it by law, so as to bring the matter within the scope of s. 115 of the C. P. Code; *Panchu Mondal v. Sheikh Isaf*, 17 C. W. N. 667.

Where the Court below has not decided the question of limitation which was raised before it, the matter comes within the purview of s. 115, C. P. Code; *Jagabandhu v. Srinath*, 18 J. C. 392.

Where by reason of a wrong decision on a question of limitation, a Court does not entertain a proceeding, it is a failure to exercise a jurisdiction vested in the Civil Court and the High Court can entertain a

Acting "with material irregularity" in the third clause of this section implies only the committing of an error of procedure affecting the merits of the case and "acting illegally" in the same clause means committing gross and palpable errors other than those of procedure.

Clauses (a), (b) and (c) of this section are exactly similar to the corresponding clauses of the old Code. The section provides for the interference of the High Court in cases in which no appeal lies, if the subordinate Court by which the case was decided appears, (a) "to have exercised a jurisdiction not vested in it by law," or (b) "to have failed to exercise a jurisdiction so vested," or (c) "to have acted in the exercise of its jurisdiction illegally or with material irregularity."

The first two clauses are clear enough, and call for no special remark except this, that exercise of jurisdiction and failure to exercise jurisdiction on the part of a Court must be taken respectively to mean its trying a case which it has no power to try, or its applying to it a mode of procedure not applicable to it, and its refusing to try it when it has power to do so, or its refusing to apply to it a mode of procedure, applicable to it; (See *Birj Mohun v. Rai Uma Nath*, 20 C. 8 and *Jogodanund v. Amrita Lal*, 22 C. 767), and that it is not every error that can be called exercise of jurisdiction, or failure to exercise jurisdiction though the attempt is not unfrequently made to bring every error under the one or the other of these two heads.

It is the third clause that presents some real difficulty. That the third clause is intended to have a meaning distinct from that of the other two clauses must be clear from its having a place in the section. What then is the meaning of this clause? *Amir Hassan Khan's case* (11 C. 6) helps us in answering the question only to this extent, namely, that it settles that it is not every wrong decision on a point of law that comes within the clause. The clause is evidently intended to authorise the High Courts to interfere and correct gross and palpable errors of subordinate Courts, so as to prevent grave injustice in non-appealable cases. See *Mohunt Bhagwan Das v. Khetter Moni*, 1 C. W. N 617.

The construction of these three clauses has given rise to much conflict of opinion. It may, however, be now taken as authoritatively settled by the decision of the Privy Council in the case of *Brijmohun v. Rai Uma Nath*, (20 C. 8) that a case comes within the scope of the first two clauses not only where a Court has tried a case which it has no power to try; or has failed to try one which it has power to try: but also where it has applied a course of procedure which is not applicable to it or has failed to apply to it a course of procedure which is applicable. As to the third clause it may be taken as authoritatively settled by the decision of the Privy Council in *Amir Hassan Khan v. Sheo Baksh Singh*, 11 C. 6, that where a Court has jurisdiction to decide a question, the mere fact that it has decided the question erroneously in point of law does not amount to its having acted illegally or with material irregularity in the exercise of its jurisdiction. The clause is evidently intended to authorize the High Courts to interfere and correct gross and palpable errors of subordinate Court so as to prevent grave injustice in non-appealable cases.— See *Mathura Nath v. Umesh Chandra*, 1 C. W. N 626.

**Object and Scope of the Section.**—The powers given by s. 115 are intended to give the High Court jurisdiction to see that the proceedings

The result of *Amir Hasan, v. Sheo Buksh*, 11 C. 6, P. C., and *Magni Ram v. Jiwa Lal*, 7 A. 336, is that the questions to which s. 622, C. P. Code, 1882 (s. 115), applies are questions of jurisdiction only. The meaning of the Privy Council case is that if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or law, and that the High Court has no jurisdiction under this section to enquire into the correctness of its view of the law, or the soundness of its findings as to facts; but that, when no appeal is provided, its decision on questions of both kinds is final.—*Badmi Kuar v. Dinu Rai*, 8 A. 111.

The High Court will not interfere with judgments, decrees or orders of a lower Court on the bare ground that they are erroneous in law, or are based upon a wrong conclusion of facts; there must be some special grounds justifying the High Court to exercise such powers.—*Madhub Chunder v. Shamchand*, 3 C. 243. See also, *Mohunt Bhagwan Ramanuj v. Khetter Moni*, 1 C W N. 617.

Where a Court had jurisdiction to make an order, it committed no illegality in passing it; whether the order was expedient or not is not a ground on which the High Court can interfere under this section; *In re Nawal Singh*, 34 A. 393; see also, *Mazhar Hasan v. Said Hasan*, 81 A. 38: 5 A. L. J. 749

An erroneous order refusing petition for amendment of plaint is not open to revision.—*Kajira v. Fatma*, 24 I. C. 779.

The High Court is not competent, in the exercise of the powers of superintendence over the Courts subordinate to it, to interfere with the order of a subordinate Court on the ground that such order has proceeded on an error of law or an error of fact.—*Tej Ram v. Harsukh*, 1 A. 101.

Under s. 15 of the Charter Act, the High Court will not interfere with the decisions of the Courts below in cases in which a special appeal is forbidden by s. 586, C. P. Code, 1882 (s. 102), and where there is no question of jurisdiction involved.—*In the petition of Lukhykant Bose*, 1 C. 180; 24 W. R. 443.

After a decree had been made *ex parte*, the defendant applied to have it set aside. The Sub-Judge refused the application, but his order was reversed by the District Judge. Held that no appeal lay, nor would the Court interfere under s. 622, C. P. Code, 1882 (s. 115).—*Abinash Chunder v. Martin*, 8 C. 832.

Where a Court rejects an application under ss. 244 (s. 47) and 311 (Or. XXI, r. 90), C. P. Code, 1882, on the ground that the applicant had no *locus standi*, the case would not fall under s. 622, C. P. Code, 1882 (s. 115). The error, if any, was upon a question of law and not of jurisdiction.—*Ganga Charan v. Shoshi Bhushan*, 32 C. 572: 1 C. L. J. 255.

Where the Small Cause Court, having jurisdiction to deal with a matter, deals with it according to law, the High Court cannot interfere either under s. 622, C. P. Code, 1882 (s. 155), or s. 15 of the Charter Act.—*The Corporation of Calcutta v. Cohen*, 6 C. W. N. 480.

The fact that a Court, having power to decide that certain matter was barred by limitation, wrongly decided that it was not barred, and

The word "case" should not always be strictly construed, and interlocutory orders, i.e., orders which do not finally dispose of a case may form the subject of revision, if the matter they relate to, though part of and connected with a case stands by itself and is a definite part of a case and in which the ends of justice would be defeated if the power of revision is not exercised; *Delhi Cloth and Gen. Mills & Co. v. Hardhan Singh*, 72 P. W. R. 1910; 6 I. C. 939. An application to sue *in forma pauperis* is itself a "case" within the meaning of this section; *Shamimuddin v. Amir Husain*, 12 O. C. 391. See also, *Md. Ayub v. Md. Mahmud*, 32 A. 623.

An application under s. 10 C. P. Code for the stay of a suit is not a "case" and an order for stay passed on that application is not the decision of a "case" within s. 115 C. P. Code and no revision lies from such order; *Sultanat Jahant Begum v. Sundar Lal*, 18 A. L. J. 431.

An order of the Appellate Court directing the appellant to pay *ad valorem* court fee is a case decided within the meaning of s. 115 C. P. Code and the High Court can revise the order; *Sudalai Muthu Pillai v. Sudalai Muthu Pillai*, 17 L. W. 623; 71 I. C. 173.

The refusal by a Court to adjourn the hearing of a suit in order to enable the applicant to pay the Court fee is not an order which should be revised by the High Court; *Chukhan Lal v. Kanhaiya Lal*, 45 A. 218.

An order rejecting an application to sue *in forma pauperis* does not determine anything in the suit. It is merely the decision of a preliminary issue anterior to the suit. It is not a "case" within s. 115 and so no revision lies against that order; *Shankar Bai v. Ram Dei*, 48 A. 493; 94 I. C. 484; A. I. R. 1926 All 446.

The expression "Case" in s. 115 does not necessarily mean the whole case and includes a particular branch of the case which is quite distinct. An order directing the defendant to deposit money under s. 10 of the Charitable and Religious Trusts Act, is open to revision by the High Court; *Mahant Kripal Singh v. Narinjan Singh*, 69 I. C. 658; *Sawan Mal v. Kanhaiya Lal Gopal Das*, 59 I. C. 680.

Proceedings consequent on an application for setting aside a decree *ex parte* are not a mere branch of a suit, but since they involve the refusal of a final order and a decree in a suit, they are in themselves a "case"; *Piroj Shah v. Qanib Shah*, 7 Lah. 161; 8 Lah. L. J. 267.

The refusal to issue interrogatories for the examination of a witness does not amount to "a case decided" within the meaning of s. 115, C. P. Code, and hence the order is not revisable; *Roop Chand v. The Church Missionary Trust Association*, A. I. R. 1923 Lah. 282; 69 I. C. 417.

"Has been decided."—Where a subordinate Court gives judgment in a case and the only thing that remains to be done is the preparation of the decree, a case "has been decided" within the meaning of the section. But if an appeal would lie against the decree when prepared, the High Court cannot interfere in revision; *Moti Lal v. Gangadhar*, 13 A. L. J. 436.

But no revision lies where the order against which the application for revision is filed is merely a finding by the trial Court on one out of several issues arising in a suit which is still pending in that Court and the record

The High Court will not interfere under this section, where the lower Court has, in setting aside its previous order on review, arrived at a right result, although it purported to act under a wrong provision of the Code; *Bollopragada v. Bollopragada*, 31 M. 414.

**Objection as to Jurisdiction cannot be Raised for the First Time in Revision.**—The High Court will decline to interfere in revision on an objection as to jurisdiction where it has been shown that no objection was taken and that the parties submitted to the jurisdiction of the Court, *Dhananjoy v. Ram Chandra*, A. I. R. 1927 Cal. 388.

The question of jurisdiction depends upon disputed facts and it cannot be allowed to be raised for the first time in revision; *Bibhuti Bhusan v. Chinibas*, A. I. R. 1927 Cal. 381.

**Cl. (c).—Mere Error of Law or Erroneous View of Law is Not Ground of Revision.**—The fact that the District Judge has taken an erroneous view of law does not amount to exercise of jurisdiction not vested in him by law or the exercise of jurisdiction illegally or with material irregularity; *Pearry Lal v. Anilchandra*, 19 I. C. 594; *Dhara Singh v. Gyan Chand*, 16 A. L. J. 441.

Wrong decision on a question of law is not a ground of revision under this section, *Mahabir Sahu v. Bharguram*, 13 A. L. J. 351; 28 I. C. 270; *Janki Prasad v. Parmeswar*, 13 A. L. J. 482; *Kalianharthi v. Rochanhai*, 8 S. L. R. 190; *Upendra v. Nanda Lal*, 11 I. C. 125; *Gurudas v. Dasarath*, 65 I. C. 512; *Bibhuti Bhusan v. Umesh*, 48 I. C. 614.

A question as to the meaning and effect of a document is one of law with which the High Court will not interfere in revision; *Ram Charan v. Jiban Chandra*, 64 I. C. 563. An erroneous construction of the rules framed by the High Court, is no ground for revision; *Ram Kishun v. Beni Prosad*, 3 Pat. L. T. 314 65 I. C. 355.

A wrong decision on a question of limitation does not fall within the ambit of "acted illegally in the exercise of its jurisdiction;" *Baheshar v. Hargobind*, 14 I. C. 52, *Thomas Pillai v. Mathuraman*, 2 L. W. 609; *Benoit Behari v. Ram Sarup*, 16 C. W. N. 1015; *Mohin Chandra v. Mirza Ahmed*, 22 C. L. J. 564, *Mangamma v. Nallamti*, 101 I. C. 514 A. I. R. 1927 Mad. 660; *Hardwari Mal v. Chiranii*, 93 I. C. 855. But see, *Tara Sunkar v. Basiruddi*, 22 C. L. J. 582; 19 C. W. N. 970.

Where the Court below took a wholly erroneous view of the law of limitation, but at the same time its decision was one arrived at with jurisdiction, it cannot be revised under s. 115, C. P. Code; *Mt. Bibi Zainab v. Paras Nath*, 4 Pat. L. T. 491 1 Pat. L. R. 361; *Hashmat Ali v. Mohan*, 55 I. C. 871.

An erroneous decision on a question of limitation is not a ground for revision. But the position might be different if the lower Court decrees a suit with a decision on the question of limitation; *Mohin Chandra v. Mirza Ahmed Ali*, 22 C. L. J. 564; *Jhotu Lal v. Ganduri Sahu*, 3 Pat. L. J. 376.

An error due to misconstruction of a decree is an error of law which does not constitute a sufficient ground for the High Court to interfere in revision; 15 C. 510 20 C. L. J. 325.

*Sadar Singh v. Amar Singh*, 45 A. 383: 71 I. C. 991 But a District Judge acting under s. 57 of the Madras Local Boards Act XIV 1920 is a Court within the meaning of this section; *Ramaswami v. Muthu*, 46 M. 536: 71 I. C. 1039 A. I. R. 1923 Mad 192, *Ahamad v. Basava*, 46 M. 123: 72 I. C. 902 A. I. R. 1923 Mad 254

A Collector acting under the second provision of s. 49 of the Land Acquisition Act I of 1894 is a Court and an order made by him refusing to refer to the Civil Court a question under that proviso is subject to revision by the High Court, *Saraswati v. The Land Acquisition Deputy Collector*, 2 Pat. L. J. 204 39 I. C. 650

A Collector acting under s. 11 of that Act is not a Court within the meaning of this section, *British Indig. Steam Navigation Co. v. Secretary of State*, 38 C. 250. 8 I. C. 107.

The Chief Judge of the Presidency Small Cause Court at Madras acting under r. 4 of the rules framed under the Madras City Municipal Act is not a Court but a *persona designata* and therefore no revision lies to the High Court against his decision; *Latchman Chettiar v. Kanappar*, 51 M. L. J. 738 F. B: 24 L. W. 773.

An application under the revisional jurisdiction of the High Court does not lie from the decision of a District Court under cl. (3) of s. 160 of the Bombay District Municipalities Act; *The Municipality of Belgaum v. Rudappa*, 40 B. 509. 18 Bom. L. R. 340.

**Application for Revision can be treated as an Appeal.**—Where an application was made under s. 622, C. P. Code, 1882 (s. 115) and the Court found that an appeal lay in the case, the application was allowed to be treated as an appeal.—*Sridharan v. Puramathan*, 28 M. 101, (25 C. 757 referred to) *J. C. Galstaun v. F. E. Dinshaw*, 31 C. W. N. 653: A. I. R. 1927 Cal. 581: 102 I. C. 513.

Where an application under this section and an appeal is pending before the High Court and the question of jurisdiction is involved in the case, the Court is competent to deal with the case, if not as an appeal, but in the exercise of its revisional powers.—*Sudhindoo Narain v. Govinda Nath*, 9 C. W. N. 504.

Where no question of limitation or Court-fee arises, an application for revision may be treated as memorandum of appeal.—*Arjundas v. Gunendra Nath*, 20 C. L. J. 341: 18 C. W. N. 1266. See also, *Mad. Akbar v. Sukhdeo Pande*, 13 C. L. J. 467.

**Whether an Appeal can be treated as a Petition for Revision.**—An appeal may be treated as a revision petition, a formal application for revision under this section is unnecessary; *Batcha Sahib v. Abdul Gunny*, 38 M. 256. See also, *Bhoyrup Chunder v. Wajedunnisa*, 6 C. L. R. 234; *Murali Visram v. Sheriff Deoji*, 36 B. 105 (107); *Maung Kyan v. Maung Po*, 7 L. B. R. 138; *Kalimuddin v. Meherul*, 39 C. 653; *Daulat Singhji v. Kachar Hamir*, 34 B. 171; *Mahatap Dasi v. Madhu Sudan*, 64 I. C. 712; *Dinabandhu v. Jagabandhu*, 33 C. L. J. 384.

Where it would amount to a denial of justice to the appellant to refuse relief and it appears that no appeal lies against the decision of the Court below, the High Court would convert the appeal into a revision petition



C. 8; 15 C. 47, and 1 C. W. N. 617, followed: and 17 M. 410, disapproved). See also, *Enaet Mondul v. Beloram*, 3 C. W. N. 581 and *Mathuranath v. Umesh Chandra*, 1 C. W. N. 626.

The words "acted illegally" do not merely imply the committing of an error of procedure which is implied by the words "acted with material irregularity." The words "acted illegally" indicate gross and palpable errors of subordinate Courts resulting in grave injustice; *Jogunnessa v. Satis*, 51 C. 600; 83 I. C. 438; A. I. R. 1924 Cal. 633.

Cl. (c) has been advisedly framed in indefinite language in order to empower the High Court to interfere and correct gross and palpable errors of subordinate Courts. When an Appellate Court reverses the decision of the trial Court without assigning any reasons therefor, it amounts to acting illegally in the exercise of its jurisdiction; *Jogesh v. Ramani Kanta*, 91 I. C. 839. A. I. R. 1926 Cal. 350.

In any case where there is a disregard of the law amounting to an excess of jurisdiction, or a perversion of, the purposes of the Legislature, the High Court will interfere under its extraordinary jurisdiction, where no other remedy is available.—*Dagdusa Tilakchand v. Bhukan Gobind*, 9 B. 82.

Where a defendant admitting execution of a bond pleads non-receipt of consideration, the only question to be raised is the non-receipt of consideration. And if a Court in such a case raises illegally the question of the execution of the bond, the High Court will interfere under this section.—*Gorakh Babhji v. Vithal Narayan*, 11 B. 435.

A Judge has no jurisdiction to pass, in a contested suit, a decree adverse to the defendant where the burden of proof is not or has not continued to be upon the defendant. If he passes such a decree, it is liable to be set aside in revision under this section.—*Shields v. Wilkinson*, 9 A. 398. (3 A. 203 and 417, referred to). Followed in *Bisecassur Das v. Johann Smidt*, 10 C. W. N. 14.

S. 203, C. P. Code, 1882 (Or. XX, r. 4), does not relieve the Judge of a Small Cause Court from the necessity of giving some indication in his judgment that he has understood the facts of the case in which such judgment is given; and where this is not done, the High Court will interfere in revision.—*Malik Rahmat v. Shiva Prasad*, 13 A. 533.

When a Court, upon an erroneous view of the scope of a section of the Code, applies it to a case, to which it has no application, it acts without jurisdiction.—*Brajabala Debi v. Gurudas Mondul*, 33 C. 487; 3 C. L. J. 293.

The occurrence of mere errors of fact or law cannot justify interference in revision unless there is a perverse decision on law or procedure. A decision is perverse where it is a conscious deviation from some rule of procedure.—*Venkatachalam v. Parasu Patten*, 16 M. L. T. 156; (1914) M. W. N. 614. 26 I. C. 106.

Mere errors of procedure or technical defects not affecting the legal justice of a case will not be encouraged by a Court of revision; but when the law prohibits an agreement and requires that effect should not be given to it, the High Court is bound to interfere. The High Court as

Where a suit under section 9 of the Specific Relief Act was decided on wrong issue relating to title, *held* that the High Court ought not to interfere in revision, as the aggrieved party has another remedy by suit; *Devata Sri Ramamurti v Venkata*, (1914) M. W. N. R. 5 22 I. C. 279. See also 8 A. L. J. 791, and 4 A. I. R. 80, 13 C. W. N. 307 footnote, 13 C. W. N. 835; 10 C. L. J. 30, *Debnath v Ram Sundar*, 19 C. W. N. 1205. But see *Ramdoyal v Upendra Nath*, 17 C. W. N. 501; 18 I. C. 292.

The High Court will not interfere under section 115 with an order refusing to allow an amendment when the party has another effective remedy under section 105 (1) of the C. P. Code, 1909; *Penumarli v. Reddi* (1914) M. W. N. 98; 22 I. C. 39 14 M. L. T. 588.

An order setting aside an *ex parte* decree is appealable under s. 588, C. P. Code, 1882, (and is therefore not subject to revision under s. 622, C. P. Code, 1882 (s. 115))—*Ram Kristo v. Naik Tara Das*, 12 C. L. R. 440. See also *Ganga Ram v Chhedi Singh*, 9 A. L. J. 763; 14 I. C. 119.

An order setting aside an *ex parte* decree may be challenged by the plaintiff in appealing against the final decree if it is decided against him. Hence the order is not open to revision under s. 115.—*Jagannath v. Vathyar*, 24 I. C. 782.

The District Munsif passed a decree against three persons, S, V, and C. V and C appealed against this decree. The Appellate Court, holding that the plaintiff had no cause of action against V or S, dismissed the suit against V, but refused to interfere with the decree against S on the ground that he did not appeal against the original decree. S appealed against this decree. *Held* that even if S was not entitled to appeal in order to have the decree against him set aside, the error of the lower Appellate Court could be corrected under s. 622 C. P. Code, 1882, (s. 115), by a direction to exercise the discretionary power given by s. 544 of the Code, 1882.—*Seshadri v. Krishnan*, 8 M. 192.

An order rejecting an application to set aside an order under s. 368, C. P. Code, 1882 (Or. XXII, r. 4) directing by the High Court under s. 622, C. P. Code, 1882, *v. Sarat Chunder*, 8 C. 837; 10 C. L. R. 4.

An order passed on an application under s. 372, C. P. Code, 1882 (Or. XXII, r. 10) is appealable under s. 588 (21), C. P. Code, 1882 (s. 104; Or. XLIII, r. 1) and is therefore not open to revision by the High Court.—*Raynor v. Mussoorie Bank*, 7 A. 681.

*Held* that an order under s. 25, C. P. Code, 1882 (s. 24) transferring a suit in which an appeal would lie from the decree made therein, was not subject to revision by the High Court under s. 622, C. P. Code, 1882 (s. 115).—*Farid Ahmad v. Dulari Bibi*, 6 A. 238.

A decision by a subordinate Court on a question of valuation, determining the amount of a Court-fee, is, notwithstanding its declared finality, subject to revision by the High Court under this section—*Vithal Krishna v Balkarishna*, 10 B. 610.

An order of a Court directing to pay additional Court-fee stamp is not subject to revision by the High Court under this section, inasmuch as the order dismissing a suit on the ground of under-valuation or for non-payment of additional Court-fee stamp is appealable.—*Omrao Mirza v. Jones*, 12 C.

the revisional jurisdiction of the High Court under s. 115; *Jewraj v. Lalbhai*, 30 C. W. N. 834; 96 I. C. 131; A. I. R. 1926 Cal. 1011.

The Courts have an inherent power to amend or vary decrees so as to bring them in conformity with the judgments after they are signed by the Judges under s. 151 of the Code, even, if they do not fall under s. 152 (a). An order under s. 151, however, can only be made where it is necessary for the ends of justice. Where the Court acts under s. 151 in a case where it should not have done, it is competent to the High Court to interfere and set matters right; *Bibhut Bhushan v. Lalit Mohan*, 23 I. C. 906.

**Acting Illegally or with Material Irregularity in the Exercise of Jurisdiction.**—The words "acted illegally" mean giving a wilfully perverse decision on a question of law and not a mere erroneous one on a question of law. The erroneous decision of an Appellate Court on the question of the jurisdiction of the first Court does not come under any of the three clauses (a), (b) and (c) of section 115, and the Appellate Court cannot, by any reasonable use of language, be held in such cases to have exercised a jurisdiction not vested in it (Appellate Court) by law, or to have failed to exercise a jurisdiction so vested (in itself), nor can it be said to have acted illegally or with material irregularity in the exercise of such jurisdiction. Clauses (a) and (b) of section 115 can only apply to the jurisdiction of the Court, whose order or decree is sought to be revised, to pass such order or decree, and not to its decision on the jurisdiction of some other Court; *Puppuluri Atchayya v. Kanchumarti*, 24 M. L. J. 112 F. B.: 13 M. L. T. 60. 18 I. C. 555. For the meaning of the word "irregularity," see also, *Kashiram v. Rajaram*, 13 Bom. L. R. 879. 35 B. 487.; *Goridut Bagla v. Bookman*, 47 I. C. 781; 12 Bur. L. T. 5.

It is not always easy to draw a clear line between the illegal exercise of jurisdiction in this section and a mistake of law; *Nabinchandra v. Sheikh Amir*, 9 I. C. 132.

The placing of the burden of proof on the wrong party amounts to a material irregularity and justifies intervention in revision under this section, *Maung Kan Pe v. Maung San Kyi*, 11 I. C. 774.

The failure of the Subordinate Judge to frame and try the requisite issue under Or. XL, r. 25, is a material irregularity which may lead to failure of justice and is subject to revision; *Ramdas v. I. G. Navigation Co.*, 16 C. W. N. 424. Failure of the lower Court to determine material questions before it amounts to material irregularity; *Veadaji Baskara Thuumal v. Subramania*, 52 I. C. 992.

Where in an action on pro-notes, the Court dismissed the plaintiff's suit, simply on the ground of certain discrepancies between the terms of the pro-notes and the description of them in the plaint. Held, that the Court acted with material irregularity and failed to exercise a jurisdiction vested in it by law, and the High Court was empowered to exercise its revisional jurisdiction; *Sri Mirza Pasupati v. Muduri*, 21 M. L. J. 451; 9 M. L. T. 268; 9 I. C. 32.

If a Court amends a sale certificate, without giving notice of the application to the judgment-debtor or other persons interested, it acts with material irregularity; *Yagnaswami v. Chidambara Natha*, (1922) M. W. N. 130. 65 I. C. 782.

C. P. Code, 1882 (s. 115) *Held* that the petition was not maintainable, as the petitioner was the representative of the decree-holder within the meaning of s. 244, C. P. Code, 1882 (s. 47) and might have preferred an appeal, against, the order sought to be revised.—*Sahman Mull v. Kanaga Sabapathi*, 16 M. 20 (12 M. 454, 13 M. 504, 15 C. 371, *referred to*)

An application under s. 622, C. P. Code, 1882 (s. 115) cannot be entertained in the case of those interlocutory orders against which though an immediate appeal lies, a remedy is supplied by s. 591, C. P. Code, 1882 (s. 105) which provides that they may be made a ground of objection in the appeal against the final decree. The purpose with which s. 622, C. P. Code, 1882 (s. 115) was framed was to enable a party to a suit to get a decision or order of a lower Court rectified where there would otherwise be no remedy.—*Moti Lal v. Nama*, 18 B. 35.

A revision lies against an order re-admitting a suit which had been dismissed for default.—*Ajodya v. Chabilla*, 20 I. C. 1001.

Where an application, by a judgment-debtor to set aside a sale under section 310-A., C. P. Code, 1882 (Or. XXI, r. 89), was rejected on the ground that, at the date of the execution-sale he had no interest in the property having disposed of it by private sale, *held* that the order was not appealable, and the judgment-debtor could apply under s. 622, C. P. Code, 1882 (s. 115).—*Magan Lal Mulji v. Doshi Mulji*, 25 B. 631

Where a person, not a party to the decree, applied to set aside an execution-sale, alleging that the Judgment-debtor was his *benamidar* and his petition was dismissed; but setting aside the order remanded the case to be disposed of on the merits.—*Held* that the order remanding the case was not appealable, and consequently that the petition for revision was maintainable.—*Timmanna Banta v. Mahabala Bhatta*, 10 M. 167.

Where, in a case for the execution of a decree in which no second appeal lay to the High Court the Appellate Court *held*, on the construction of the decree, that it awarded interest on the principal amount of the decree, the High Court, holding that the decree did not award such interest, modified the decree of the Appellate Court under this section.—*In the petition of Muhammad v. Husam*, 3 A. 203.

Where an order was passed under s. 315, C. P. Code, 1882 (Or. XXI, r. 93) directing refund to a purchaser in execution of a decree in a suit in which a second appeal lay to the High Court, *held* that, under s. 622, C. P. Code, 1882 (s. 115) the High Court could set aside the order, because the judgment-debtor having been found to have a saleable interest, the lower Court had no power to order a refund.—*Kunhamed v. Chathu*, 9 M. 437.

When a claim has been disallowed, no revision lies to the High Court, as the petitioner has a remedy by a suit; *Subbu Reddiar v. Kumaraswamy*, (1918) M. W. N. 856, 21 I. C. 461; *Bhaion v. Rajania*, 38 I. C. 299. But see, *Sathari Mandal v. Tirtha Narain*, 24 I. C. 62.

The High Court may on the judgment-debtor's application under Or. 41, r. 5, stay execution, provided it appears that the conditions mentioned in clauses (a), (b) and (c) have been fulfilled. The High Court may deal with the order under this section and direct the execution to be stayed; *Ram Nath v. Kamleshwar Prasad*, 15 C. W. N. 432.

Where a Court fails to entertain plea of illegality *suo motu*, i.e., that a certain contract is opposed to public policy and even refuses to allow the defendant to raise it must be deemed to have declined a jurisdiction vested in it and to have acted with material irregularity in the exercise of jurisdiction; *Kandasami Goundan v. Narayanswami Goundan*, 45 M. L. J. 551: (1923) M. W. N. 566.

Where a Court improperly refused to amend a decree, which was at variance with the judgment, *held* that, in so acting, the Court had acted in the exercise of its jurisdiction illegally and with material irregularity, within the meaning of this section, and its order was consequently subject to revision under that section.—*Balmakund v. Sheo Jatan*, 6 A. 125. See also *Dhan Singh v. Basant Singh*, 8 A. 519.

An order of dismissal of a suit for failure to amend plaint and pay costs of adjournment is a material irregularity justifying interference in revision, *Rahman v. Ahmad Din*, 96 I. C. 312: A. I. R. 1926 Lah. 571. Where an execution application is dismissed without giving reasonable time for the applicant to file processes, the High Court will interfere in revision; *Ram Prosad Ram Kissen v. Harokumar*, 92 I. C. 298: A. I. R. 1926 Cal. 1017.

A Court, which admits an application to set aside an *ex parte* decree after the expiry of the prescribed period of limitation, acts in the exercise of its jurisdiction illegally and with material irregularity within the meaning of s. 622, C. P. Code, 1882 (s. 115), and such action may therefore be made the subject revision by the High Court.—*Sundar Das v. Mansaram*, 7 A. 345 (11 C. 6: 7 A. 336, *commented on*).

Where the lower Court dismissed for default an application for the restoration of an application for setting aside an *ex parte* decree without considering whether there was sufficient cause for the non-appearance of the petitioner, *held* that the High Court can properly interfere in revision and set aside the order; *Rahmatunnessa v. Abdul Sobhan*, 49 I. C. 745.

Where the lower Courts have entertained an application which is on the face of it barred by limitation, without advertg to the question of limitation, the High Court can interfere under this section, and look into the evidence and itself investigate the facts.—*Kailash Chandra v. Bissonath*, 1 C. W. N. 67.

A District Judge allowed certain rent-appeals below Rs. 100 to stand over until the decision of a title-suit between the parties, and disposed of the appeals after the decision of the title-suit. *Held*, that there was no such irregularity on the part of the District Judge in making his decision in such rent-appeals depend upon the decision of the title-suit as would justify the High Court to interfere under this section.—*Daorga Narain v. Ram Lall*, 7 C. 330: 9 C. L. R. 86.

The deposit under s. 174 of the Bengal Tenancy Act must be of such a nature as to be at once payable to the parties, and a Court has no power to set aside a sale under that section unless the judgment-debtor has complied strictly with its provisions. Where, therefore, the Court accepted a deposit, partly in cash and partly in Government Promissory Notes and set aside the sale, the High Court set aside such order under this section.—*Rahim Bux v. Nundo Lal*, 14 C. 321.

A Munsif having dismissed a suit, the plaintiff appealed and also applied to the Appellate Court to allow him to withdraw the suit with



diction, and the High Court will be justified to interfere with his order; *Surangini Dassi v. Nakaraddi Mullick*, 23 I. C. 844.

The defendants erected on their land a screen of corrugated non sheets for blocking up the openings which the plaintiff had made in his wall. The plaintiff filed a suit to have the screen removed, and pending the suit applied for and obtained a mandatory injunction directing the defendants to remove the screen. *Held*, setting aside the order, that the lower Courts had acted illegally and with material irregularity in granting the mandatory injunction, as the Courts have no jurisdiction to grant a mandatory injunction before hearing; *Rasul Karim v. Pirubhai*, 38 B. 381; 16 Bom. L. R. 288.

A Subordinate Judge in trying a suit gave his decision on issues relating to misjoinder, limitation and jurisdiction, and directed the parties to adduce evidence relating to accounts. He was asked to draw up a preliminary decree in accordance with his findings but declined to do so. *Held* that he committed a material irregularity in the exercise of his jurisdiction; *Sidhanath v. Ganesh*, 37 B. 60; 14 Bom. L. R. 916.

In passing an order under s. 171 of the B. T. Act, allowing a person to deposit the claim without making any enquiry into the question whether he has or has not any interest voidable on the sale, a Court acts with material irregularity in the exercise of its jurisdiction; *Gobinda Sundar v. Chand Meah*, 17 C. W. N. 602; 16 I. C. 202.

In a suit to recover a debt incurred by the deceased father of a Hindu family, the District Judge gave a personal decree against the sons of the debtor, of whom two were minors. *Held*, that under this section, the decree against the minors should be reversed, but that the Court has no power to revise the decree against the other defendants.—*Bhashyam v. Jayaram*, 11 M. 303.

In any case where the Court, having a mistaken and wrong apprehension of the questions at issue, proceeds to determine an issue which does not really arise in the case, and bases its decision of the case on its determination of that issue, it acts with material irregularity in the exercise of its jurisdiction within the meaning of this section.—*Venkubai v. Lakshman*, 12 B. 617.

S 315, C. P. Code, 1882 (Or. XXI, r. 93), provides that the purchase-money paid at an execution-sale is to be returned when it is found that the judgment-debtor has no saleable interest in the property sold. It does not prescribe how the fact is to be ascertained, but the conclusion from s. 313, C. P. Code, 1882 (Or. XXI, r. 91), as well as from general principles is that it must be a finding on some proceedings to which the judgment-creditor was a party, or, at any rate, of which he had notice. Where a Court ordered refund of purchase-money without so doing, the High Court set aside the order under s. 622, C. P. Code, 1882 (s. 115).—*Vithova v. Esat*, 18 B. 594.

A Small Cause Court having forwarded the summons to the defendant in a registered packet through the Post Office, the packet was returned endorsed "refused." The Small Cause Court held the service of the summons to be good service, and passed an *ex parte* decree against the defendant. On an application under this section, *held* that the Small Cause Court acted with material irregularity, and that its order must be set aside.—*Jagannath v. Sassoon*, 18 B. 606.

Where a subordinate Court wrongly refused to exercise its jurisdiction which it possessed, the High Court would give relief under the extraordinary jurisdiction conferred by this section.—*Shamrar v. Nilap*, 10 B 200.

The question of amendment of the pleadings is a question of jurisdiction and unless the High Court is satisfied that the discretion was exercised on entirely wrong lines or in fact the lower Court refused a jurisdiction vested in it the High Court will not be justified in interfering under this section. *Lloyd & Bank Ltd v. Surojimal*, 30 C W N 926 A. I. R 1926 Cal 1112

It is not a case of failure to exercise jurisdiction justifying interference in revision if the lower Court rejects an application under Or. I, r 10, C. P. Code, on the ground that it was made too late; *Ramcharan v. Jiban Chandra*, 64 I C 563

Failure to exercise jurisdiction vested by the Calcutta Rent Act can be interfered with under s 115; *Basanta Charan v. Rajani Mohan*, 26 C. W. N. 711

Where a Court refuses to entertain an application on the erroneous ground that the application does not lie, its action amounts to declining jurisdiction and its order is liable to be set aside under s. 115; *Ramaswami Pillai v. Badra Nayakar*, 98 M. L. J 922; 27 M. L. T. 99.

Where the lower Court, having failed to exercise the discretion vested in it under Or. I, r 10 (2), failed to exercise a jurisdiction vested in it by refusing to make a transposition prayed for, the order is liable to be set aside on revision; *Brojendra Kumar v. Gobinda Mohan*, 20 C. W. N. 752.

Where the Sub-Judge had failed to exercise jurisdiction vested in him by law by returning the plaint for presentation to another Court and the District Judge confirmed that decision, the High Court had authority to interfere under this section.—*Zamiran v. Fateh Ali*, 32 C 146.

Where a Munsif improperly refused to investigate a claim under ss. 278—290, C. P. Code, 1882 (Or. XXI, rr. 58, 59 and 60), he was held to have refused to exercise a jurisdiction he was bound to exercise, and the High Court set aside his order, and ordered the investigation to be made.—*Jameela v. Luchmun Panday*, 4 C. L. R. 74.

It is now the settled practice of the Patna High Court to treat a refusal to accept deposit tendered for the purpose of setting aside a sale as a refusal to exercise jurisdiction; *Aulad Ali v. Abdul Hamid*, 2 Pat 715; 74 I. C. 102.

A Court of Small Causes, without considering the merits, dismissed a suit brought by a sole surviving partner to recover a partnership-debt, on the ground that the plaintiff was not competent to maintain the suit without joining the representatives of the deceased partner as co-plaintiff. Held, the Judge had failed to exercise his jurisdiction and had acted with material irregularity within the meaning of s 622, C. P. Code, 1882 (s. 115).—*Gobind Prasad v. Chandar Sekhar*, 9 A. 486 (9 A. 104·8 A. 579 referred to).

Section 539, C. P. Code, 1882 (ss. 92 and 93), has no application to a suit brought by the trustees of a religious endowment to eject persons



section does not include an issue or part of a case, that it does not therefore include an interlocutory order, and that the High Court therefore has no power to interfere in revision with interlocutory orders in any case. The same view was taken by a Full Bench of the Lahore High Court in *Lal Chand v. Bcharilal*, 5 Lah. 288; 84 I. C. 250; A. I. R. 1924 Lah. 425 F. B.

It has been the established practice in the Calcutta High Court to interfere with interlocutory orders and that practice has been adopted by the Patna High Court; *Nauratam Lal v. W. J. Stephenson*, 4 Pat. L. J. 195.

Interlocutory orders cannot or at any rate should not be interfered with in revision as a matter of course; *Gulab Chand v. Sher Singh*, 149 P. W. R. 1916; 85 I. C. 608 (51 P. R. 1899 *folld.*).

In very exceptional cases, the High Court can interfere and set matter right by the reversal of interlocutory orders. The fact of each individual case is the determining factor; *Yatindranath v. Hari Charan*, 20 C. L. J. 426 (10 C. L. J. 407; 12 C. L. J. 519; 525 and 537: 88 C. 230; 35 C. 120; 12 C. W. N. 16; 8 C. L. J. 245 *referred to*); *Amjad Ali v. Ali Husam*, 15 C. W. N. 353 (356); 12 C. L. J. 519 (14 C. W. N. 174 *referred to*). See also, *V. V. M. Chetty v. Arunachallam*, 29 I. C. 876

The High Court would exercise its revisional power in the case of interlocutory orders where otherwise irremediable damage would result to the parties; *Firm of Durga Prasad Matsaddi Lal v. Firm of Rulia Mal*, 4 Lah. L. J. 176; 65 I. C. 282. See also, 17 P. L. R. 1922, 11 L. B. R. 65; *Ramkrishna Pillai v. Krishnaswami*, 15 L. W. 667; (1922) M. W. N. 521; *Alla Baksh v. Lal Khan*, 67 I. C. 269; See also, 20 P. W. R. 1919

It is settled law that the High Court has jurisdiction under s. 115 to revise interlocutory orders passed by subordinate Courts from which no appeal lies to the High Court; *Dhapi v. Ram Pershad*, 14 C. 768; *Gorinda v. Kunja*, 14 C. W. N. 147; *Siva Prasad v. Tricomdas*, 42 C. 926; *Sarajubala v. Mohini*, A. I. R. 1925 Cal. 204. But it is only when an irremediable injury will be done and a miscarriage of justice inevitably will ensue if the Court holds its hand, that the Court ought to intervene in current litigation and disturb the normal progress of a case by revising an interlocutory order that has been passed by a subordinate Court; (*per* Page, J.) *Salam Chand v. Bhagican Das*, 30 C. W. N. 907; 53 C. 767; A. I. R. 1926 Cal. 1149.

Under s. 622, C. P. Code, 1882 (s. 115), interlocutory orders passed under s. 397, C. P. Code, 1882 (Or. XXVI, r. 15), refusing applications for the issue of a commission to examine witnesses, or, under s. 130, directing the production of documents, cannot be revised.—*In re Nizam of Hyderabad*, 9 M. 256; followed in *Chinna v. Sambanda*, 15 M. L. T. 339; 23 I. C. 522. But see, *Somasundaram v. Manickavasaka*, 31 M. 60, in which a contrary view has been taken. See also, *Jaganatha Sastry v. Sarathambal Ammal*, 46 M. 574; 1923 M. W. N. 157; 71 I. C. 530, in which it has been held that where a Court refused to examine a witness on Commission, when it had no discretion to refuse it, the High Court will interfere in interlocutory proceedings.

An order by the District Judge with regard to the place where a lunatic should reside, is an interlocutory order, and is, therefore, not subject to

revision under s. 115, C. P. Code, (44 M. 554, *folld*); *The British India Steam Navigation Co v Sharafalley*, 46 M. 939-41 M. L. J. 100: 70 I. C. 888.

Wrong decision of the lower Court on the question of possession in a suit under s. 9 of the Specific Relief Act, is more than a mere error of law, and amounts to a refusal to exercise jurisdiction vested in it by law; *Ram Dayal v Upendra Nath*, 17 C. W. N. 501. But see, *Devata Sri Ramamurti v Venkata*, (1914) M. W. N. 95 22 I. C. 279.

The High Court can interfere under this section where the Court below refused to exercise the jurisdiction vested in it, by reason of an erroneous interpretation of a provision of the Code, *Maharaja of Burdwan v. Apurba*, 14 C. L. J. 50.

Where the lower Appellate Court erroneously holds that the District Munsif had no jurisdiction to execute a decree and dismisses the execution petition as having been referred to a Court not having jurisdiction, the lower Appellate Court must be held to have declined to exercise a jurisdiction within the meaning of s. 115, C. P. Code; *Muthu Karuppa v Paiya Karundan*, 45 M. L. J. 210: 18 L. W. 17: (1923) M. W. N. 406.

Where an Appellate Court erroneously, i.e., by reason of an error of law, decides that the Court of the first instance has or has not jurisdiction to entertain a suit, the High Court can set aside the order both on the ground that it exercises or declines to exercise a jurisdiction vested in it by law and on the ground that it acts illegally in the exercise of its jurisdiction; *Vappuluri v. Seetarama Chandra*, 24 M. L. J. 112.

A Court which dismisses a suit or application under an erroneous view of the law that the party or the applicant has no right of suit, does not decline to exercise a jurisdiction and that no revision petition lies against such decision under this section; *Subbarayudu v. Lakshminarasamma*, 38 M. 775: 15 M. L. T. 98: 22 I. C. 193.

Cl. (c).—A Court Cannot be Said to have Acted " Illegally or with material irregularity " In the Exercise of Its Jurisdiction Simply Because It has Arrived at a Wrong Decision in Deciding a Question.—The leading case on this subject is *Amir Hassan Khan v. Sheo Baksh Singh*, 11 C. 6: 11 I. A. 257. In that case it was held by their Lordships of the Privy Council that where a Court has jurisdiction to determine a question, and it has determined that question, it cannot be said to have acted illegally or with material irregularity because it has come to an erroneous decision. See also, *Magni Ram v. Java Lal*, 7 A. 836: *Sundar Das v. Mansa Ram*, 7 A. 407; *Raghunath v. Chatrapat Singh*, 1 C. W. N. 633; *Krishna Mohini v. Kedar Nath*, 15 C. 446; *Muhammad Yusuf v. Abdul Rahman*, 16 C. 749, P. C.: *Enat Mondul v. Balaram Dey*, 3 C. W. N. 581; *Kali Charan v. Sarat Chunder*, 30 C. 397; *Paramurama v. Seher*, 27 M. 504 (509); and *Godu Ram v. Suraj Mal*, 27 A. 380: 2 A. L. J. 18: (1905) A. W. N. 10, *Satya Bhusan v. Krishnakali*, 20 C. L. J. 196: 18 C. W. N. 1308; *Shew Prosad v. Ramchunder*, 41 C. 323; *Rajendra Nath v. Sheikh Abdul*, 1923 Cal. 280; *Yad Ram v. Sunder Singh*, 21 A. L. J. 313 F. B.: 45 A. 425: 74 I. C. 778. In *Satish Chunder v. Nil Comul*, 11 C. 45, it has been held that under the section, the High Court can explain to the Court below what is the law on the subject without interfering. Explained in *Port Canning v. Rosan Ali*, 17 C. W. N. 100.

The High Court can interfere in revision with interlocutory orders of Subordinate Courts, where patent irregularities in procedure are brought to its notice. The power of superintendence under s. 15 of the Charter Act and s. 115 of the C. P. Code, are intended to give the High Court jurisdiction to see that the proceedings before the lower Courts are properly conducted and the High Court should not refuse to set right matters, if by doing so, it would save unnecessary expense or delay or multiplicity of proceedings; *Sri Poosapathi v. Sri Raja*, 29 M. L. J. 53: 30 I. C. 41; *Gowri Shankar v. Gangaram*, 77 P. R. 1919.

The High Court will interfere with an interlocutory order directing the trial of certain issues in a case before proceeding to the trial of the others; *Raja Satyaniranjan v. Dwarkanath*, 2 Pat. L. T. 154: 60 I. C. 528.

**Order Granting or Refusing to Grant Review Whether Open to Revision.**—The Court which originally heard a case should be the Court to decide whether an application for review of its former judgment should or should not be granted, and where that Court rejects such an application, its decision is not open to revision by a High Court.—*Ram Lal v. Ratan Lal*, 26 A. 572. See also, *Tola Ram v. Chandu Mal*, 71 I. C. 160; *Jag Mohun Sing v. Mata Badal*, 9 O. L. J. 623: 74 I. C. 351; *Lakshman v. Maruti*, 26 Bom. L. R. 284: 80 I. C. 267: A. I. R. 1924 Bom. 344. A Judge is not likely to entertain a review of his own judgment unless he is *prima facie* satisfied that the new matter is important, and simply because the Court has not said in so many words, that the matter is important, interference in revision is not competent; *Srinivasa v. Official Assignee of Madras*, 52 M. L. J. 682: A. I. R. 1927 Mad. 641.

Where a subordinate Court rejected an application for review of judgment of its predecessor, the High Court in the exercise of its powers of superintendence under s. 15 of the Charter Act, directed such Court to consider the ground.—*In the petition of Mathura Parshad*, 1 A. 296. But see, *Ram Lal v. Janki Mahatoon*, 4 C. L. R. 14.

The High Court refused to interfere with the order of a Court granting a review of judgment, although the application for review was made after the lapse of three years from the date of the decree, the party who applied for the review having satisfied the lower Court of the existence of just and reasonable cause for the delay.—*Ajonnissa Bibee v. Surja Kant*, 2 B. L. R. Ap 181; 11 W. R. 56. See also, *Asrafaniisa Begum v. Inayet Hossain*, 5 Bom. L. R. 316, 13 W. R. 439.

An application for review of judgment in a Small Cause Court suit was rejected wrongly on the ground of supposed deficiency in the court-fee paid on the application. *Held*, that the order was open to revision. *Willis v. Jawad*, 29 A. 468; 4 A. L. J. 439.

Where the Court does not consider whether or not there are sufficient grounds for review, but rejects the application on the erroneous view that it has no jurisdiction to entertain it, the order is open to revision; *Albar Khan v. Md. Ali Khan*, 31 A. 610 (29 A. 468 *refd. to*). See also, *Ram Prasad v. Anaram*, 43 A. 288; 19 A. L. J. 24.

In an appeal against the final decree, the propriety of the order whereby the review was granted by the lower Court can be challenged only on the ground specified in Or XLVII, r. 7, of the C. P. Code, 1908. The aggrieved

proceeded to deal with it affords no grounds for revision under this section.—*Sunder Singh v. Daru Shankar*, 20 A. 78. (11 C. 6, P. C. referred to.)

A suit to recover damages for trespass to immoveable property was instituted in the Small Cause Court at Calcutta. The defendant contended that the suit was not maintainable in the Small Cause Court. The Small Cause Court decided the case. On an application to the High Court under this section, held that the Small Cause Court had jurisdiction to entertain the suit.—*Peary Mohun v. Haran Chunder*, 11 C. 261.

It is competent to the High Court, in the exercise of its power of superintendence, to direct a subordinate Court to do its duty or to abstain from taking action in matters of which it has no cognizance; but the High Court is not competent, in the exercise of this authority, to interfere with and set right the orders of a subordinate Court on the ground that the order of the subordinate Court has proceeded on an error of law or an error of fact. The High Court's power to direct a Sub-Judge to do his duty is not limited to cases in which such Judge declines to hear or determine a suit or application within his jurisdiction.—*Muhamad Suleman v. Fatima*, 9 A. 101. (1 A. 101 and 206 L. R. 3 I. A. 230: 8 A. 111, referred to) See also *Abdullah v. Salaru*, 18 A. 4.

Right of fishery is immoveable property within the meaning of s. 9 of the Specific Relief Act (I of 1877). Therefore a decree given under that section for possession of fishery cannot be set aside under s. 622, C. P. Code, 1882 (s. 145), as being passed without jurisdiction.—*Bhunda Panda v. Pandol Pospalil*, 12 B. 221.

Unless the facts from which want of jurisdiction on the part of a subordinate Court may be inferred are patent upon the fact of the record, the High Court will not interfere in revision.—*Mihr Ali v. Muhammad Husen*, 14 A. 413.

A District Judge disposed of some suits on a point taken by himself on appeal without affording the parties an opportunity of proving what was necessary to meet the point, and admitted other appeals after they had become time-barred. Held that, where a subordinate Court, having applied its mind to a question of law or procedure, arrives at an erroneous decision, such decision is not by itself any ground for the exercise by a High Court of the powers given by this section.—*Kristamma Naidu v. Chapa Naidu*, 17 M. 410. (11 C. 6, P. C., followed). Disapproved in *Mohunt Bhagwan Ramanuj v. Khetter Moni*, 1 C. W. N. 617, and also in *Mothuranath v. Umesh Chandra*, 1 C. W. N. 626.

Held that, under the provisions of s. 588, C. P. Code, 1882 (s. 104; Or. XLIII, r. 1), no second appeal lies to the High Court from an order passed in appeal by a District Judge on an application by a judgment-debtor to have a sale in execution of a decree set aside on the ground of material irregularity. Held, further, that the District Judge having full jurisdiction to determine whether the sale was good or bad, it cannot be said that, even if he has come to an erroneous legal conclusion, he has exercised his jurisdiction illegally or with material irregularity, and that the High Court cannot therefore interfere under s. 622, C. P. Code, 1882 (s. 145).—*Gopi Koeri v. Gopi Lal*, 21 C. 799.

A wrong decision on a question of *res judicata* is not a subject for the interference of the High Court under this section.—*Hari Bhikaji v. Naro Visranath*, 9 B. 432. See also *Amritrav v. Bal Krishna*, 11 B. 488.

to revision by the High Court under s. 622, C. P. Code, 1882 (s. 115).—*Chaitar Singh v. Lakhraj Singh*, 5 A. 298; *Chimanbhai v. Keshavlal*, 25 Bom. L. R. 448; 47 B. 721.

An award having been returned after expiry of the period allowed for its return, the Court refused to give judgment in accordance with it on the ground that it was not valid. The plaintiff then moved the High Court under this section: *Held*, that the award was invalid, and the Court had not failed to exercise its jurisdiction within the meaning of this section.—*Simson v. Venkata Gopallam*, 9 M. 475.

When the jurisdiction of the Court to make an order of reference to arbitration is challenged, the High Court has power to revise the order under its revisional jurisdiction, *Jatindra v. Manindra*, 44 C. L. J. 224: A. I. R. 1927 Cal. 52.

If a Court passing a decree on an award has committed an error in procedure or has misused the jurisdiction prescribed by Sch. II, C. P. Code, there is a revision against the decree; *Delhi Cloth and General Mills Co. v. Kidari Pershad Cheddi Lal*, 22 P. L. R. (1922); 64 I. C. 363.

A party to a suit having authorized his agent to conduct the suit, the agent consented to the case being referred to arbitration, and accordingly the arbitration was carried on to the knowledge and with the consent of the party. On an application by him under s. 622, C. P. Code, 1882 (s. 115), to set aside the award on the ground that his pleader had not been authorized in writing, as required by s. 506, C. P. Code, 1882 (Second Schedule), to apply for arbitration, and that he himself had not consented to the reference, *held* that he was not entitled to the relief on equitable grounds.—*Unniraman v. Chathan*, 9 M. 451.

The High Court can in the exercise of its powers under s. 115 make an order remitting the award for reconsideration by the same arbitrator on the ground that the award had left undetermined matter referred to arbitration; *Gopal Chandra v. Kshetra Mohun*, 22 C. W. N. 933.

Certain disputes between parties were referred under a written agreement to an arbitrator who made his award. The plaintiff then applied to the Sub-Judge to have the award filed under s. 525, C. P. Code, 1882 (Second Schedule). The defendants came in and objected under ss. 520 and 521, C. P. Code, 1882 (Second Schedule), but the Sub-Judge, overruling the objections without taking any evidence, directed the award to be filed, and a decree to be passed thereon. The plaintiff appealed. The defendants contended that no appeal lay: *Held*, that, even if no appeal lay, the High Court could interfere under its revisional powers.—*Hindassuri Pershad v. Jankee Pershad*, 16 C. 482.

Where no application to set aside an award was made in the lower Court within the prescribed period of limitation, the High Court cannot interfere in revision, with the decree passed in accordance with the award.—*Surya Narain v. Banuani*, 18 C. W. N. 626.

The plaintiff filed an arbitrator's award made against the defendant and prayed for a decree in terms of the award. The Court having presumed that there was a real point of difference between the parties, passed a decree in terms of the award without instituting inquiry directed by a circular of

A Small Cause Court's decision that notice is unnecessary in a suit under s. 77 of the Railways Act is an error on a point of law and that the High Court ought not to interfere under s. 115, C. P. Code; *E. I. Ry. Co. v. Kanai Lal*, 28 C. W. N. 202. A. I. R. 1924 Cal. 103.

Irregular preparation of a sale-proclamation and omission to issue notice to settle details to be stated in the sale-proclamation, were held to be error of law and not a ground of revision under this section; *Bepin Behari v. Kantichandra*, 18 I. C. 715.

Where the lower Court after hearing the parties decides that Or. IX, r. 4, does not apply to execution proceedings, it cannot form the subject of revision under s. 115. The decision may be right or wrong; if wrong, it is a mere error of law and cannot form the subject of revision; *Basaratulla v. Reapuddin*, 53 C. 670. 30 C. W. N. 570. A. I. R. 1926 Cal. 773.

A decision of the lower Court is not revisable under this section because it is erroneous in law, *Subbarayudu v. Lakshminarasimma*, 88 M. 775; 15 M. L. T. 98. (1914) M. W. N. 147, 22 I. C. 193. See also, *Manya v. Diwakar*, 11 N. L. R. 99, *Golam Sobhan v. Ali Hossain Bahadur*, A. I. R. 1923 Cal. 322, *Ganesh Prasad v. Dukh Haran*, A. I. R. 1922 All. 441; 66 I. C. 509; *Rajendra Nath v. Sheikh Abdul*, 68 I. C. 430; *Jamadar Singh v. Raja Jagat Kishore*, 23 C. L. J. 557; *Jwala Prasad v. E. I. Ry.* 10 A. L. J. 535.

When a Munsif refused to make a decree under s. 9 of the Specific Relief Act, in favour of a landlord, as he thought the land was not in his possession, but in that of his tenants, and so he was not dispossessed, held that he merely committed an error of law, and the High Court could not interfere in revision, *Shyamachurn v. Muhomed Ali*, 18 C. W. N. 835; 10 C. L. J. 30 (18 C. W. N. 303) referred to.

A wrong decision on a question of *res judicata* would originally not be a ground for interference in revision; *Ganesh v. Kundan*, 15 I. C. 83.

Mere mistake in fact or law is no ground for revision; *Venkataramangulu v. Ramaswami*, 29 M. L. J. 353; 14 M. L. T. 161; *Hari Charan v. Birendra*, 35 C. L. J. 827; *Golam Sobhan v. Ali Hossain*, 65 I. C. 696; *River Steam Navigation Co. Ltd., v. Messrs. Hazarimal Multan Mal*, 27 C. L. J. 294; *Komandur v. Danoji*, 35 M. L. J. 604; (1918) M. W. N. 716; *Musst. Dhanwanti v. Sheoshankar*, 4 Pat. L. J. 840; *Gulam v. Sheodin Ram*, 48 I. C. 415; *Abinas v. Osman*, 51 I. C. 757.

A mistaken view of the law by the lower Court is no ground for the interference of the High Court. But where the case has not been properly heard by the lower Court and the mistake of law was probably the result of such defective trial, the High Court will interfere on the ground that the lower Court had acted with material irregularity within the meaning of this section; *Duraisami v. Muthial*, 81 M. 458; *Bhola Nath v. Ram Sahai*, 71 I. C. 472; A. I. R. 1923 All. 465.

Cl. (c).—Gross and Palpable Error of Law Amounts to "Acting Illegally" in the Exercise of its Jurisdiction.—The third clause of s. 622, C. P. Code, 1882 (s. 115), is evidently intended to authorize the High Courts to interfere and to correct gross and palpable errors of subordinate Courts so as to prevent grave injustice in non-appealable cases. *Mathura Nath v. Umesh Chandra*, 1 C. W. N. 626. (11 C. 6, P. C., explained; 20

An application for permission to sue as a pauper is itself a case within the meaning of s. 115, *Shamimuddin v. Amir Hasain*, 12 O. C. 381. See also, *Sheo Narayan Lal v. Mt. Munagga*, 9 O. L. J. 610; 74 I. C. 344.

Where the lower Court in making an enquiry under s. 407 (c), C. P. Code, 1882 (Or. XXXIII, r. 5), found that the applicant was a pauper, but having addressed himself to the merits of the case, to the rights of the parties, and to matters which were entirely foreign to the enquiry that he had to make, rejected the application upon the ground that the allegations of the petitioner did not show a cause of action.—*Held*, that the High Court could interfere under s. 622, C. P. Code, 1882 (s. 115).—*Debo Das v. Mohunt Ram Charn*, 2 C. W. N. 474. (1 C. W. N. 626; 11 C. 6 P. C. ; 13 C. 225; 14 C. 321; 15 C. 47; and 20 C. 8 discussed and explained). See also, *Muhammad Hussain v. Ajudhia Prasad*, 10 A. 487; *Rustomji v. Husain Shah*; 29 P. W. R. 1918: 58 P. L. R. 1913: *Swaran Bibi v. Abdus Samad*, 45 A. 548: 21 A. L. J. 441: 73 I. C. 538.

Revision lies from an order granting leave to sue as a pauper in a case when applicant let in no evidence of pauperism: *Venkata Krishnayya v. Sayamma*, 96 I. C. 175: A. I. R. 1926 Mad. 956.

Where an application for leave to sue as a pauper was rejected with reference to s. 407 (c), C. P. Code, 1882 (Or. XXXIII, r. 5), on the ground that the claim was barred by limitation, and therefore the applicant had no right to sue. *Held*, by the Full Bench that the Court had acted within its powers, and that its jurisdiction not having been exercised illegally or with material irregularity, the High Court had no power of interference in revision under s. 622, C. P. Code 1882 (s. 115).—*Chatterpal Singh v. Rajaram* 7 A. 661.

No application will lie to the High Court from an order granting an application for leave to sue in *forma pauperis*; *Md. Ayub v. Md. Mahmud*, 32 A. 623: 7 A. L. J. 741 (4 A. 91 *folld.*; 18 A. 163; 28 A. 72 *repl.*). Followed in *Sitai v. Tenai*, 7 N. L. R. 49: 10 I. C. 471; *Kandhaia v. Mt. Kundan*, 20 A. L. J. 471: A. I. R. 1922 All. 208.

An application to sue as a pauper having been refused on the ground that the suit was barred by limitation, the High Court, on revision, permitted the applicant to renew his application to the Court below. The Sub-Judge verbally, rejected this second application, and before the written judgment was delivered, the applicant offered to pay the usual Court-fees: this offer was mentioned and refused in the written judgment. On an application under this section, *held* that the circumstances of the case were not such as would justify an interference under that section.—*Ram Sahai v. Maniram*, 5 C. 807; 6 C. L. R. 223.

An order of a lower Appellate Court refusing to give leave to appeal in *forma pauperis* is not open to revision unless it is shewn that there was some illegality or irregularity in the exercise of its jurisdiction; *Ahsan Ali v. Md. Jafar*, 30 I. C. 86; *Mahadeo v. Secretary of State for India*, 44 A. 218: 20 A. L. J. 55; *Mausa Puri v. Har Bhagat*, 37 I. C. 172; *Indri v. Bala-kissen*, 39 I. C. 912.; *Shamsuddin v. Gur Bakhsh*, 91 I. C. 96: A. I. R. 1920 Oudh 204.

Where a decree in pauper suit omitted to order plaintiff to pay Court-fees payable in the plaint, the High Court would rectify the decree by directing the plaintiff to pay the costs of Government.—*Collector of Kanara v. Rambhat*, 17 B. 451.

a Court of revision has no power to consider justice, apart from such justice as the law recognizes, *Moffai v. Thanappa*, 37 M 395: 26 I. C. 181.

The appointment of a guardian of a minor for purposes of suits is really a question of procedure and an error in matters of procedure is not generally revisable under s. 115, *Muhammad Abdus Salam v. Kamal-mukhi*, 5 Pat L. W. 92.

Where the lower Appellate Court had based conclusions on grounds entirely contrary to a settled rule embodied in judicial decisions to which the attention of that Court had not been drawn, the High Court interfered in revision though filed after a long delay in a case in which no second appeal lay, *Nur Miah v. Chandra Mohan*, 23 I. C. 939.

Where an Appellate Court erroneously decides, in the exercise of its admitted jurisdiction as an Appellate Court, that the Court of the first instance was or was not competent (i. e., had or had not jurisdiction) to entertain a suit, the High Court has jurisdiction to interfere under this section. The High Court has power to rectify the erroneous decision of the Appellate Court under the first part of s. 115; *Vuppuluri Atchayya v. Kanchumarti*, 24 M. L. J. 112, F. B.: 13 M. L. T. 60: 18 I. C. 555.

Where a Court refuses to entertain an application on the ground of limitation, or wrongly entertains it when it is not within limitation, the High Court can interfere in its revisional jurisdiction. The question of limitation in such cases is virtually a question of jurisdiction, because no Court has jurisdiction to entertain an application after the period prescribed by law, *Debi Baksh v. Habib Shah*, 14 I. C. 711. See also, *Tarasankar v. Basiruddi*, 19 C. W. N. 970: 22 C. L. J. 589.

Where in a suit for resumption of certain lands, the lower Courts wrongly threw the burden of proof on the defendant, there is a gross and palpable error of law justifying interference in revision; *Narain Das v. Mir Khan*, 20 I. C. 61.

The High Court can interfere with an order erroneous in law, when as a result of that order, the Court has assumed a jurisdiction which it did not possess or has declined a jurisdiction which was vested in it by law; *Madhu Sudhan v. Rash Mohan*, 21 C. L. J. 614.

An erroneous decision on a question of limitation can be revised, if the order results in an improper refusal to exercise jurisdiction, e.g., to execute a decree; *Surajman v. Anone Shukul*, 21 A. L. J. 861.

**Improper and Wrong Exercise of Inherent Jurisdiction.**—It is unsound on general principles to invoke the inherent jurisdiction of a Court in a matter for which provision is made in the Code itself. A Court has no inherent jurisdiction under s. 151 of the Code to supersede an arbitration proceeding during its pendency, and the High Court can interfere in revision when the inherent jurisdiction is exercised wrongly and with material irregularity; *Chattar Bhuj v. Raghubar Dayal*, 36 A. 354: 12 A. L. J. 529: 23 I. C. 758 (34 B. 1, not followed). See, *Madhusudan v. Rash Mohan*, 21 C. L. J. 614.

In the absence of a provision in the Provincial Insolvency Act, the fact that the lower Court has not passed an *ad interim* protection order in the exercise of its inherent powers, does not bring the order within



**High Court's Revisional Power in Cases under Curator's Act (XIX of 1841).**—Where a District Court, purporting to act under s. 4 of Act XIX of 1841, directed an inventory of the estate of a deceased person to be taken without conforming to the requirements of s. 3 of that Act, the High Court set aside the order under s. 622, C. P. Code, 1882 (s. 115) as made without jurisdiction.—*Abdul Rahiman v. Kutti Ahed*, 10 M. 68, see also, *Sato Koer v. Gopal Sahu*, 34 C. 929; 12 C. W. N. 65 (6 W. R. Mis. 53 and 4 C. W. N. CCXVI, followed). See also *Lal Ghurku v. Musst Durga*, 65 P. L. R. 1911. 10 I. C. 820.

Where a District Court without examining the complainant, or making further enquiry under s. 3 of Act XIX of 1841, called for a report from the Collector under s. 8, and on receipt thereof made an order under s. 5 appointing a curator: Held that the order must be set aside under this section, as the Judge acted without jurisdiction and with material irregularity.—*Krishna Sami v. Muthu Krishna*, 24 M. 364. See also, *Pappamma v. The Collector of Godavari*, 12 M. 341.

Where an order under this Act has been made but the procedure has not been followed, it is competent to the High Court to interfere; *Phul Chand v. Kishmish Koer*, 11 C. L. J. 521. Followed in *Gopi Krishna v. Raj Krishna*, 12 C. L. J. 8 (6 W. R. Miss. 53; 34 C. 929 referred to).

**High Court's Revisional Powers in Cases under the Land Acquisition Act (1 of 1894).**—In rejecting an application under s. 18, cl. (1) of the Land Acquisition Act asking for a reference to the Civil Court, the Collector acts judicially and his order is subject to revision by the High Court.—*Administrator-General of Bengal v. Land Acquisition Collector of 24-Pergs.*, 12 C. W. N. 241 (32 C. 605; 9 C. W. N. 454, distinguished). See also, *Haridas Pal v. Municipal Board, Lucknow*, 22 I. C. 652; 16 O. C. 374; *Krishna Das v. The Land Acquisition Collector of Pabna*, 16 C. L. J. 165; 16 C. W. N. 327. See however, *British Indian Steam Navigation Co. v. Secretary of State*, 38 C. 233; 15 C. W. N. 87; 12 C. L. J. 505.

Where a Collector in a land acquisition proceeding refuses to make a reference to the District Court on the question of the appointment of the compensation, the High Court has no power to interfere with the order in the exercise of its revisional jurisdiction, as the Collector is not a "subordinate Court" to the High Court; *Balkrishna v. The Collector of Bombay Suburban*, 47 B. 699; 25 Bpm. L. R. 398.

If a Judge and Assessors, sitting to determine the amount of compensation to be awarded for land acquired under the Land Acquisition Act, 1870, have refused to take into consideration any of the matters prescribed by s. 24 of that Act, or have improperly taken into consideration any of the matters prohibited by s. 25 thereof, such procedure would amount to material irregularity in the exercise of their jurisdiction and would justify the intervention of the High Court under s. 622, C. P. Code, 1882 (s. 115).—*Joseph v. Salt Co.*, 17 M. 371.

Where a person, who has a substantial interest in the matter, acted as an Assessor in a proceeding under the Land Acquisition Act (X of 1870), the High Court on an application under s. 622, C. P. Code, 1882 (s. 115), set aside the award.—*Suamirao v. Collector of Dharwar*, 17 B. 299.

A District Judge has no jurisdiction to order a refund of money paid by a Collector without any irregularity apparent at the time and without

Where it is clear upon the face of the judgment that there has been an illegality and irregularity in the trial of the case, it is a proper one for interference under this section; *Sibu Sant v. Netai Charan*; 16 C. L. J. 114; 9 I. C. 806.

Ordering the amount deposited to be returned to the transferee of a non-transferable occupancy holding is an irregularity which is subject to revision; *Nalini v. Fulmani*, 15 C. L. J. 388.

The word jurisdiction in clause (c) of this section, is used in a much wider sense than is generally attributed to it and means the authority or power which a Court has to do justice in the case of complaint brought before it. It must not be restricted to the pecuniary, local or other statutory limits of a forum before which proceedings are taken. The words "acting illegally or with material irregularity in the exercise of jurisdiction" cover cases in which a Court has failed to arrive at an obvious conclusion which the facts found necessitate or has so misapplied the principles of law as to result in a perversion of justice, *Subramania v. Narayana*, 28 I. C. 189; 2 L. W. 230. For the meaning of the word "jurisdiction" in this section, see, *Shew Prasad v. Ram Chunder*, 41 C. 323, p. 330.

Where an application to set aside a *pauk* sale had been dismissed by the lower Court and the judgment-debtor applied to set aside the order in revision.—*Held*, that a mistake of fact and a wrong decision based on it, does not constitute illegality or irregularity within the meaning of cl. (c) of s. 115, C. P. Code; *Kumar Chandra Kishore v. Basarat Ali*, 22 C. W. N. 627; 27 C. L. J. 418.

The Court of first instance allowed a document on which the suit was based to be produced at a late stage; the Appellate Court rejected it. *Held* that the Appellate Court acted illegally and with irregularity in the exercise of its jurisdiction and the High Court could interfere in revision; *Mewa Lal v. Kumarji Jha*, 10 C. L. J. 33; 13 C. W. N. 797.

The words "material irregularity" in this section include an irregularity of procedure materially affecting the merits of the case. An application of the section of the Code to a cause to which it does not apply is a material irregularity within the meaning of the section—*Shew Bux v. Shib Chunder*, 13 C. 225 (7 A. 336, *observed on*.)

Any error of law which amounts to a usurpation of authority in the act done by the Court comes within the scope of s. 115, C. P. Code; *Hindley v. Joyanarain*, 46 C. 962; 24 C. W. N. 288 (20 B. 259; 35 C. 641; 8 A. 111, 519; 13 C. 295; 18 C. 200; 41 C. 323, and 49 M. 723 *referred to*).

The error of the lower Appellate Court, in rejecting an unstamped document admitted by the first Court, was held to be a material irregularity in the exercise of its jurisdiction. The case of *Ameer Hossein v. Sheo Bux*, 11 C. 6 P. C., must be taken to have settled that it is not every error of law that will come within the scope of s. 622, C. P. Code, 1882 (s. 115), but it does not follow that no error of law, unless it is also an error of jurisdiction, can come within the operation of that section.—*Enat Mondul v. Batoram Dey*, 3 C. W. N. 581 (11 C. 6, P. C., *explained*: 1 C. W. N. 617, 626, and 633, *referred to*). See also *Chenbasapa v. Lalshman*, 18 B. 369, where the High Court set aside the decision of the lower Court on the ground that it acted upon *hundis* which were unstamped, and therefore inadmissible in evidence.

having been tried under the Small Cause Court powers, the decree was not appealable. The only remedy open to the aggrieved party was to apply under s. 25 of Act IX of 1887.—*Diwalibai v. Sadashivdas*, 24 B. 310.

Where a case properly cognizable by a Small Cause Court had been heard and determined by the Sub-Judge, and, on appeal, by the District Judge, the High Court, in the exercise of its extraordinary jurisdiction, annulled the proceedings of the two Courts.—*Bhimrav Jivaji v. Bhimrav Govind*, 11 Bom. H. C. 194. See also, *Sarnam Tewari v. Sakina Bibi*, 3 A. 417.

Section 25 of the Provincial Small Cause Courts Act (IX of 1887) was not intended to give in effect a right of appeal in all Small Cause Court cases, either on law or fact. The revisional powers given by that section are only exercisable where it appears that some substantial injustice to a party to the litigation has directly resulted from a material misapplication or misapprehension of law, or from a material error in procedure.—*Muhammad Bakar v. Bahal Singh*, 13 A. 277. See also, *Raghunath v. Official Liquidator*, 15 A. 139; *Sarman Lal v. Khuban*, 16 A. 476; and *Sarman Lal v. Khuban*, 17 A. 422. See however, *Poona City Municipality v. Ramji Raghunath*, 21 B. 250.

Under s. 25 of the Provincial Small Cause Courts Act, the High Court has wider revisional powers than under this section, and can even disturb a finding of fact of the lower Court on substantial ground.—*Turner v. Jogomohan Singh*, 27 A. 531; 2 A. L. J. 297; A. W. N. (1905), 77. See also *Mc. Carron v. Welti*, 27 A. 192; *Seth Rupchand v. Minhomal*, 8 S. L. B. 164.

Where a judge misapprehends the nature of the plaintiff's claim and the effect of art. 29 of the Provincial S. C. Court Act, he exercises a jurisdiction with material irregularity and the High Court has jurisdiction to interfere; *Indar Mal v. Budha*, 13 A. L. J. 58; 27 I. C. 620.

The High Court can revise the decision of a S. C. Court on a question of limitation; *Sheo Pershad v. Sheo Pershad*, 20 I. C. 175 (16 A. 476 referred to).

Where the finding of fact arrived at by the lower Court is entirely opposed to the evidence, the High Court has no power to interfere in revision; *In re Ganapathi*, (1912) M. W. N. 181; 15 I. C. 186.

Where a subordinate Court dealing with a suit of a Small Cause Court nature commits an error of procedure patent on the face of the record, the High Court will interfere in revision, *Ammasi Kutti v. Appalu*, 29 I. C. 234.

**High Court's Revisional Power in Cases under the Provincial Insolvency Act (III of 1907).**—An official Receiver appointed under the provisions of the Provincial Insolvency Act, when duly authorised by the High Court, has the same powers as the District Court, as regards dismissal of insolvency petitions. His order is open to appeal to the District Court under s. 22 (2) read with s. 52 of the Act; his order of dismissal is not liable to revision under this section, there being other remedy available; *Chidambaram v. Nagappa*, 38 M. 15; 24 M. L. J. 73.

**High Court's Revisional Powers under the Guardian and Wards' Act (VIII of 1890).**—An order of the District Judge selecting a suitable

leave to bring a fresh one on the same cause of action. The Appellate Court granted the application without assigning any reasons for its orders. *Held*, that the Appellate Court had acted with material irregularity within the meaning of s. 622, C. P. Code, 1882 (s. 115).—*Tirupati v. Mulla*, 11 M. 322.

A District Judge, in deciding a rent-suit, held that s. 188 of the Bengal Tenancy Act prohibited the Court from entertaining the suit in the form in which it had been framed, and therefore dismissed the suit.—*Held*, on an application under this section that the District Judge had acted in the exercise of his jurisdiction illegally, inasmuch as s. 188 had no application to the case, and that his decision must be set aside.—*Jugobandhu v. Jadu Ghose*, 15 C. 47. (14 C. 201 and 203 not followed. 11 C. 6 distinguished.) Referred to in *C. Ross Alston v. Pitambar Das*, 25 A. 509.

Where a Small Cause Court entertained a suit for rent under an erroneous impression that it was due under a contract, and passed a decree for the rent in arrears, *held* that, under this section, the High Court had power to set aside the decree.—*Manisha Eradi v. Snyali Koya*, 11 M. 220. Referred to in *C. Ross Alston v. Pitambar Das*, 25 A. 509.

Disregarding the provisions of s. 74 of the Contract Act in assessing damages is a material irregularity within the meaning of this section: *Maung Tha v. Shive Zan*, 27 I. C. 885.

On a point of fact, a Court cannot come to a finding without taking any evidence, especially where there is no affidavit on the record and the parties are not agreed as to the facts; *Jaban Saha v. Sebate Mondol*, 64 I. C. 85.

A Court acts with material irregularity in the exercise of jurisdiction when its decision is based upon evidence not taken in accordance with the law. A Court cannot examine witnesses without notice to parties or their pleaders and if it does so, it acts with material irregularity justifying an interference under this section; *Peary Lal v. Peary Lal*, 19 C. W. N. 903: 18 C. L. J. 646.

Whenever the Court below has refused to hear a party on the merits without just grounds, the High Court is entitled to interfere in revision; *Bachubai v. Ibrahim*, 24 Bom. L. R. 744.

One of the defendants in a mortgage suit which was decreed *ex parte* applied to the Sub-Judge to set aside the *ex parte* decree as against him. Thereupon the plaintiff applied to the District Judge for transfer of the case to some other Court; the District Judge issued a rule upon the said defendant. In the meantime, pending the hearing of the rule, the Sub-Judge set aside the *ex parte* decree. The District Judge dismissed the application for transfer on the ground that the Sub-Judge had already set aside the *ex parte* decree. *Held*, that the Sub-Judge acted with material irregularity, and the High Court could and should interfere; *Narayan Prasad v. Jotindranath*, 19 C. L. J. 258.

The jurisdiction of the District Judge, under s. 153 of the B. T. Act, is revisional and not appellate; therefore when he fails to consider whether the original Court has exercised a jurisdiction not vested in it or has acted in the exercise of its jurisdiction illegally or with material irregularity and treats the matter before it as, in substance, an appeal from the decree he acts illegally and with material irregularity in the exercise of his

the plaintiff, who moved the High Court under this section, to set aside the order of the Full Court as one which, at that stage of the proceedings, that Court had no right to make. *Held* that, in making the order in question, the Full Court had acted with material irregularity, and that the case must be remanded to be dealt with according to law.—*Ralli v. Parmanand*, 18 B. 642. See *Bissesswar Das v. Smidt*, 4 C. L. J. 46.

The High Court has no power under this section to revise the decision of the Full Bench of the Presidency S. C. Court on the question of limitation which that Court has power to decide; *Kuppusamy v. Narayaneer*, 16 M. L. T. 438: 25 I. C. 647. See also, *Ramgopal v. Joharmall*, 39 C. 473. [11 B. 488 (492), 18 A. 78, 11 C. 6 referred to] and *Kuppuswami v. Narayana*, 19 M. L. T. 24: 32 I. C. 3. See, however, *Shamul Kishan v. Girindra Nath*, 18 C. L. J. 594.

**High Court's Revisional Powers in Cases under the Rent Act (X of 1859).**—Section 153, Act X of 1859, does not preclude revision by the High Court of an order of a Collector which is final within the meaning of that section. The High Court has power either under this section or under s. 15 of the Charter Act, to interfere in cases where the lower Courts have not acted correctly in accordance with law.—*Mohant Gobind Ramanuja Das v. Lakhun Parida*, 11 C. W. N. 112 (12 C. L. R. 449: 8 C. L. J. 43, distinguished). See also, *Chaiton Patjosi v. Kunja Behari*, 15 C. W. N. 863; 14 C. L. J. 284; 38 C. 832.

**High Court's Revisional Powers in Cases under Chota-Nagpur Tenancy Act (VI of 1908 B. C.).**—Proceedings on application for enhancement of rent under the provisions of ss. 27 to 30 of the Chota-Nagpur Tenancy Act, are judicial proceedings and the Deputy Commissioners in the performance of their judicial duties under the said Act are subject to the appellate and revisional jurisdiction of the High Court. A judge in omitting to deal with the merits of an appeal, fails to exercise a jurisdiction vested in it by law; *Kartick Chandra v. Gorachand*, 17 C. L. J. 593 (38 C. 832. 14 C. L. J. 284: 15 C. W. N. 863 referred to). But see, *Umacharan v. Midnapur Zemindary & Co*, 19 C. L. J. 300.

Application to set aside sale under s. 215 of the Chota-Nagpur Tenancy Act on the ground of material irregularity—Refusal by Dy. Commissioner to summon witnesses as unnecessary.—*Held*, that the High Court could interfere in revision as there was a denial of the right of fair trial; *Nilmaninath Sahu Deb v. Prasad Asainath*, (1919) Pat. 60: 49 I. C. 389.

**High Court's Revisional Power in Cases under the Madras Rent Recovery Act or under the N. W. P. Act.**—Orders passed by a Collector under the Rent Recovery Act are not open to revision under this section.—*Venkatanarasimha v. Suranna*, 17 M. 298. See also, *Veli Periya v. Moidin Padsha*, 9 M. 332. See also, *Appandia v. Srihari*, 16 M. 451.

The High Court has no power to revise, under this section, order passed by a Collector under s. 183 of the North-Western Provinces Rent Act (XII of 1881) on appeal from an Assistant Collector of the second class.—*Ram Dayal v. Ramadhin*, 12 A. 198 (3 N. W. P. 60 distinguished).

**High Court's Revisional Powers in Cases under the Bombay Mamlatdar's Act.**—Where a Mamlatdar committed a formal error in the exercise of his judicial functions by following a circular of the executive Government as his authority—*held* that it is merely an irregularity and not a case for the

Under a decree of the Presidency Small Cause Court (the decree being a personal one against the judgment-debtor) trust property of which the judgment-debtor was a trustee was attached in execution, the beneficiaries under the trust not being parties to the proceedings. *Held*, that the attachment of trust property was such an irregularity of procedure as would justify the interference of the High Court under this section.—*In the matter of Shard*, 24 C. 574

Where a Second-class Sub-Judge returned a plaint for presentation in proper Court, on the ground that the subject-matter exceeded his pecuniary jurisdiction and the First-class Sub-Judge also returned it on the ground that the subject-matter was below his pecuniary jurisdiction; and where the Second-class Sub-Judge refused to review the former order, and an appeal therefrom was rejected by the Judge, the High Court set aside the order of the Second-class Sub-Judge and directed him to admit the plaint.—*Girdhar Lal v. Lallu Jagpran*, 20 B. 50. See also, *Mathura Nath v. Umesh Chunder*, 1 C. W. N. 581

An under-valuation of property in the proclamation of sale, is not a material irregularity within the meaning of s. 115 C. P. Code; *Hansraj v. Mohiuddin*, 29 I. C. 745.

Where an order of lower Court for consolidation of several suits is erroneous in principle and will lead to irretrievable mischief, the High Court can, under this section, set it aside, the lower Court having acted with material irregularity in the exercise of its jurisdiction; *Kali Charan v. Surja Kumar*, 17 C. W. N. 526.

An *ex parte* decree can be set aside only after service of notice on the plaintiff and it is illegal to set it aside without such notice; *Subbiah v. Daulat Jai*, 24 M. L. J. 482; 13 M. L. T. 344.

Where the Court entertains an application obviously out of time, without adjudicating the question of limitation, it acts with material irregularity and its order is liable to revision; *Tara Sankar v. Basiruddi*, 19 C. W. N. 970; 22 C. L. J. 589; *Kaliyaperumal v. C. V. A. R. Chetty*, 9 L. B. R. 71; 11 Bur. L. T. 73. But see *British India Steam Navigation Co., Ltd. v. Hussien Kasim*, 42 I. C. 536

**Interlocutory Orders, when Subject to Revision.**—The word "case" in this section is wide enough to include an interlocutory order, and the words "records of any case" include so much of the proceedings in any suit as relate to an interlocutory order and that the High Court therefore has the power to interfere in revision with orders, passed at any stage of a suit, though there may be another remedy open to an injured party, *e.g.*, by appeal from the final decree under s. 105; *Dhapi v. Ram Pershad*, 14 C. 768; *Govinda v. Kunja*, 14 C. W. N. 147; *Sivaprasad v. Tricomdas*, 42 C. 926; *Sarajubala v. Mohini*, 28 C. W. N. 991; 82 I. C. 1008; A. I. R. 1925 Cal. 204; *Rajani v. Rajabala*, 52 C. 128, 186; 85 I. C. 870; A. I. R. 1925 Cal. 320; *Kariya v. Tirukkavvelu*, 48 M. L. J. 349; 87 I. C. 90; A. I. R. 1925 Mad. 585; *Janardanam v. Verghese*, 48 M. L. J. 451; 87 I. C. 113; *Srikrishna v. Chandook*, 32 M. 334; 4 I. C. 509; *Bankey v. Ram Bahadur*, 4 Pat. L. J. 195; 50 I. C. 470; *Mani Lal v. Durga Prasad*, 3 Pat. 930; 80 I. C. 667; A. I. R. 1924 Pat. 673; *Jupitar General Insurance Co. v. Abdul Aziz*, 1 Rang. 231; 76 I. C. 482; A. I. R. 1924 Rang. 2. The Allahabad High Court in the Full Bench case of *Buddhu Lal v. Mewa Ram*, 43 A. 564; 63 I. C. 15 F. B., *held*, that the word "Case" in this

tion of the land contained therein in accordance with that contained in the mortgage-bond, and the Court made an order accordingly. On an application by the decree-holder for revision under this section, *held* that the High Court had no power to interfere.—*Narayanasami v. Natesa*, 16 M. 424.

An order refusing to amend a clerical error in the form of probate might be dealt with under this section.—*Girindra Kumar v. Rajeswari*, 27 C. 5.

**Order Permitting Withdrawal of a Suit.**—A Munsif having dismissed a suit, the plaintiff appealed and also applied to the Appellate Court to allow him to withdraw the suit with leave to bring a fresh one. The Appellate Court granted the application without assigning any reasons for its orders. *Held* that the Appellate Court had acted with material irregularity within the meaning of this section.—*Tirupati v. Multa*, 11 M. 322.

Where the lower Appellate Court assigned no reason for giving permission to the plaintiff nor did the application filed by the plaintiff for permission to withdraw the suit disclose any real defect or any sufficient reason for the grant of the relief prayed, the High Court interfered under s. 115 C. P. Code and set aside the order; *Subasini Devi v. Ashutosh Lahiri*, 39 C. L. J. 371; (*Rajendra v. Atul*, 44 C. 454 *refd. to*).

An order under Or. XXIII, r. 1, allowing withdrawal of a suit without sufficient grounds is an order liable to revision.—*Dick v. Dick*, 15 A. 169. See also, *Durbar Khachar v. Khachar*, 32 B. 348; *Khada Co. Ltd. v. Durgacharan*, 11 C. L. J. 45; *Mahipet v. Nathu*, 33 B. 722; 11 Bom. L. R. 1109; *Hira Lal v. Uday Chandra*, 16 C. L. J. 103; 16 C. W. N. 1027; *Bai Kashibai v. Shidapa Annapa*, 15 Bom. L. R. 823; 37 B. 682; followed in *Aiya Gounden v. Jagan*, 27 M. L. J. 477; 16 M. L. T. 253. See *Vēera Reddi v. Akka Reddi*, 28 I. C. 487; *Monbhari v. Sumer Chand*, 12 A. L. J. 441; 25 I. C. 175; *Eknath v. Ranoji*, 35 B. 261. *Ghulam Rasul v. Mt. Ramjan Bibi*, A. I. R. 1923 Lah. 97, 68 I. C. 753; *Chinta Rangayya v. Chinta Butchamma*, 6 L. W. 1 (1917) M. W. N. 719; *Basudeb v. Kadam-bini*, 40 I. C. 77; *Bisheshwar v. Brijraj*, 3 Pat. L. J. 630; *Munna Lal v. Chhabal Das*, 117 P. W. R. 1918; see also, 40 A. 612; 35 M. L. J. 27; *Shanu Shashk v. Dhan Sarkar*, 41 I. C. 934; *Rajendra Nath v. Bai Kuntha*, 34 I. C. 934. But see, *Bansi Singh v. Kishun Lal*, 41 C. 632 and *Kamta Prosad v. Ram Ratan*, 24 A. L. J. 721. A. I. R. 1926 All. 548 where it has been held that no revision lies from an order under Or. XXIII, r. 1, where the Court passing the order has exercised its discretion.

Where leave to withdraw a suit under Or. XXIII, r. 1, was disallowed by the trial Court but was granted by the Appellate Court, which had applied its mind judicially to the question which was before it, *held* that the High Court would not interfere in revision merely on the ground that it itself might have taken a different view in the matter; *Ratan Lal v. Mohammad Hamidullah Khan*, 19 A. L. J. 47; 60 I. C. 899.

**Order Setting Aside or Refusing to Set Aside an Auction Sale.**—An execution-sale was set aside by the lower Court on the ground of irregularity and illegality, but the order of the lower Court was reversed, and the sale was confirmed by the Appellate Court. On an application to the High Court to set aside the order of the Lower Appellate Court confirming the sale, *held* that the High Court had a right, under its summary power, to set aside the sale itself, notwithstanding the order of the lower Appellate Court.—*Khekraj Koeni v. Gendh Lal*, 5 C. 878.

revision under s. 622, C. P. Code, 1882 s. 115.—*In the matter of Basharat Ali*, 24 C. 133.

An application under s. 622, C. P. Code, 1882 (s. 115), cannot be entertained in the case of those interlocutory orders against which, though no immediate appeal lies, a remedy is supplied by s. 591, C. P. Code, 1882 (s. 105), which provides that they may be made a ground of objection in the appeal against the final decree. The purpose with which s. 622, C. P. Code, 1882 (s. 115), was framed was to enable a party to a suit to get a decision or order of a lower Court rectified where there would otherwise be no remedy.—*Moti Lal v Nana*, 18 B 35 followed in *Nandram v Bhopal Singh*, 34 A 592 10 A. L. J. 130. See also, *Bibi Chandoo v. Jawala Pershad*, 163 P. W. R. 1911 253 P. L. R. 1911, *Nihala Mall v Bagu Ram*, 164 P. W. R. 1911 243 P. L. R. 1911

An order to adjourn a case conditional on payment of costs thereof is merely an interlocutory order and is not one of those the revision of which is contemplated under this section, *Mul Chand v Juggi Lal*, 12 A. L. J. 460: 25 I. C. 207

The High Court should not interfere in revision with an interlocutory order directing the plaintiff to pay additional Court-fees and granting time for the payment of such fees; *Acha v Sankaran*, 50 M. L. J. 497: 95 I. C. 421: A. I. R. 1926 Mad 768

Where the Court below refused to raise an issue clearly arising from the pleading of the party, without assigning any reason whatever, the High Court interfered under s. 107 of the Government of India Act; *Sheo Prasad v Shukhu Mahto*, 4 Pat. L. T. 401: 72 I. C. 148.

Unless there has been an improper exercise of jurisdiction by the subordinate Court or an improper refusal to exercise the jurisdiction vested in it, the High Court will not interfere in revision under this section, specially where the legality of an interlocutory order can be questioned by way of appeal against the final decree that may be passed in the suit; *Sambasiva Aiyar v. Ganapathi*, 23 I. C. 564. (32 M. 62 and 334: 36 M. 275 followed); *Nagaraja v. Pythinatha*, 21 M. L. J. 484: 9 M. L. T. 248; *Chandi Ray v. Kripal Rai*, 15 C. W. N. 682; *Hossain Sahib v. Hammad Sahib*, 16 L. W. 312: 31 M. L. T. 180.

Where an interlocutory order was passed without jurisdiction, the High Court has power to interfere under this section and to set aside the order; *Venkatachala v. Narayana*, 24 M. L. J. 455: (1918) M. W. N. 399: 19 I. C. 672 See also, *Mankolam v. Mankolam*, 22 M. L. J. 60: 10 M. L. T. 451; *Gobind v. Kunja Behari*, 10 C. L. J. 407: 14 C. W. N. 147; *Sawan Singh v. Rahman*, 55 I. C. 739.

When the Court below has improperly refused to join a person as a party to the proceedings, it is competent to the High Court to interfere in revision; *Dwarkanath v. Kishori Lal*, 11 C. L. J. 426: 14 C. W. N. 703; *Promotha Nath v. Rakhal Das*, 11 C. L. J. 420

The use of the revisional powers would be justified where the lower Court has decided that the suit is not bad for misjoinder of parties and causes of action; *Velappa Nadar v. Chidambara Nadar*, 43 M. L. J. 277: (1922) M. W. N. 316.



tion, interfere, except under circumstances of a very special nature, with the discretion of a Judge who has transferred execution-proceedings under a decree from one subordinate Court to another—*Krishna Velji v. Bhaumansaram*, 18 B. 61.

The High Court in revision under s. 115, C. P. Code, cannot interfere with the discretion of a subordinate Court as to whether it should or should not review its judgment; *Bhabasindhu v. Kesabchandra*, 40 I. C. 463.

When the Special Judge under the Dekhan Agriculturists' Relief Act (Bom Act XVII of 1879) entertain a clear opinion that the findings of the Subordinate Judge on the question of fact are erroneous, and exercises his discretion in setting aside the decree, the High Court will not, in its extraordinary jurisdiction, interfere with that discretion except under most exceptional circumstances.—*Rayachand Mayachand v. Rahimbhai*, 18 B. 347. See also, *Guru Basaya v. Chanmalappa*, 19 B. 286 (15 B. 180, dissented from); and *Ram Singh v. Kisan Singh*, 19 B. 116 (19 B. 113, approved).

The Collector, when granting a certificate under section 10 of the Bombay Hereditary Offices Act (II of 1874), acts judicially, and is subject to the supervision of the High Court; but the High Court will not interfere with his discretion, unless there is a violent misuse of authority or reckless disregard or wanton perversion of the law on his part.—*Collector of Thana v. Bhaskar Mahadev*, 8 B. 264.

Where a District Court admitted an appeal presented out of time, on the ground that the appellant, having filed an application for review within the time allowed for an appeal, was entitled to exclude the time occupied in prosecuting the review, held that the High Court could not interfere on revision.—*Vasudeva v. Chinnasami*, 7 M. 584. See also, *Thandayuthapani v. Chinnathal* 24 I. C. 872.

The High Court should not under s. 115 of the C. P. Code, revise the lower Court's discretion in regard to excusing the delay in applying under Or. XXII, r. 9 or for a review; *Krishnaswami Aiyar v. Seethalakshmi*, (1918) M. W. N. 888: 25 M. L. T. 116: 45 I. C. 269.

It is purely a matter of discretion to grant or refuse an adjournment and the Court of revision will not lightly interfere with this discretion deliberately exercised; *Shivadas v. Pamanmal*, 8 S. L. R. 275: 27 I. C. 942.

The exercise of appellate Court's discretion in not extending time spent in obtaining copies is not open to revision; *Raghu v. Madghia*, 10 N. L. R. 189.

Mere erroneous exercise of discretion is no ground of interference in revision; *V. Venkata Subbia v. Seshachalam*, (1911) 2 M. W. N. 257: 22 M. L. J. 136: 10 M. L. T. 549.

**High Court's Superintending Power under Sec. 15 of the Charter Act.**—If the High Court is satisfied that an interlocutory order, such as an order for production of documents, has been made without jurisdiction, or under such circumstances as are likely to cause irreparable injury to one of the litigants, it has powers to set matters right under section 15 of the Charter Act; *Gobind Mohan v. Kunja Behari*, 10 C. L. J. 447.

party's remedy, if the order was made without jurisdiction, is by way of revision under this section; *Sheikh Sadarnuddin v. Sheikh Ekramuddin*, 19 C. L. J. 225; 18 C. W. N. 22 (31 M. 49 *refd.* to).

It is the essence of a judicial order upon an application that the applicant should have an opportunity of being heard in support of his prayer. Where the Court rejects an application for review without hearing the applicant the Court acts with material irregularity in the exercise of its jurisdiction; *Jaydhan v. Rank Lal*, 24 I. C. 691.

It is not open to a Court, after deciding a matter on the authority of one ruling of the High Court, to review that order on the basis of another ruling of equal authority. Such a case can be dealt with by the High Court on revision; *Chandi Charan v. Monotanjan*, 17 C. L. J. 410.

The High Court has power to entertain a revision petition against an order refusing to grant a review, *Pena Madi v. Thommat* (1911), 2 M. W. N. 252; 10 M. L. T. 284, *see also*, *Fauz Muhammad v. Muhammad Zakira*, 195 P. L. R. (1911), 11 I. C. 5.

The High Court will not interfere on revision where the right result has been reached by the lower Court on review of its wrong order; *Balla-pogada v. Ballapogada*, 31 M. 414.

**Power to Interfere with Decrees or Orders Passed upon an Arbitration Award.**—No appeal lies from a decree upon an award pronounced under s. 522, C. P. Code, 1882 (the Second Schedule), except in so far as the decree may be in excess of, or not in accordance with, the award. The principle of finality that finds expression in that section is quite in accordance with the tendency of modern decisions and now-a-days no Court will sit as a Court of Appeal on awards in respect of matters of fact or in respect of matters of law. An application under s. 622, C. P. Code, 1882 (s. 115), to set aside an award is incompetent. Such an application is more objectionable than an appeal—*Ghulam Khan v. Muhammad Hassan*, 29 C. 167, P. C.; 6 C. W. N. 226, P. C. (Full Bench case in 84 P. R. 1901, *overruled*); *Prabhu Dayal v. Munshulal*, 100 I. C. 761; A. I. R. 1927 All. 573. *See Sarut Singh v. Jiman Singh*, 63 P. L. R. 1905; 41 P. R. 1905.

Where the arbitrators nominated by the parties to a suit, and appointed by the Court, declined to act, and the Court appointed two arbitrators in their place against the consent of one of the parties—*held* that the award made by them and the decree passed upon the award was illegal, and the High Court could set aside the decree under this section.—*Pugardin Ravu than v. Maidinsa*, 6 M. 414.

Where a decree was passed in the terms of an award without giving notice of the filing of the award under s. 516, C. P. Code, 1882 (Second Schedule)—*held* that the omission to give notice was a material irregularity within the meaning of s. 622, C. P. Code, 1882 (s. 115)—*Rangasami v. Muttasami*, 11 M. 144; *Darbari Ram v. Bhika Ram*, 64 I. C. 394; *Gopi Nath v. Naresh*, 63 I. C. 243.

Where an order is made refusing to file an award, no appeal lies from it, but the High Court can interfere under this section.—*Mana Vikrama v. Mallicherry*, 3 M. 68.

An order under s. 521, C. P. Code, 1882 (Second Schedule), setting aside an award, on the ground of the arbitrator's misconduct, is not subject

A Civil Court in making an order under s. 195 of the Cr. P. Code, does not exercise criminal jurisdiction. The High Court can interfere with such order under s. 115 of the C. P. Code; *Sew Bollock v. Ramadhin*, 37 C. 714: 14 C. W. N. 806 and *Ram Prasad v. Raghubar* 37 C. 13: 13 C. W. N. 1038. See also, *Beni Prasad v. Saru*, 33 A. 572. See also, *Emperor v. Har Prasad*, 40 C. 477 F. B.: 17 C. L. J. 245; *Muhammed Yasin v. Cheda Lal*, 13 A. L. J. 709. In the above F. B. case, all the previous cases have been reviewed; where the Court below grants sanction to prosecute on evidence which is legally inadmissible, it acts with material irregularity and the order is open to revision by the High Court; *Peary Lal v. Emperor*, 21 A. L. J. 399: 75 I. C. 148.

**Appeal against Order of a single Judge refusing Application for Revision.**—An appeal lies against an order passed by a single Judge of the High Court under this section, when such order amounts to a judgment.—*Chappau v. Moidin Kutti*, 22 M. 68, F. B. followed in *Shew Prasad v. Ram Chunder*, 41 C. 323 and *Srinivas v. Ramaswami*, 29 M. L. J. 12: 18 M. L. T. 46: 29 I. C. 846. But no appeal lies under s. 15 of the Letters Patent, against an order of a single Judge dismissing an application under s. 622, C. P. Code, 1882 (s. 115).—*Sriramulu v. Ramasami*, 23 M. 109. See also, *Nisar Ali v. Ali*, A. W. N. (1905), 218; *Rama Aiyar v. Venkatachella*, 30 M. 311: 17 M. L. J. 123 and *Salig Ram v. Ramji Lal*, 28 A. 554, *Jalan Chand v. Assaram*, 22 C. L. J. 22; *Peary Lal v. Banamali*, 22 C. L. J. 40.

Where the Judges of a Division Court being equally divided in opinion discharged a rule under s. 115 it is doubtful whether a Letters Patent appeal lies against the judgment —*Baijnath v. Raja Jung Bhadur*, 22 C. L. J. 113.

**High Court's Power of Revision in Miscellaneous Cases.**—The Civil Court has no power to refuse to admit a person who has obtained a certificate of administration under Act XL of 1858, to defend a suit on behalf of a minor as his guardian. Where a Sub-Judge had so acted, held that the High Court had no power to revise his order under this section.—*Baldeo Das v. Gobind Shanker*, 7 A. 914.

The High Court has power to interfere, where a Civil Court exercises its jurisdiction improperly in assessing municipal taxes and fixing the amount of house tax —*Hamir Sing Fatesing v. The Amod Town Municipality*, 7 Bom L. R. 288.

A Sub-Judge having permitted the junior widow of a Hindu to be made a party to the proceedings in execution of a decree obtained by the senior widow against a debtor of their deceased husband, the High Court declined to interfere under this section.—*Lingammal v. Ghinna*, 6 M. 227.

Plaintiff filed two suits on the same day for rent of two successive years. The sum of the two claims exceeded the pecuniary limit of the Court's jurisdiction. The suit for rent of the first year was dismissed under s. 43, C. P. Code, 1882 (Or 11, r. 2) on the ground of splitting a claim. Held in an application under s. 622, C. P. Code, 1882 (s. 115) to set aside the order, that although s. 43, C. P. Code, 1882, Or. 11, r. 2) did prevent the maintenance of the two suits, yet the proper course was to allow the plaintiffs to withdraw both suits, and file a fresh suit in a competent Court. —*Alagu v. Abdoola*, 3 M. 147.

the High Court. The High Court set aside the decree under ss. 115 and 151 of the C. P. Code; *Velchand v. Liston*, 38 B. 638; 16 Bom. L. R. 517.

Where the Court passed its judgment and decree on award before the expiry of the time allowed for making an application to set aside the award, *held*, that the lower Court acted without jurisdiction or with material irregularity in the exercise of its jurisdiction, so as to call for the interference of the High Court under s. 115 of the C. P. Code; *Rudraraju v. Rudraraju*, 12 M. L. T. 608; (1912) M. W. N. 1232; 17 I. C. 431. See also, *Mirali Visram v. Sheriff Dcrji*, 13 Bom. L. R. 1017.

A charge of misconduct against an arbitrator, if made out, invalidates the award, and it is incumbent upon the Court to examine him in cases of charge of misconduct, and to refuse to do so is to commit a material irregularity within the meaning of s. 115, C. P. Code; *Juggobundhu v. Chand Mohun*, 22 C. L. J. 237.

An order refusing to hear objections to an award on the ground of the objections having been filed out of time is open to revision where as a matter of fact they had been filed in time.—*Nanjunda v. Ramaswamy*, 2 L. W. 1115.

**High Court's Revisional Power in Claim Cases.**—Where the Court below in a claim case refuses to determine the one question it was competent to decide, namely, the question of possession, and, on the other hand, determines the question it was not competent to investigate, namely, the question of title, the High Court will set aside the order in revision; *Satkari Mondal v. Tirtha Narain*, 24 I. C. 62. See also, *Subhu Reddiar v. Kumaraswamy*, (1913) M. W. N. 856; 21 I. C. 46; where it has been held that where a claim under Or. XXI, rr. 58 to 63, has been disallowed, no revision lies to the High Court, as the petitioner has a remedy by suit. See also *Mahabir Prasad v. Jogenda Nath*, 26 C. W. N. 50.

The Court acted in excess of its authority in violation of the express provisions of the statute in allowing a claim petition preferred under Or. XVI, r. 58, after the property attached was sold, and the order was set aside on revision; *Gopal Chundra v. Notobar*, 16 C. W. N. 1026. See also, *Braja Bala v. Gurudas*, 33 C. 487; 3 C. L. J. 293.

Where the lower Court has disposed of a case without deciding questions which under the Code it is bound to decide, *e.g.* (the question of possession in a claim case), the High Court ought to interfere under s. 115 of the C. P. Code; *Rangammal v. Sevugan Chetti*, 28 M. L. J. 327.

**High Court's Revisional Power in Pauper Cases.**—An application for permission to appeal as a pauper was rejected on the ground that it was not presented by the applicant in person, but by his pleader. *Held*, that s. 622, C. P. Code, 1882 (s. 115), did not apply to a proceeding of so purely an interlocutory character as mentioned in s. 592, C. P. Code, 1882 (Or. XLIV, r. 1), and such application therefore could not be entertained.—*Harsaran Singh v. Muhammad Raza*, 4 A. 91.

Where an application for leave to sue in *forma pauperis* was rejected on the ground that the applicant was possessed of some ornaments more than six months before the date of the application, the High Court holding the lower Court's procedure to be materially defective went into the merits and set aside the order; *Sarojini Dasi v. Bholanath Das*, 24 I. C. .

One applied for leave to sue in *forma pauperis* to recover assets forming part of the estate of a deceased person. His application was dismissed for non-production of a certificate under Act VII of 1880: *Held*, that the application was wrongly dismissed, and that the High Court has jurisdiction to interfere on revision under this section.—*Kammathi v. Mangapa*, 16 M. 484.

**Collector's Power to Move the High Court in Pauper Suits.**—The plaintiff, after having filed his suit in *forma pauperis*, came to an amicable arrangement with the defendants and asked the Court that the suit should be dismissed. The Court granted this application but made no order as to the payment of Court-fees. Thereupon the Collector moved the High Court under s. 622, C. P. Code, 1882 (s. 115), to direct the lower Court to make an order for the payment of Court-fees under s. 412, C. P. Code, 1882 (Or. XXXIII, r. 11). *Held*, that the Collector, though not a party to the suit, was entitled to move the High Court under s. 622, C. P. Code, 1882 (s. 115).—*Collector of Kanara v. Krishnappa*, 15 B. 77. See also, 16 B. 454, 464 and 23 M. 73.

**High Court's Revisional Power in Cases Under the Religious Endowments Act (XX of 1863).**—An order passed under s. 18 of Act XX of 1863, refusing leave to sue, is not appealable, nor, if the Judge has exercised his discretion, liable to revision under this section.—*In re Venkateswara*, 10 M. 90 and 98-note. Referred to in *Ramanathan v. Ananthanarayana*, 33 M. 412; 7 M. L. T. 126.

An order made by a Civil Court under the powers conferred by s. 5 of Act (XX of 1863) is a judicial adjudication in the matter before it, and it is competent to the High Court to entertain a civil revision petition against such an order.—*Gopala Ayyar v. Arunachallam*, 26 M. 85. See also, *Vasudeva v. The Negapatam Devasthanam*, 38 M. 591; *Vasudeva v. Devasthanam Committee of Negapatam*, 25 M. L. J. 536; 14 M. L. T. 354.

An order of a District Judge appointing a trustee of a religious endowment is not appealable but subject to revision under this section.—*Samasundara v. Vythilinga*, 19 M. 285 (11 M. 26, *followed*; and 4 M. 295, *dissented from*).

The order of the District Judge directing the members of the Devasthanam Committee to fill up by election the vacancy caused by the death of a life member of such committee was without jurisdiction, as the District Judge was not authorized by s. 10 of the Religious Endowments Act to direct the committee to hold the election. *Held*, therefore, that the High Court was right in setting aside his orders in exercise of their powers of revision under s. 115, C. P. Code; *T. A. Balakrishna Udayar v. Vasudeva Aiyar*, 22 C. W. N. 50.

A grant of leave to sue under s. 18 of the Religious Endowments Act (XX of 1863) on an unverified application not presented to Court by the applicant or his pleader is a material irregularity within the meaning of this section, and the order is subject to revision.—*Andoo Miyan v. Muham-mad Davud Khan*, 24 M. 685.

Where an application for sanction does not clearly set forth the nature of charges against each of the trustees, the Judge acts with material irregularity in according its sanction upon such an application.—*Chitvanarker Sahib v. Mohiuddin Sahib*, 15 M. L. J. 221.

any order from the Civil Court, and an application against his order lies in the High Court under this section; *Gobindarane v. Brindarane*, 35 C. 1104; 12 C. W. N. 1039.

**High Court's Power to Revise the Decision of Settlement and Survey Officers.**—The High Court has no jurisdiction either to entertain a second appeal from, or to interfere under this section, with an order of a Special Judge in regard to settlement of rents.—*Sheikharat Koer v. Nirpat Roy*, 16 C 596. Dissented from in *Upadhaya Thakur v. Persidh Singh*, 23 C. 723, F. B.

Where a decision of the Settlement Officer, in a case under s. 104, clause (2), of the Bengal Tenancy Act, dealt with the question of the status of the ryots, and was passed before the record had been framed; and after the record had been framed, there was no dispute as to correctness of any entry except the entries of the rent settled, *held* that the order of the Special Judge on appeal from such decision of the Settlement Officer was not open to special appeal to the High Court, nor subject to revision under s. 622, C. P. Code, 1882 (s. 115)—*Gopinath v. Adoita Naik*, 21 C. 776.

No second appeal lies from an order of the Special Judge dismissing an appeal, on the ground that no appeal lay to him in a case of a boundary dispute which had been tried and decided by a Settlement Officer acting as a Survey Officer under Pt. V of the Bengal Survey Act (V. of 1875). The High Court also declined to interfere under s. 622, C. P. Code, 1882 (s. 115), being of opinion that, in holding that no appeal lay to him, the Special Judge had not refrained from exercising any jurisdiction which he ought to have exercised.—*Irshad Ali v. Kanta Pershad*, 21 C. 935.

**High Court's Revisional Powers in Cases under the Provincial Small Cause Court Act (IX of 1887).**—A Small Cause Court having dismissed a suit brought by a pleader to recover fees from his client, on the ground that such suit was not maintainable, as it was based on an oral contract, which could not be enforced by reason of the provisions of the Legal Practitioners Act, the High Court, under this section, reversed the decision of the S. C. Court.—*Rama v. Kunji*, 9 M. 375.

In a suit in a Small Cause Court for rent due in respect of two pieces of land the Court passed a decree in favour of the plaintiff. The defendant moved the High Court under this section, which came on for hearing before one Judge, who held that the Small Cause Court had failed to give effect to a former decree between the parties in respect of one piece of land, and made an order reversing the decree as to that, and calling for a report of what was due on the other piece of land. On appeal by the plaintiff under s. 15 of the Letters Patent, *held* that, even if the Sub-Judge had failed to give effect to the previous decree, the error was not such as to give the Court jurisdiction to revise his proceedings under this section.—*Vangamudi v. Ramasami*, 14 M. 406.

A Sub-Judge tried a suit under his Small Cause Court powers and passed a decree. The Appellate Court reversed the decree, being of opinion that the suit was not of a Small Cause Court nature, and remanded the case for trial under the ordinary procedure. The Sub-Judge made a reference under s. 646-A, C. P. Code, 1882 (Or. XLVI, r. 6): *Held* that the reference was not authorized under that section. The High Court could, however, deal with the case under this section. *Held* also, that the suit

husband for a Mahomedan girl on the basis of the report of a Hindu Nazir is not appealable under s. 47 (1) of the Guardian and Wards' Act, but the High Court can set aside the order in the exercise of its revisional jurisdiction; *Monijah Bibi v. District Judge of Burbhun*, 20 C. L. J. 91; 19 C. W. N. 290.

An order recalling the order previously made for the appointment of the guardian is not appealable under s. 47 (g) of the Guardian and Wards' Act; but the order is subject to revision under s. 115 of the C. P. Code; *Rathmoni Das v. Ganada Sundari*, 20 C. L. J. 213; 19 C. W. N. 84.

An application by the mother for custody of the minor was rejected by the District Judge on the ground of jurisdiction. *Held* that the order is open to revision by the High Court, *Ulma Kuar v. Bhagwantia Kuar*, 18 A. L. J. 742; 20 I. C. 416.

Where no notice was served upon a person interested in the result of an application for guardianship of a minor, nor was he made a party in the application, he cannot file an appeal from the order passed on the application; but he can file a petition for revision under s. 115, C. P. C.—*Jhandehru v. Baijnath*, 18 O. C. 66; 27 I. C. 121.

Orders under s. 31 of the Guardian and Wards' Act are open to examination by the High Court on the revision side: *Ramjas v. Ghani*, 55 I. C. 597.

**High Court's Revisional Power in Cases under the Presidency S. C. Court Act.**—*Held* that the High Court in the exercise of its superintending power will not ordinarily interfere except in cases of grave and otherwise irreparable injustice.—*Ismaelji v. Macleod*, 81 B. 198; 8 Bom. L. R. 969.

Where the decision of the Judge of the Presidency Small Cause Court amounted to an error in law and not to an illegality or material irregularity in the procedure.—*Held*, that the High Court was not entitled to interfere in revision under s. 115; *Haranchandra v. The Royal Exchange Association*, 23 C. W. N. 759.

The Registrar of the Presidency Small Cause Court has no jurisdiction to entertain an application for new trial to set aside an *ex parte* decree made by him for default, and the High Court has jurisdiction to deal with the case under this section—*Haladhar Mailu v. Choytonna Maitee*, 80 C. 588; 7 C. W. N. 547 (29 C. 498 explained). See also, *Sarat Chandra v. Brojo Lal*, 30 C. 986; 7 C. W. N. 843.

The Presidency S. C. Court being subordinate to the High Court, the High Court, under s. 115 of the C. P. Code, has power to revise a proceeding taken under s. 41 of the Presidency S. C. Court Act, 1883; *Ramasami Naidu v. Venkataramanjulu*, 26 M. L. J. 467; (1914) M. W. N. 368; 23 I. C. 572 (30 C. 588, 37 C. 714, 80 C. 986 referred to). See also, *Rangiah Naidu v. Rangiah*, 31 M. 490; *Johan Smidt v. Ram Prasad*, 38 C. 425. The High Court has power under this section to revise the decision of the Presidency S. C. Court: *Venkataramanjulu v. Ramaswami*, 29 M. L. J. 353; 18 M. L. T. 164; *Nagoor Meera v. Sookulal*, 18 M. L. T. 254; 2 L. W. 719.

The plaintiff sued the defendants in the Calcutta Small Cause Court to recover damages for breach of contract to deliver goods. The Full Court, on the statement of facts, and before evidence was gone into, decided against

exercise of the extraordinary jurisdiction of the High Court.—*Nana Bayaji v. Pandurany Varuder*, 9 B. 97.

A party aggrieved by a Mamlatdar's decree or order may apply to the High Court to set it aside or may question its validity by a suit in a civil Court.—*Vora Isaballi v. Dandbhari*, 14 B. 371. See also, *Nathekha v. Abdul Ali*, 18 B. 449, *Ram Rao Talyaji v. Babaji*, 20 B. 630; and *Kashinath v. Nana*, 21 B. 731 and 775.

The High Court will not interfere on a reference by the Collector with a Mamlatdar's decision in a possessory suit. The aggrieved party may himself apply to the Court.—*Pandu v. Bharada*, 21 B. 806.

A Collector exercising judicial function under the Mamlatdars Court's Act (II of 1906) is subject to the superintendence and control of the High Court under s. 115 of the C. P. Code; *Purshottam v. Mahadu*, 37 B. 114 [8 B. 264 (267) and 268 referred to].

**Order Amending or Refusing to Amend a Decree or a Clerical Error.**—An amendment by the court of the first instance of its decree, after it has been affirmed by the Appellate Court is made without jurisdiction; *Brij Narain v. Tejbal Bilram*, 32 A. 295 P. C.; 14 C. W. N. 667; 11 C. L. J. 560; 32 Bom. L. R. 444; 20 M. L. J. 587; followed in *Krishna Uppadhya v. Ganapayc*, 28 I. C. 586.

High Court can correct a mistaken calculation of Vakil's fee in the lower Court's decree but not an omission to enter proportionate costs as this could have been corrected by appeal.—*Sankuratri v. Upalpati*, 24 I. C. 878.

Where a Court improperly refused to amend a decree, which was at variance with the judgment, held that, in so acting, the Court had acted in the exercise of its jurisdiction illegally and with material irregularity, within the meaning of this section, and its order was consequently subject to revision under this section.—*Balmakund v. Sheo Jatan*, 6 A. 125. See also *Dhan Singh v. Basant Singh*, 8 A. 519.

There is no appeal from an order under s. 206, C. P. Code, 1882 (Or. XX, r. 6, s. 152) amending a decree not in conformity with the judgment. The remedy, if any, in such a case would be by an application under this section.—*Nalinakshya Ghosal v. Mafakshar Hossain*, 28 C. 117; 5 C. W. N. 192 (25 C. and 6 C. 22, referred to). See also, *Menat Ali v. Amwar Ali*, 9 C. W. N. 605; and *Raghunath v. Raj Kumar*, 7 A. 876 (on appeal from 2 A. 276). But see, *Abdul Hayat v. Chunia Kuar*, 8 A. 377; *Huhammad Sulaiman v. Fatima*, 11 A. 314; *Visvanathan v. Ramanathan*, 24 M. 646, and *Jivraj v. Pragji*, 10 M. 51.

In a suit for recovery of a certain sum of money and interest up to date of suit, and for interest during the suit and subsequent to decree until satisfaction thereof, the Court, in its judgment, awarded a specified sum of money, and disallowed the rest of the claim. Subsequently the Court amended its decree by adding a decretal order for the payment of interest during the pendency of the suit, and after decree until the satisfaction of the debt. Held the order awarding interest by amending the decree was illegal, and was open to revision under this section.—*Hasan Shah v. Sheo Prasad*, 15 A. 121.

The holder of a mortgage-decree applied, under s. 206, C. P. Code, 1882 (Or. XX, r. 6, s. 152) to have the decree amended by bringing the descrip-



The High Court has jurisdiction to interfere in revision with the wrong exercise by the Courts below of powers vested in them under Or. XXI, rr. 89 to 92, dealing with confirmation or setting aside of auction sale; *Santosh Bala v. Ramchandra*, 67 I. C. 286; *Srini Chandra v. Sadhu Charan*, (1918) Pat. 284.

The purchaser at an execution-sale succeeded, by the exercise of fraud and collusion with the agent of the execution-creditors, in becoming the purchaser at a depreciated value. There was no material irregularity in publishing or conducting the sale. Held that the High Court had power under this section, to rescind the order of the lower Court confirming the sale.—*Subhaji Rau v. Srinirasa Rau*, 2 M. 264.

**Orders Allowing or Disallowing Applications for Rateable Distribution.**—No application for revision under this section lies against an order rejecting an application for rateable distribution; the applicant can bring a regular suit—*Lachmi Dayal v. Srikishna*, 2 A. L. J. 370. But see *Wali Mohamed v. Abdul Hamid*, 95 I. C. 205; A. I. R. 1926 Nag. 380, in which it has been held that revision lies against an order rejecting an application for rateable distribution, though a remedy by suit is open to the applicant under the provisions of s. 73 itself. See also, *Sreekrishna v. Chandook*, 32 M. 334; *Somasundaram v. Tiru Narayana*, (1914) M. W. N. 738; *Radhe Kishan v. Bholu Mal*, 171 P. W. 1912; 176 P. L. R. 1912; *Bishun Mohan v. Narayan Prasad*, 74 I. C. 140.

Where a rateable distribution was ordered among decree-holders whose applications had been struck off the file prior to realization of assets, held that it was open to the party injured to apply to the High Court under this section to revise the order.—*Tiruchittambala v. Seshayyengar*, 4 M. 383.

A debtor, against whom several decrees had been passed, filed his petition in the Insolvent Court at Madras, and the usual vesting order was made. One of the decree-holders had already attached property of the insolvent, and had obtained an order for sale in a District Court, and now another decree-holder applied to the same Court for the attachment of other property and for rateable distribution of the proceeds of the sale to be held in execution of the attachment already made. The District Judge held that the vesting order was a bar to both of these applications. Held, on an application under this section, that the order rejecting the application for rateable distribution was wrong.—*Viraraghava v. Parasurama*, 15 M. 372.

The High Court can interfere in the exercise of its revisional jurisdiction where the Court below refused to exercise the jurisdiction vested in it, by reason of an erroneous interpretation of the provisions of s. 73 of the Code; *Maharaja of Burdwan v. Apurba Krishna*, 14 C. L. J. 50; 15 C. W. N. 872. See also, *Indra Chand v. Ghanshyam*, 9 C. L. J. 210; *Madhusudan v. Rashmohan*, 21 C. L. J. 614.

An order under s. 73 of the C. P. Code passed as between parties who are not same as in the decree, in execution of which assets were realized under this section is not appealable under s. 47 and the order of the District Judge on appeal, setting aside the order of the Munsif, is without jurisdiction, and the High Court should interfere in revision under s. 115 of the Code; *Jagadish Chandra v. Kripanath*, 36 C. 130 (26 M. 176 followed).

**High Court's Power to Interfere with Discretionary Powers of Subordinate Courts.**—The High Court will not, in its extraordinary jurisdiction.

The High Court in the exercise of superintending powers will not ordinarily interfere except in cases of grave and otherwise irreparable injustice. *Jamali v. Macleod*, 31 B. 139; 8 Bom. L. R. 960.

The High Court will interfere, under section 15 of the Charter Act with an order made by a lower Court which is merely contrary to law, when that order has been passed in consequence of a wilfully false statement made by the opposite party.—*Roghu Nundun v. Mohesh Lall*, 3 C. L. R. 137.

Whether a decree for rent under Act X of 1859, made in one district, can be transferred to another for execution, is a question which the High Court can decide in the exercise of its "superintendence over all Courts subject to its appellate jurisdiction" under s. 15 of the Charter Act.—*Nilmoni Singh v. Tara Nath*, 9 C. 295; 12 C. L. R. 361; L. R. 9 I. A. 174.

The High Court has powers under this section or under s. 15 of the Charter Act to interfere in cases where the lower Courts have not acted correctly in accordance with law.—*Mohant Gobinda Ramanuja Das v. Lakhun Parida*, 11 C. W. N. 112; 8 C. L. J. 48. See also, *Mankolam v. Mankolam*, 22 M. L. J. 60; 10 M. L. T. 451.

High Court can interfere under s. 15 of Charter Act when lower Court issues commission to examine a witness on grounds other than those mentioned in the Code.—*Soma Sundaram v. Manick Vasaka*, 31 M. 60. The ruling of the Calcutta High Court that the High Court has power to interfere under s. 15 of the Charter Act with the orders of the Subordinate Courts passed without jurisdiction has been approved by the Privy Council in *Nilmoni Singh Deo v. Tara Nath Mukerji*, 9 C. 295.

Where an order is passed by the lower Court staying sale of property, it is not within s. 115, as no case is decided, though such an order may be interfered with under the general power of superintendence under the Charter Act; *Sardhari Sah v. Hukumchand*, 41 C. 875; 18 C. W. N. 662.

Where the lower Court dismissed the plaintiff's suit in its entirety, on the ground of his co-sharer not having complied with the requirements of s. 15 of the Bengal Tenancy Act, the High Court can interfere under s. 115 of the C. P. Code and under s. 15 of the Charter Act, *Tarinicharan v. Chandra Kumar*, 14 C. W. N. 788. See also, *Sital Chandra v. Sheikh Afiluddin*, 13 C. W. N. 793.

It is open to the High Court to interfere under s. 15 of the Charter Act, to prevent what might otherwise place one of the litigant parties in an unfair position, thus turn out in the end to be the cause to another, *Hemanta Kumar v. Baranagore Jute Factory & Co.*, 20 C. L. J. 441.

**High Court's Power of Revision in Cases of Sanction to Prosecute granted by a Civil or Revenue Court.**—An order of a Civil Court refusing an application for sanction to prosecute, can be set aside on revision under s. 15 of the Letters Patent and also under s. 115 of the Code; *Dy. Legal Remembrancer v. Ram Udar Singh*, 19 C. W. N. 447; 21 C. L. J. 198; See also, *Mt. Feroza Jan v. Hirza Amir Ali*, 24 Cr. L. J. 781. 9 O. L. J. 593. *Ram Narain v. Harbans*, 71 I. C. 617; *R. Simeon v. Emperor*, A. I. R. 1922 All 438; 66 I. C. 515.

The High Court has power under s. 115 C. P. Code to interfere with an appellate order of a District Judge passed under s. 195 of the Cr. Pro. Code; *Rang Bahadur v. Sheonandan*, 18 Cr. L. J. 873; 41 I. C. 685.